THE M.A.P. TO RESOLVE TAX TREATY DISPUTES

BLIS 6510M – Taxation of Cross-Border Transactions

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RESEARCH MEMORANDUM

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MATTER: An explanation of the Mutual Agreement Procedure article and its operation in tax treaty dispute resolution, including a critical analysis of the shortfalls.

1. EXECUTIVE SUMMARY

Article 25 of the Organization for Economic Co-operation and Development's ("OECD") Model Tax Convention on Income and on Capital[1] ("Model Convention"), provides draft dispute resolution wording for two contracting states to incorporate into their negotiated tax treaties, referred to as the Mutual Agreement Procedure ("MAP"). The goal of the MAP is to create consistent interpretation and application of a particular tax treaty in both states.

As tax treaties are a form of contract between two competent tax authorities of contracting states, at a high level a contractual MAP clause may assist the parties with treaty interpretation disputes. As explained below, the MAP generally incorporates a contractual good faith obligation when resolving tax disputes by incorporating wording which obligates the competent authorities to "endeavor" to resolve the tax dispute by way of mutual agreement. Therefore, such mutual agreements may include negotiating the definition of a term not defined by the treaty, or to clarify different interpretations of a term defined differently in the domestic law of each state, with the intention of reducing double taxation. Such interpretive aids can resolve issues over specific wording or vagueness, to relieve double taxation of a particular taxpayer's income.

[1] OECD, "Model Tax Convention on Income and on Capital: Condensed Version 2017" (18 December 2017), online (pdf): <https://www.oecd.org/en/publications/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en.html>.

Any mutual agreement reached supersedes the domestic law of the two contracting states. As we will see from a recent decision, this binds the local tax authority to assess consistently with such mutual agreements. In addition to a contractual good faith requirement, competent authorities are free to also incorporate a Mandatory Binding Arbitration ("MAB") clause into the tax treaty's MAP clause. A MAB would appoint an impartial third-party decision-maker if the competent authorities are unable to reach resolution within two (2) years. Bearing in mind that there is no international court or precedent system to defer to when there are interpretation issues. Arbitration can motivate the competent authorities to resolve the dispute and deter them from litigating.

Below I have provided an explanation as to how the MAP procedure is implemented in a horizontal tax dispute[2] between two competent authorities, provided some examples of current MAP articles and MAB clauses, and critically summarize some of the shortfalls and benefits, of the MAP framework. For an overview of countries implementing MAP, see the OECD's website.[3]

2. OECD's Model Tax Convention on Income and on Capital

A. Article 25 – Mutual Agreement Procedure

Article 25 of the *OECD's Model Tax Convention on Income and on Capital*[4] ("MAP article") provides competent authorities of contracting states with a mechanism to resolve disputes arising from a tax treaty. Such a clause, when incorporated into a treaty, includes an obligation to resolve a dispute in good faith, and may potentially include a binding arbitration component as a backstop. This is an attempt to create enhanced certainty[5] and better results in tax treaty disputes in the absence of a holistic framework to resolve both domestic and international tax matters. The OECD's primary objectives are to improve the transparency of cross-border taxpayer information

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2 See Tadmore & Moses, "The Future of International Tax Disputes: The Inevitability of Fusion" (eClass), for the distinction between horizontal tax disputes occurring between two competent authorities, as opposed to vertical tax disputes occurring domestically between a taxpayer and the relevant domestic competent authority.

3 OECD, "Compare your country: Tax co-operation", online: <https://www.compareyourcountry.org/tax-cooperation/en/0/623/default>.

4 *Supra* 1.

5 Thomas D. Bettge, Jessie Coleman, Quyen Huynh, Theresa Kolish, and Alistair Pepper, "Mutual Agreement Procedure: Progress Without Perfection".

