

Answer-to-Question-_1_

Introduction

Article 25 of the OECD Model Tax Convention deals with the Mutual Agreement Procedure.

Paragraph 1 states, "Where a person considers that the actions of one or both of the contracting states result or will result for him in taxation not in accordance with the provisions of this convention, he may irrespective of the remedies provided by the domestic law of those states, present his case to the competent authority of either contracting state".

The main objective of tax treaties is:

Prevent/minimise instances of double taxation;
Promote international trade and investment;
Prevent tax evasion.

Article 25 came into play to provide a mechanism for dispute resolution in instances where contracting states have a claim to the same tax base for a taxpayer.

Dispute Resolution under Article 25

For Article 25 to apply, reference must be had to other Articles of the Model tax convention. For instance:

Is the person covered under Article 1?- This examines the concept of residence and whether the person is a resident of one or both contracting states.

Is the tax covered under Article 2?- This Article provides what taxes are covered- in most treaties taxes on income and capital and any substantially similar taxes.

If the facts under Article 1 and 2 apply, then a taxpayer can apply Article 25 to a dispute.

How does Article 25 apply?

Para 1 provides that, *The tax payer must present the case within three years from the first notification of the action resulting in taxation that is contrary to the convention to the competent authority in the contracting state.*

Para 2 states that if the objection is justified, the competent authority shall endeavour to arrive at a satisfactory solution, failing which it shall resolve the case by mutual agreement with the competent authority of the other contracting state with a view to the avoidance of double taxation.

The competent authorities of both contracting states would usually endeavour to resolve any difficulties or doubts arising from the interpretation or application of the conventions. In most case, they would communicate directly or including through a joint commission.

Time limits

Paragraph 5 provides that "where the competent authorities are unable to reach an agreement to resolve that case pursuant to para 2 within 2

years.....any unresolved cases shall be submitted to arbitration if the taxpayer requests in writing.

However, arbitration is not permitted where a court has given a decision on the issue at stake in either state.

In practice, for a taxpayer to trigger the Mutual Agreement Procedure (MAP) is usually a last resort. The process is time consuming, requires a lot of dedicated resource to gather the information required, attend meetings, respond to enquiries of either state and in most cases drags on for a number of years. The tax authorities in either state, are also under pressure to maximise the tax revenue and will not be very willing to let go of a potential source of tax revenue.

Article 24 of the OECD Model tax convention provides for non discrimination. This essentially means that a foreign person cannot be subjected to more burdensome or otherwise unfair tax levies than the nationals of that particular contracting state. This becomes an

important item for consideration when it comes to the MAP.

There has been varied case law in MAP, with some achieving a favourable outcome to the tax payer and some not. On a review of these cases, where it can be proven that the taxpayer has been treated in a discriminate way the ruling may be in favour of the tax payer.

Evolving international tax law is inevitably going to lead to disputes in various forms. New international tax law measures and the possible

different interpretations of tax law, added to the pressure of tax authorities to widen their tax base and collect maximum revenue is likely to lead to increased disputes. Unfortunately, the competent authorities involved in MAP are not always fully resourced to fully attend to MAP cases, hence leading to protracted delays and frustrations to the taxpayers. This may lead to a choice of Tax payers choosing not to go to MAP unless the tax at stake is very high. It may also lead to tax authorities implementing domestic law measures that provide further clarity on new tax measures to their domestic taxpayers to avoid the need to go to MAP.

Conclusion

Dispute resolution under MAP is a lengthy and time consuming activity that may not be available to all tax payers due to various reasons such as resource constraints as well as financial constraints.

Tax authorities are also not fully resourced to provide timely resolutions to MAP cases. Adding resources for MAP and added international willingness will go a long way in reducing the time frame it takes for resolving MAP cases. In addition, countries should endeavour to review the domestic legislation and align it with international tax principles for example ensure that domestic law is not discriminatory.

