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# OECD Provides Useful Guidance on Advance Pricing Agreements

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Monique van Herksen of Simmons & Simmons LLP discusses the recent guidelines from the Organisation for Economic Cooperation and Development, intended to provide best practices to improve the effectiveness of the bilateral advance pricing agreement process.

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In the last week of September, the Organisation for Economic Cooperation and Development issued a Bilateral Advance Pricing Arrangement Manual (BAPAM) that serves to improve the advance pricing agreement (APA) process.

## Discussion

The BAPAM provides that APAs supplement traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing disputes by preventing those disputes from occurring. They are considered most useful when the traditional mechanisms fail or are difficult to apply, or in situations where there is an expectation of a transfer pricing dispute arising. The three most common types are unilateral APAs, bilateral APAs (BAPAS), and multilateral APAs (MAPAS).

The BAPAM acknowledges that many transfer pricing disputes occur purely due to the subjective nature of the analysis required under the arm's length principle. Clearly, transfer pricing disputes are generally eligible for resolution of double taxation under mutual agreement procedures, but they impose a significant burden on tax administrations and taxpayers well after the initial audit assessment. There is, therefore, a clear case for why BAPAs or MAPAs are good: Having a homogeneous process in place helps to make them an efficient dispute resolution mechanism.

Based on a survey conducted by the OECD, taxpayers prefer BAPAs to audits and mutual agreement procedures, considering the BAPA outcome more fair and the process more collaborative. The main problems with BAPAs were deemed to be the time to agree a BAPA, the difference in country BAPA processes, the amount of resources required to conclude a BAPA, and the lack of transparency between all stakeholders in the BAPA process.

The best practices suggested by the BAPAM focus particularly on these challenges and are outlined below.

### **Best Practices**

The BAPAM provides for a practical checklist and useful overview of issues to consider in one clear and accessible reference manual. Annex A to the BAPAM provides a separate list of the best practices, Annex B presents a sample BAPA timeline, Annexes C and D provide for a sample position paper and a sample list of critical assumptions, Annex E presents a sample position matrix (used by some jurisdictions to reconcile positions of the taxpayer with that of both competent authorities), and Annex F is a sample BAPA agreement.

Best practices listed regard the effectiveness of the BAPA process and the BAPA process in detail. For the first group, the best practices include that:

1. Taxpayers and competent authorities engage with one another in a principled, fair and objective and transparent manner, with each BAPA application decided on its own merits. This touches upon the trust factor, which was the subject of a recent OECD survey and concludes that there is still quite some work to be done to re-establish or improve trust in governments.
2. During the BAPA process, taxpayers should file their tax returns in the relevant jurisdictions in the proposed covered years based on the positions taken in their BAPA application.
3. All jurisdictions with BAPA rules should have clear published rules, guidelines, and procedures that outline the BAPA process and relevant steps in the BAPA process in a local language and in English.
4. Good use is made of technology throughout the BAPA process, including the possibility to provide information electronically.
5. A BAPA agreement should be signed within 24 to 30 months from the receipt of a complete BAPA application by both competent authorities.
6. The term of the APA should be a minimum of five years (including at least two prospective taxation years, if possible).
7. Competent authorities should be adequately resourced and trained to meet the demands of their BAPA programs.
8. BAPA case officers (and competent authorities) should be in regular contact with each other during the BAPA process.
9. Once a BAPA has been accepted into a BAPA program, BAPA case officers and/or competent authorities in each jurisdiction should be in regular contact with one another in relation to the specific case.
10. Competent authorities should ensure that turnover of BAPA case officers is effectively managed.

As for detailed guidance, the best practices include that:

1. Taxpayers should notify both competent authorities of their potential BAPA application before requesting access to the BAPA program.
2. Prior to a taxpayer being accepted into a BAPA process or lodging a BAPA application, the competent authorities should not unduly influence the taxpayer's position on any issue that forms part of the BAPA application.
3. Taxpayers should submit BAPA applications with the same information simultaneously to both competent authorities.
4. Where competent authorities do not share a common language, BAPA applications should be filed by the taxpayer with an attached English translation.
5. A competent authority should, upon receiving a BAPA application, notify the treaty partner of the receipt of such BAPA application and engage with its treaty partner to address the parameters of the BAPA application or any domestic limitations.
6. A decision in relation to a BAPA application should be made within 30 days of receipt of a complete BAPA application.
7. Upon acceptance of an application into the BAPA program, a project plan should be agreed outlining the timelines for each stage of the process.
8. The competent authorities should coordinate the information gathering process to limit duplication.
9. Taxpayers should provide any requested information to both competent authorities simultaneously.
10. Competent authorities should only request information from the taxpayer that is necessary and relevant.
11. If, during the information gathering stage, a competent authority materially disagrees with the delineation of the covered transaction(s), this should be shared with the treaty partner as soon as possible.
12. Position papers and competent authority discussions should be based on current/the latest financial information available.
13. Competent authorities and BAPA case officers should not give taxpayers access to position papers.
14. A competent authority raising an issue should, where possible, provide its treaty partner with a recommendation as to how to resolve the issue.
15. Competent authorities should mutually agree who will draft the text of the BAPA.
16. Competent authorities and taxpayers should complete finalization and implementation of a BAPA as soon as possible.
17. The terms of the domestic agreement implementing a BAPA between the competent authorities should be similar to those in the BAPA.
18. Jurisdictions should have adequate policies/practices to allow for effective coordination and communication between the audit and BAPA process.
19. Where appropriate, the renewal of a BAPA should be considered in the final year of a BAPA.

## Conclusion

Tricky issues in practice—audits commencing briefly after an APA is filed, or how to deal with critical assumptions and potential breaches thereof after concluding the BAPA—are not addressed in detail. That said, if the best practices are adopted by revenue authorities, that would certainly be a positive sign for corporate taxpayers in these uncertain times and would be well received.

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