and bring about consistent resolution of similar tax disputes. Enhanced transparency measures include an obligation on taxpayers to provide tax information in a timely manner, which in turn brings about certainty. Tax certainty requires the application of tax laws to be clear and transparent so that taxpayers can anticipate the tax impact expected. As such, consistent application of tax treaties and domestic laws is important to relieve double taxation issues.[6]

i. The Objective

As stated above, one of the main objectives of the MAP article is to create consistent interpretation and application of a particular tax treaty in both states. Once engaged, the MAP article may compel negotiations between two competent authorities over the definition of a term not defined by the respective treaty, or to clarify different interpretations of a term defined within the domestic law of each state. An important feature here, as we will see below from a recent decision, negotiation is an important aspect of triggering the MAP article. Statistically, Canada has resolved MAP cases within 18.44 months on average.[7] Although there may be an objective to resolve matters within 24 months, the resolution timing is dependent on many factors outside of the control of the competent authority, or the taxpayer. This includes, amongst other factors, the other competent authority refusing or unable to accept an interpretation due to domestic laws, foreign adjustments not recognized in Canada, no responses from the taxpayer or the other competent authority, or disagreement on residence tie-breaker rules.[8]

Just because there may be a requirement to negotiate matters to reach a mutual agreement, doesn't mean that it always occurs. Some treaties have gone as far as incorporating a contractual obligation to attend private arbitration in the event that a negotiated resolution on all outstanding matters is unable to be reached. From review of some of Canada's MAB clauses to which they are privy to, arbitration can be commenced within those two years. Arbitration can motivate the

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6 *Ibid.*

7 Government of Canada, "Mutual Agreement Procedure – Program report – 2022" (28 May 2024), online: <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-services/2022map.html>.

8 *Ibid.*

competent authorities to resolve the dispute and deter them from litigating the tax dispute in the absence of a binding forum of adjudication such as an international tax court.

ii. Good Faith Requirement

The MAP article, when incorporated, compels competent authorities to endeavor to resolve the dispute in a mutually agreeable manner. This good faith obligation is important because it's a contractual obligation compelling the negotiation and participation by competent authorities in resolving double taxation disputes without a forum of adjudication. This is a form of contractual dispute resolution imposed, requiring at least some consultation and negotiation between contracting states. Without such an obligation, each state would be free to tax income as they saw fit without the need for consideration of the other contracting state's rights to tax such income. Self-interest brings about tax disputes. Such selfish motivations may be non-financial, such as political pressures to maintain economic partnerships for trade, or due to war.[9]

iii. Mandatory Arbitration

Second, as stated above, the MAP article may also provide a MAB component which can be engaged within two (2) years, without which there is no forum of adjudication between contracting states if they cannot reach mutual agreement through consultation and negotiation. This is because at the international level, there is no court or adjudication forum. Unfortunately, not only is there no public forum of adjudication to resolve disputes, but it also lacks a system of diarized precedents to refer to when looking for consistency in interpretation of a treaty. Private arbitration provides an alternative.

Canada, for example, has the following mandate to apply to the tax treaty arbitration processes to which they are a party to:[10]

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9 *Supra* 2, at 578 to 579.

10 BEPS, "Canada – MLI Arbitration Profile" (16 December 2022) online (pdf): <https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-canada.pdf>.

> The "final offer" arbitration process (otherwise known as "last best offer" arbitration) will apply as the default type of arbitration process to Canada's Covered Tax Agreements. Canada reserved the right not to apply independent opinion arbitration. In cases where one of its treaty partners to a Covered Tax Agreement reserves the right not to apply last best offer arbitration, Canada and its treaty partner will endeavour, in accordance with Article 23(3) of the MLI, to reach an agreement on the type of arbitration process that will apply. In these cases, Article 19 will not apply between Canada and the treaty partner until such agreement is in place.

Private arbitration can provide the backstop and enhance the contracting state's cost/benefit analysis weighing in favor of negotiated mutual agreements. In the context of international tax treaty disputes, "baseball style arbitration" such as that mandated by Canada above, may be implemented, meaning one of the last best offers must me accepted, forcing parties to take more reasonable positions. [11] At this time, there is no comprehensive report on the number of tax treaties that include a MAB, however, we know that currently there is low receptiveness in agreeing to incorporate an arbitration clause into the MAP article. At current, there is approximately a 15% acceptance rate among all countries worldwide to agree to an arbitration clause.[12]

One of the proposed "second-best solutions" to arbitration clauses being included, is to mandate mandatory mediation within the MAP article.[13] As outlined below, from my review of conventions like that between Australia and Canada, this is already being implemented to some degree by utilizing the Council for Trade in Services. Frankly, I am a proponent of utilizing an impartial third-party to assist parties with understanding the strengths and weaknesses of their claims / positions. The issue I foresee is that the ultimate party affected, being the taxpayer, would need to be included in the mediation process to limit the amount of self-interest being exercised by each contracting state. I would suggest that arbitration would also benefit from the involvement of the taxpayer. Therefore, I propose as a means of improving the MAP is to involve the taxpayer

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11 De Frutos, "International Tax Arbitration: What It means and how it has evolved", (online): <https://www.elgaronline.com/edcollchap/book/9781035317042/book-part-9781035317042-9.xml>.