Answer-to-Question-__3

Role and limits of Transfer Pricing Documentation - Master File, Local File and CbCR

Introduction

The three tier documentation requirement was a result of the OECD/G20 work on Base Erosion and Profit Shifting. The introduction of this three tier approach was meant to provide information to tax authorities on the operation of groups/entities in the local jurisdiction in a timely manner. These requirements are contained in the OECD Transfer Pricing Guidelines for Multinational Enterprises (latest edition being 2022), but were also required to be transposed into local law for them to apply in a local jurisdiction. As a result of the BEPS project, these requirements have been transposed into local law in a number of jurisdictions.

Role and Limits

i) Master File

This is a document that gives a broad and general overview of the operations of the group. It is meant to be a high level summary, and does not provide specifics on local entity operations.

In most countries, there is a threshold limit to require local entities to apply the Master File- for instance in the UK, a group needs a revenue threshold of EUR 750 million.

Role and contents of the Master File

The Master file should include information on various aspects of the group, such that to a reader they can get a basic but good understanding of the group including where it operates, how the operations are structured, business activity. The information in a Master file includes:

Overview of the Group;

Business Activities of the Group- This would give information on the industry the business operates in;

General Transfer Pricing Policies in the group;

Summary of business restructurings- acquisitions and disposals in the group;

Financing/finance structure in the Group;

Intellectual Property in the Group including the structure.

Limits

Only specific entities may be required to prepare a master File in a jurisdiction due to any applicable threshold limits.

The MAster file is not required to be submitted to a tax authority, similar to a tax return and so a tax authority will only get a view of the contents upon request.

The information is very high level and more often than not requires a deeper review of the local file to fully understand the business.

The information is required to be refreshed annually, but as it is not required to be submitted annually tax payers may not always have the resource to undertake this exercise annually hence a lag in timely review.

Tax payers need input from the wider business and not just the finance/tax teams. If this information cannot be gathered in time and in its fullness, this is a limiting factor to the completeness of the Master File.

Administrative and financial burden may restrict timely preparation.

ii) Local File

This is provided for under the OECD Guideline smentioned above, but is only required if local legislation has been implemented to require its preparation. Similar to the Master file, most countries will also apply threshold limits to determine whether a local file is required. In most

cases, these thresholds are based on the volume and quantity of cross-border intercompany transactions- for instance only requiring a local file if cross border intercompany transactions are over a certain monetary threshold for example €1m. In spite of this, most countries will also insert a clause to require that all intercompany transactions are at arm's length even if there is no need to report in a local file.

Role and Contents of a local file

The local file is intended to give more granular information on the business operations of an entity in a particular jurisdiction. Information to be provided includes:

Description of the business activity of the entity;
Industry overview;
Organisation chart/structure;
Listing of all intercompany transactions including trading partners and amounts involved;
Functional Analysis- Functions, Assets and Risks
Documentation of Transfer Pricing Policy method chosen/Applied to each intercompany transaction and a detailed report of why it is the chosen method;
Benchmarking to support the Transfer Pricing method chosen/applied.

Some jurisdictions may allow one local file per jurisdiction, covering all entities in that jurisdiction which minimises administrative burden.

Looking at the above, a local file is therefore intended to provide specifics of intercompany trading and therefore, a tax authority can get a glimpse of the volume of intercompany trading and use this information to assess compliance with local law and any potential profit shifting across jurisdictions that a Multinational enterprise operates in.

Limits

Not all local entities in a jurisdiction are required to prepare a local file, if threshold limits apply in local legislation. The tax authority may therefore not always obtain information on all entities for their review.

The local file may not be required to be submitted annually to the tax authority. In some countries, it may be only on request. This therefore gives a time lag between actual intercompany trading and when the tax authorities get the detail and review it.

Administrative and financial burden on tax payers, and hence may not be prepared in a timely manner. Tax payers may adopt a risk based approach and only prepare upon request.

iii) Country by Country Reporting

This is a report of various parameters of a group with regard to its operations in different jurisdictions. Again, this is done in line with local law and threshold limits may apply.

In most countries, the threshold for country by country reporting is by groups with revenue above EUR 750 million.

The information to be reported includes (on a jurisdiction basis):

Revenue

Full time headcount

Tax Paid

Tax Accrued

The Multinational group is required to report these parameters on all jurisdictions it operates in, to its tax authority.

Limits

May only apply to selected groups in a particular jurisdiction due to the threshold limits.

