

# **A simplified guide to increasing your chances of survival in battles with tax authorities**

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# Speaker



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# Index

- Current stage of affairs
  
- Key tax-related areas of disputes
  - New ones due to new international principles
  - Existing one based on specific issues in specific countries
  
- How to handle Tax disputes
  - Negotiations
  - Mediation
  - Court Battles
  
- How we can help relieve your burden of disputes and smoothen the process of representation before tax authorities and courts.

# Current stage of affairs

- **Developments OECD**
  - MLI
    - Default
    - Non-default
  - Others
    - CFC
    - EBIDTA
  
- **Developments UN**
  - PPT in new model tax convention
  - Technical Services

# Key 'tax-related' areas of disputes

- Tax treaties will demonstrate more complexity
  - Anti-abuse
  - Tax evasion/tax avoidance
  - PPT/SLOB
  - Etc
  
- Some of the main discussion areas
  - Dual residency issues
  - Permanent establishments
  - Withholding Taxes
  - Substance issues

# Dual residency

## ▫ Article 4, MLI

- Where by reason of the provisions of a Covered Tax Agreement a person other than an individual is a resident of more than one Contracting Jurisdiction, the competent authorities of the Contracting Jurisdictions shall endeavor to determine by mutual agreement the Contracting Jurisdiction of which such person shall be deemed to be a resident for the purposes of the Covered Tax Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. **In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement** *except* to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Jurisdictions

# Permanent Establishments

- To be discussed...
  - Construction PE's and splitting up of contracts
  - Service PE's (mostly UN)
  - Auxiliary and Preparatory Activities
    - Two alternatives in MLI
    - DPT UK, Australia
  - Agency PE
  - 'Client base taxation'

# Withholding taxes

- Broad acceptance of 'PPT's' leads a.o. to increased WHT issues
  - A.o. UN approach of putting PPT in article 1
    - Consequence: no treaty benefits at all
  - OECD approach focusing with PPT more on articles 10-12
    - Consequence: No limitation of WHT but (limited) possibility to discuss this by MAP
    - Don't expect tax credits to be available in receiving country
      - Sometimes not enough taxable basis
      - Most situations receiving state will deny the credit since WHT has been levied contrary to that states perception if the treaty

# Substance issues

- Most countries demand increased substance
  - Under treaties
  - And domestically
  
- Problem is 'how to measure' substance?
  - For some countries headcount is enough
  - For more and more countries the role of the people within the value chain counts
    - What functions do they perform?
    - How do they relate to value chain?

# Some example of existing disputes

- Disputes
  - Nokia India and the interpretation of 'royalty' under the Finnish Indian tax treaty
  - US Private Equity House sells participation in the Netherlands and is taxed on the capital gain
  - Portuguese and Spanish interpretation of PPT under secondary EU-law
  - Italy and the many unnecessary TP disputes
  - Etc. etc.

# How to handle tax disputes?

- Many tax disputes will arise due to new international tax principles being applied globally
  - However no one set of new principles but many...
- Principles will be interpreted differently around the globe
  - Still, principles are principles
    - They are backed up by a lot of information on how they apply these
  - That makes that disputes can be handled by applying these principles in a consistent way.
    - Deep knowledge of these principles is necessary to make this work

# Ways to handle this

## □ Negotiation

- Be aware that knowledge within tax administrations around the world is increasing
  - Many training programs are available for countries
  - Also initiatives by OECD and ATAF help with knowledge sharing and capacity building
  - Any preparation should be based on a deep knowledge of OECD, UN and EU measures
  - Keep in mind that cultural differences can influence the affectivity
- In western countries the possibility to negotiate is well known
  - Be aware of having to pay a price for any grey area in the facts
  - .We can help you with technical support on your argumentation

# Ways to handle this (2)

- **Mediation**

- Difference between negotiation and mediation is that in mediation a third person is involved who is acceptable by both parties based on his knowledge and reputation
- Mediation is in some countries free of form but will also be a new way forward under OECD's MLI and UN
  - That does not mean that mediation will always work
  - Some countries do only accept mediation in relation to certain other countries

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# Ways to handle this (3)

- Courts
  - Going to the courts is not something many tax managers are used to
  - In more and more countries tax courts exist where people judge who know about taxation
    - Basis of any case is the value chain
    - A sound value chain will keep attention away from facts
  - Here also a deep knowledge of all principles in combination with an understanding of the value chain will make the differences between success and failure

# How can we help?

- We have the experience in supervising a court cases in many countries
  - Reputation plays in many situations a role which cannot be ignored
  - Understanding the new principles is key
  
- We have assisted in the past in court cases around the globe
  - Domestic courts
    - Outside NL as expert witness or advisor
  - European Court of Justice
  
- How does this work?

# Litigation support

1. Understanding the facts of the case is key
  - Facts should preferably be supported by Value Chain Analyses
  - VCA helps in keeping discussions as far away as possible from facts
2. Understanding the way the country looks at these facts and applies their laws is essential for success
3. Stating these facts and understanding government's potential response is the fundament under any case
4. With you we will interpret the facts and its relation to international tax principles and make sure your chances of success will increase

## Litigation support (2)

- The different phases of this support
  - You provide us with a written description of the facts and the points of view from the tax inspector and yours
    - If not in English, please provide us a translation
  - With you we will conduct a feasibility study in order to determine the chances of success
  - We will fine-tune your line of defense and bring you arguments based on international tax principles which have to be used in the discussion
  - If possible we join you for a meeting with the tax administration to (pre)discuss the case
  - Alternatively we will provide you with a mediator if this suits the case/country

# Litigation Support Summary

- In court cases we can support you as follows:
  - Content driven support in the phases of exchanging the point of views with the court in charge
    - Interpretations
    - Litigation Strategy, including writing of documents
  - Appearance at the court as technical advisor/expert witness if allowed by the court

# Q&A Session



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