12 *Ibid*.

13 *Supra* 2, at 586.

in each step of the process, even those after a formal position paper is submitted and disclosure is provided.

Another solution proposed to the low receptiveness of arbitration, has been to reserve a more limited form of arbitration for those situations where the is a balance of adjustment that cannot be agreed upon and instead of having partial agreement, having final resolution on all double taxation issues.[14] The issue I foresee with these MAB clauses is the fact that they may be incorporated into tax treaties well before there is even a disagreement arising, or arbitration between the two states has ever occurred. This may result in vague arbitration powers and uncertainty as to the scope of the arbitrator's authority when a dispute does arise. Perhaps similar to civil arbitration contracts, the MAB within the MAP could include the ability to define the scope of the arbitration powers in the event that there is a disagreement. An example of a refined memorandum clarifying how the arbitration process would be undertaken as part of the relevant MAP article, is that between New Zealand and the Kingdon of the Netherlands, the "Memorandum of Arrangement on the Implementation of Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting."[15]

3. Operation of the MAP in Canada

In Canada, the MAP article incorporated in tax treaties to which Canada is privy to authorizes the Canadian Competent Authority ("CCA"), an extension of the Canada Revenue Agency ("CRA"), as the competent authority to negotiate directly with the other competent authority of a contracting state to resolve matters arising from the administration of foreign taxes against Canadian tax residents. It provides tax residents the ability to request application of the MAP to resolve existing double taxation issues, or negotiation advanced pricing arrangements ("APAs") to determine transfer pricing issues, as we will see from a recent decision below. Once assistance

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14 Edward (Eddie) Morris and Sobhan Kar, Deloitte, International Tax Review, "How well are mutual agreement procedures working?" (27 September 2023), online: <https://www.internationaltaxreview.com/article/2c8vb1sj1ljw4btf10a2o/expert-analysis/special-focus/how-well-are-mutual-agreement-procedures-working>.

15 "Memorandum of Arrangement on the Implementation of Party VI of the Mutlilateral Convention to Implement Tax Treaty Reletaed Measures to Prevent Base Erosion and Profit Shifting" (23 October 2023), online: <https://zoek.officielebekendmakingen.nl/stcrt-2023-27297.html>.

is requested, the CCA issues an acknowledgment letter to the taxpayer, and the CCA reviews whether the request submitted is justified under the applicable tax treaty. If justified, the CCA will issue a letter to the taxpayer and the contracting state's competent authority to pursue the matter. The CCA then works with the taxpayer to prepare a position paper and subsequently sends it to the contracting state. If there is disagreement, negotiation would be required to resolve the issue to the joint satisfaction of both competent authorities. If a resolution is reached, the competent authorities confirm the details of resolution and send it to the taxpayer for acceptance or rejection. If accepted, the taxpayer (and the domestic revenue agency) is bound by that resolution, but if rejected, the taxpayer may pursue domestic resolution.

Although the views of the taxpayer and their supporting information is incorporated into the position paper, the taxpayer themselves are not involved in the negotiations between the two contracting states, which is where the is room for improvement in the author's opinion. The resolution process is strictly between the two contracting states.[16] This leaves the resolution out of the hands of the individual personally affected by the resolution, allowing political factors to drive mutual agreements not necessarily beneficial to the taxpayer. Again, I see this as a shortfall.

i. Canada and Australia – Case Study

To provide an example, I have replicated the MAP article of the tax convention signed between Australia and Canada, the "For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income"[17] (referred to herein as the "Canada-Australia Treaty"). The MAP article is reproduced for ease of reference as follows:

> **Mutual Agreement Procedure**
>
> 1. Where a resident of a Contracting State considers that the actions of the competent authority of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, without prejudice

16 *Supra* 7.

17 Government of Canada, "Consolidated convention Between Canada and Australia" (23 January 2002), online: <https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/australia-convention-consolidated-1980-2002.html>.

to the remedies provided by the national laws of those States, present his case in writing to the competent authority of the Contracting State of which he is a resident.