Only submitted after the actual activity has taken place (for example 12 months after FY end), hence not as timely.

May only need to be submitted by the parent company, hence local tax authorities in other jurisdictions of the Multi National enterprise do not get this data.

Conclusion

The three tier documentation approach arising out of the BEPS project was definitely a step in the right direction and most countries have now adopted these requirements into local law. However, the administrative burden and financial constraints of putting the Master File and Local file in place annually may lead to tax payers adopting a risk based approach and only preparing these upon request. These documents are also not required to be submitted in some jurisdictions, and hence tax authorities will not necessarily get the information/contents on an annual basis.

Public Country by country reporting is a new measure that also adds to these reporting requirements, and may change the scope of Cbcr reporting.

Answer-to-Question-_4

Introduction

This situation requires a review of the Articles pertaining to Business Profits, Permanent Establishment as well as employment income- Articles 7, 5 and 15.__

Both countries have a double tax agreement in line with the Model Convention.

To allocate taxing rights, a review will need to be made as to whether NIC had a permanent establishment in Country B under Article 5, and then assess Article 7.

Allocation of taxing rights for business profits in the period 15 October- 31 December 2024

NIC is incorporated and tax resident in Country A.

No office in Country B

Suzie was on a 4 month fixed term contract- around 120 days.

Suzie spent 50% of her time in Country A.

Suzie worked from her home, making the home set up herself.

Article 7 of the OECD Model tax convention para 1 provides that, Profits of NIC are only taxable in Country A unless NIC has a permanent establishment in Country B.

Article 5 of the OECD Model tax convention (para 1) provides that a Permanent Establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

Para 2 provides that this may arise from:

Physical presence- a branch, office, factory, workshop, place of management.

Article 5 also provides for other provisions including a dependent agent PE (a person who habitually negotiates/concludes contracts on behalf of an enterprise) and also has the provisions of a services PE.

Paragraph 4 however provides that no Permanent establishment exists if the activities are of a preparatory or auxiliary in nature, with an anti avoidance measure included in para 4.1 to cover the splitting of functions.

Assessment

For the period 15 October- 31 December 2024

There was no fixed place of business that was at the disposal of NIC in Country B. In addition, Suzie was required to be in Country A for 50% of her working week.

The activities Suzie carried out:

Develop and propose a marketing strategy;

Support in operations- obtain licenses, permits, registrations and approvals

Support establishment of local operations including a new entity.

all endeavor themselves to be of a preparatory or auxiliary character.

Conclusion: For this period, allocation of taxing rights are made to Country A, and profits will be included in the FY ended 31 December 2024 in Country A filings.

Assessment for the period

1 January- 31 December 2025

Suzie's role:

Sales and business development manager;

Identify , pursue and seek new business opportunities;

Meet customers, regulators in connection with proposed expansion.

Contract was extended from 16 January 2025 indefinitely

Under the revised OECD commentary on Article 5, Para 44.10 onwards provides for a review of the working conditions including time spent and commercial requirements.

Is Suzie's home a fixed place of business for NIC? This can be argued to be so, as her home working has a certain degree of permanence.

Is there a commercial reason for Suzie's presence in country B? It appears so, as her role changed. She was required to secure new business opportunities and exceed certain targets implying a commercial need for her presence in country B. She is required to meet prospective clients.

With no entity in Country B, any revenue generated from these business opportunities is recognised in NIC financial statements in country A.

Conclusion: Based on the updated commentary to Article 5, NIC would be considered to have a permanent establishment in Country B.

Allocation of taxing rights

Article 7 (para 1) provides that the profits of NIC are only taxable in Country A unless NIC has a permanent establishment (PE) in country B.

As NIC has a PE in country B, profits have to be attributed to the PE as if it was an independent enterprise, and therefore allocate the profits the PE might be expected to make in the particular circumstances.

This requires a review of:

Functions performed- in this case, sales activity;
Assets used;
Risks Assumed.

Once the functional analysis is done, allocate profits to the functions Suzie performs in Country B, taking into account the Arm's length principle.

Expenses can also be attributed to the PE, if they would otherwise have been charged to an entity in Country B including management expenses.

In the profit allocation, consideration will also need to be given to significant people functions in NIC.