2. The competent authority shall endeavour, if the taxpayer's claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Convention.

3. The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the application of this Convention.

4. The competent authorities of the Contracting States may consult together with respect of the elimination of double taxation in cases not provided for in the Convention.

5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Convention.

6. For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.

From review of the MAP article above, Canada and Australia have agreed to the standard good faith obligation under paragraph 3, whereby they shall "endeavor to resolve any difficulties or doubts arising as to the application of this Convention." There is no MAB incorporated whereby the parties would be compelled to attend private arbitration. Instead, as per paragraph 6, in the

event of a disagreement they can bring issues before the World Trade Organization's ("WTO) Council for Trade in Services, who facilitate a discussion. I would suggest this is similar to the mediation obligation proposed as one of the alternatives to arbitration. As we can see, there is little additional mandatory enunciated obligations as to how to resolve matters through negotiation.

ii. Australia and United States – Case Study

In contrast to the Canada-Australia Treaty, below I have reproduced the MAP articles from Australia and the United States of America's tax convention, "Convention Between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income[18] (referred to herein as the "Australia-USA Treaty").

> **Mutual agreement procedure**
>
> (1) (a) Where a resident of one of the Contracting States considers that the action of one or both of the Contracting States results or will result for him in taxation not in accordance with this Convention, he may, notwithstanding the remedies provided by the domestic laws of those States, present his case to the competent authority of the Contracting State of which he is a resident or citizen. The case must be presented within three years from the first notification of that action.
>
> (b) Should the claim be considered to have merit by the competent authority of the Contracting State to which the claim is made, that competent authority shall seek to come to an agreement with the competent authority of the other Contracting State with a view to the avoidance of taxation contrary to the provisions of this Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.
>
> (2) The competent authorities of the Contracting States shall seek to resolve by agreement any difficulties or doubts arising as to the application or interpretation

[18] Department of Foreign Affairs Canberra, "Australian Treaty Series 1983 No 16: Convention Between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and he Prevention of Fiscal Evasion with Respect to Taxes on Income" (6 August 1982), online: <https://www.austlii.edu.au/au/other/dfat/treaties/1983/16.html>.

> of this Convention. In particular the competent authorities of the Contracting States may agree:
>
> (a) to the same attribution of income, deductions, credits, or allowances of an enterprise of one of the Contracting States to its permanent establishment situated in the other Contracting State;
>
> (b) to the same allocation of income, deductions, credits, or allowances between persons;
>
> (c) to the same determination of the source of particular items of income;
>
> (d) to the same meaning of any term used in this Convention; or
>
> (e) to which of the Contracting States an individual described in sub-paragraph (2)(c) of Article 4 (Residence) has closer personal and economic relations.
>
> (3) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of this Article.

In contrast to the Canada-Australia Treaty, the Australia-USA Treaty has further enunciated how the contracting states shall undertake their good faith negotiations. As we can see from paragraph 2, there are specific contractual obligations on both competent authorities of Australia and the United States when resolving double taxation issues. Again, however, we do not see the inclusion of a MAB clause into the MAP article. For an even more detailed double-taxation avoidance convention and MAP articles, see that between Canada and the United States, which also includes the following MAB (which is referenced in the case of *Siftco Canada Corp. v The Queen*, 2017 TCC 37, referenced below):[19]

[19] Government of Canada, "Convention Between Canada and the United States of America" (29 July 1997), online: <https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/united-states-america-convention-consolidated-1980-1983-1984-1995-1997.html>.

…

"6. If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities pursuant to the preceding paragraphs of this Article, the case may, if both competent authorities and the taxpayer agree, be submitted for arbitration, provided that the taxpayer agrees in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both States with respect to that case. The procedures shall be established in an exchange of notes between the Contracting States. The provisions of this paragraph shall have effect after the Contracting States have so agreed through the exchange of notes."

iii. Canada and United Kingdom of the Netherlands – Case Study

To provide an example of a MAP article which does incorporate a MAB, I have reproduced the MAP article of Canada and the United Kingdom of the Netherlands' tax convention, "For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income[20] (referred to herein as the "Canada-Netherlands Treaty").[21]

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the 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, address to the competent authority of the State of which he is a resident an application in writing stating the grounds for claiming the revision of such taxation or, if his case comes under paragraph 1 of Article 24, to that of the State of which he is a national. The case must be presented within two years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

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20 *Supra* 18.

21 Government of Canada, "Convention Between Canada and the United Kingdom of the Netherlands" (25 August 1997), online: <https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/netherlands-convention-consolidated-1986-1993-1997.html>.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other State, with a view to the avoidance of taxation which is not in accordance with the Convention.

3. A State shall not, after the expiry of the time limits provided in its national laws and, in any case, after six years from the end of the taxable period in which the income concerned has accrued, increase the tax base of a resident of either of the States by including therein items of income which have also been charged to tax in the other State. This paragraph shall not apply in the case of fraud or wilful default.

4. The competent authorities of the States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular, the competent authorities may agree to the same attribution of income, deductions, credits or allowances of an enterprise of one of the States to its permanent establishment in the other State or between related enterprises as provided for in Article 9. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

5. If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration. The procedures for arbitration shall be established between the competent authorities.

Both paragraphs 2 and 4 impose an obligation to "endevour" to resolve disputes between the competent authorities of the two states. However, paragraph 6 incorporates an arbitration obligation in the event that resolution cannot be negotiated, but even this arbitration obligation requires further future consent to agree to arbitration before such a process would be commended.

iv. Thoughts

From review of the above case studies, it is apparent that there is little uniformity as to the current wording of the MAP articles incorporated into different tax treaties, other than using the obligatory "shall endevour" outlined in the OECD MAP article. I note that even the enunciated process for resolving matters can vary from being vague, to overly detailed and complex. I further note that a third-party's intervention may very well be contemplated and contracted for, whether in an advisory role (like that of the Council for Trade in Services), or that of an arbitrator. But I also note that even the parameters of the arbitration process, or the relevant third-party's engagement scope can lack specificity, leaving uncertainty as to how the process to resolve matters post-settlement discussions. Of note, none of the discussed MAP articles incorporate the relevant taxpayer's involvement.

4. Consolidated Information on MAP

The OECD's *Making Dispute Resolution Mechanisms More Effective – Consolidated Information on Mutual Agreement Procedures 2023*[22], provides a comprehensive overview of each Inclusive Framework Member's recent developments concerning MAP, a brief overview of their MAP program including tax treaty network, their competent authority, and their MAP profile, a summary of MAP statistics based on that information provided by that jurisdiction. For example, referencing Canada, we see there are 96 treaties part of their network, of which 40 are in line with action 14, that the competent authority is made up of 46 persons, their MAP contact, and their MAP profile. A review of Canada's MAP profile states the following when inquired whether Canada's MAP article includes arbitration, "A number of Canadian tax treaties have an arbitration provision in their MAP Article. In addition, Canada elected to apply Part VI of the MLI (Arbitration)." Interestingly, six of the top performing countries implementing MAP frequently incorporate arbitration.[23]

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22 OECD, "Making Dispute Resolution Mechanism More Effective – Consolidated Information on Mutual Agreement Procedures 2023" (14 November 2023), online: <https://www.oecd.org/en/publications/making-dispute-resolution-mechanisms-more-effective-consolidated-information-on-mutual-agreement-procedures-2023_69b789e7-en.html>.

23 OECD, "The Timely Resolution of Mutual Agreement Procedure Disputes – Secrets of Success?" (25 May 2023), (online) (pdf):<https://www.ibfd.org/sites/default/files/2023-05/oecd_international-the-timely-resolution-of-mutual-agreement-procedure-disputes-secrets-of-success-ibfd.pdf>.