Considering the above outline factors, Country B should get an allocation/remuneration for the sales activity conducted by Suzie in this period.

Article 23 A and B should then be applied to provide any relief against Double taxation.

In case the competent authorities cannot agree on allocation of taxing rights, the case can be referred to the Mutual Agreement Procedure under Article 25 by NIC.

Consideration will also need to be given to Article 15 with regard to Suzie's employment income.

Assessment for the period 1 January- 15 May 2026

Suzie's role:

Marketing manager;

Based on the information provided, in particular that the new legislation imposed significant additional compliance requirements, it is reasonable to assume that Suzie spent a good amount of her time liaising with regulators to facilitate the incorporation of the new entity which was incorporated on 15 May 2026.

Conclusion: Absent other information, it is reasonable to conclude that the activities between Jan- May 26 were of a preparatory/auxiliary nature.

Therefore, NIC would not have had a permanent establishment in Country B. Allocation of taxing rights to profits of NIC in this period would be to country A, and included in tax filings for the period Jan- December 2026.

Both countries have a double tax treaty in line with the Model convention.

Facts:

Pablo
Resident in Country G
Plays for Club Horizon in Country H
Tournament in country H

Article 17 (para 1) provides that income derived by a resident of a contracting state as a sportsperson (among others), from that resident's personal activities as such exercised in the other contracting state may be taxed in that other state.

Essentially, Pablo as a resident of Country G may be taxed in country H for activities exercised in Country H (the promotion and participation in the tournament in country H).

Article 15 (para 1) provides that subject to provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other state.

Allocation of taxing rights to the pre-tournament promotional fee

Vector paid Pablo a fixed fee before he was selected to play in the tournament.

Absent any other information, it is reasonable to conclude that Pablo was not in country H for more than the days required under the pre tournament agreement- including one distributor event in Country H; and one two-day content shoot in Country H.

The advertising was generic, and were to be used even if Pablo did not participate in the tournament.

Conclusion: As Pablo was present in country H for less than 183 days (based on information provided), and Pablo did not perform Sportsperson activities in Country H, the conclusion is that the taxing rights on his pre tournament income should fall under Country G (his residence).

As a resident of country G, Pablo is taxed on his worldwide income.

Pablo should declare this income in his tax filings in country G.

Allocation of the taxing rights to the Tournament sponsorship fee

Facts:

Played four matches in Country H;
Post-match appearance in country H;
post-tournament promotional shoot outside country H;
Sponsor event in country H.

Article 17 would apply here as Pablo is a sportsperson performing sportsperson activities in a country outside his country of residence- four matches in country H.

Looking at the features of the contract, there are a number of obligations imposed on Pablo:

Must wear Vector boots;
Appear in the match - otherwise the promotions may be cancelled and sponsorship fee reduced;

In contrast:

40% of the fee is payable even if Pablo does not play in Country H, provided he completes the post-tournament promotional shoot outside Country H.

If pablo does not appear in any match in Country H, the sponsorship fee is reduced by 30%.

Allocation of taxing rights

For sportsperson activities exercised by Pablo in Country H, remuneration earned here will be taxed in Country H. This includes the four matches and the post-match appearance in country H.

Activities not related to Pablo Sports person activity, may not fall under Article 17 but may nevertheless need to be considered under Article 15. The campaign was global (so, not only in Country H), and the post tournament shoot appears to be a promotion activity outside country H. It can reasonably be argued that the taxing rights allocable to these specific activities should primarily be allocated to country G.

Looking at the arrangement overall, 40% of the fee would have remained payable even without playing in Country H, provided Pablo did the shoot outside Country H. This portion of remuneration could therefore be looked at distinctly from the actual match fee and argued to only be taxable in Country G (Pablo's country of residence).

As Pablo is resident in Country G, most countries impose worldwide taxation on their residents. Pablo is likely to be taxed on his worldwide income in Country G.

Article 23 A and B should apply to grant relief against potential double taxation.

From a practical point, Pablo should file his tax return in country G declaring all income, and claiming relief (in line with domestic law legislation in country G). Pablo should also check the tax return filing requirement in country H, in line with domestic law provisions and declare income sourced and taxable in country H.