5. Arbitration under the MAP article in action - *Siftco Canada Corp v The Queen*[24]

In *Siftco Canada Corp v The Queen*, 2017 TCC 37, Siftco Canada ("Siftco Canada"), a subsidiary of Compass (a corporation), had voluntarily disclosed to the CRA through the voluntary disclosure program ("VDP") underreported transfer price income for the taxation years 2002 to 2006 for monies earned from the sale of rock salt to a related US corporation, North American Salt Corporation ("NASC"). NASC was an indirect subsidiary of Compass (making it a related party for the purposes of the Canada-United States Tax Convention) and resident in the United States of America. The increased VDP figures were accepted by the CRA and Siftco Canada was reassessed. Subsequently, though the MAP article (Article XXVI) Siftco Canada, and Compass on behalf of NASC, each applied to the relevant competent authorities for relief under the Canada-United States Tax Convention because the income resulting from the adjustment to the transfer price was taxed twice, once in Canada and once in the United States. The CCA was, on behalf of Siftco, seeking assistance from the USCA to allow a deduction in taxable income from NASC for the income claimed by Siftco to prevent double taxation. A satisfactory mutual agreement under the relevant MAP article was reached between the two authorities whereby NASC was granted correlative relief of tax (firstly for years 2003 to 2006, and subsequently to include 2002). This was memorialized into two letters. Subsequently, Siftco Canada accepted the agreement terms. The CRA then audited Siftco Canada in 2010 and reassessed the tax years 2004 to 2008 (some of which years fell within the VDP and increased the transfer pricing taxable income further for those years).

The representative of the CCA expressly confirms under questioning that taxpayers are not directly involved in the discussions between competent authorities via telephone. Their involvement includes making the initial request to engage the MAP article for relief of double taxation and providing requested information. What was unique about this decision, is that the position paper advanced by the CCA to the USCA, was essentially a summary of the taxpayer's voluntary disclosure, and the transfer pricing was unaudited by the CCA or CRA. The CAA had no idea whether the transfer price was arm's length or not when they presented the position paper to the USCA. This resulted in the taxpayer's disclosure position directly to the IRS. When the

[24] *Siftco Canada Corp v The Queen*, 2017 TCC 37.

CRA reassessed some of the VDP years, they then sought to retroactively audit the returns submitted. It was confirmed that no real negotiations between competent authorities occurred in this matter. Instead, the CRA wanted to audit the tax years after a MAP agreement had already been reached (and after Siftco voluntarily disclosed the transfer pricing income issue). Of note, there was pressure on the CCA to resolve the matter, citing the risk of arbitration (the relevant paragraph referenced above) being invoked at any time (as of December 2010). The Tax Court of Canada ultimately finds that the MAP agreements between the two authorities were also binding on the CRA, and they were not permitted to reassess Sifcto in a manner inconsistent with those agreement.[25] As such, the Minister breached Canada's obligation to continue to give effect to MAP agreements reached under the MAP article. Those reassessments were then referred back to the Minister for reconsideration and reassessment, to be consistent with the MAP agreements reached.

6. Other Shortfalls of the MAP

As alluded to, there are shortfalls in the operation of the MAP article by contracting states. Further to the other shortfalls listed within, additional factors of concern with the MAP implementation at an international level are:

A. Lack of resources available to fund a competent authority in a contracting state;
B. Lack of participation by the taxpayer affected most by the resolution;
C. Right to tax sovereignty by contracting states and political factors driving agreement;
D. Lack of international tax court and judiciary;
E. Lack of harmony between global minimum taxation standards, such as the Pillar-Two Initiative;
F. Political factors at play;
G. Inability to resolve both domestic and international tax issues harmoniously in a timely manner;
H. Necessity to provide confidential personal tax information to a foreign competent authority to access MAP;

[25] *Ibid*, at para 146.

I. Government being the gatekeeper to a taxpayer accessing MAP;
J. Low acceptance rate of including an arbitration clause to the MAP article;
K. No impartial third-party providing interpretative assistance;
L. Lack of involvement of the taxpayer;
M. Lack of memorandum setting out the process for arbitration in the event it were engaged; and
N. Not complete relief of double taxation.

7. CONCLUSION

In conclusion, the international tax dispute realm is still evolving. We are still at the early stages of advancing towards a global economy without double taxation. Tax treaties attempt to resolve competing priorities over taxable income by two or more contracting states. However, there are still situations where complete double tax relief requires negotiation. Initiatives such as global minimum tax standards are still on the horizon. With a world defined by political and legal borders, international tax regimes are applied inconsistently. Initiatives such as the Two-Pillar Initiative (not further elaborated on herein), have been advanced to create a consensus-based set of international tax rules to alleviate double-taxation, however, without a process to resolve disputes over interpretation (particularly when domestic legislation is inconsistent) and application of those rules, there will continue to be uncertainty, inconsistency, and lack of trust in international tax treaty application. The MAP article attempts to alleviate these issues by mandating a mandatory good faith obligation, with an optional arbitration component. Although reception of mandatory arbitration is low, early adopters are likely to find long term consistency and less recourses expounded on MAP disputes.

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