

Competent Authority Issues affecting the tax dispute

Bo Darling Larsen, Head of Competent Authority,
MAP and APA regarding Transfer Pricing



CV

- Bo Darling has since the first of October 2016 been the Head of Competent Authority in Denmark. The office is based in Copenhagen. The task of the office is mainly MAP, APA, Arbitration, and valuation. There are currently 10 employees in the office. Bo Darling has been working with corporate tax for almost 40 years about 25 of these in the field of transfer pricing. Since 2005 Bo Darling has been the Head of transfer pricing Auditing teams. Bo Darling has been the main driver in putting these teams together and educate them as the teams were often starting from scratch. Bo Darling has also been the main driver of the Danish case finding network where all sorts of data has been put together to find suitable transfer pricing cases. Furthermore, Bo Darling has been the project leader of several transfer pricing projects. Among others a project involving almost all transfer pricing issues and with 60 FTE. Bo Darling has also been the Head mediator in the Danish alternative dispute resolution pilot project. Bo Darling has a 4-year tax education and a 4-year Master of Tax Auditing. Furthermore a 3-year master's in leadership.

Background material

- TPG [OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022 | en | OECD](#)
- **MEMAP** [Manual on Effective Mutual Agreement Procedures \(MEMAP\) - OECD](#)
- Maisto and **IFA** on dispute resolution in several countries. Contributions from Arne Molin and Bo Darling.
- Convention [L_1990225EN.01001001.xml \(europa.eu\)](#)
- Directive [COUNCIL DIRECTIVE \(EU\) 2017/ 1852 - of 10 October 2017 - on tax dispute resolution mechanisms in the European Union \(europa.eu\)](#)
- MLI [Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS - OECD](#)
- OECD Best Practises on MAP and APA

Domestic legislation



Has to be arms length

Tax Assessment Act § 2, para.

Taxable persons

1. Where physical or legal persons exercise a decisive influence,
 2. Exercising a decisive influence over legal persons,
 3. Affiliated in a group with a legal person,
 4. Having a permanent establishment located abroad,
 5. Being a foreign natural or legal person with a permanent establishment in Denmark,
 6. Being a foreign natural or legal person with hydrocarbon-related activities covered by the Hydrocarbon Tax Act § 21, para. 1 or 4.
- must**, in determining the taxable or distributable income, **apply prices and conditions for commercial or economic transactions** with the aforementioned parties in nos. 1-6 (controlled transactions) **in accordance with what could have been obtained if the transactions were concluded between independent parties**. Companies and associations, etc., that do not constitute a separate taxable entity according to Danish tax rules but whose affairs are regulated by company law rules, a company agreement, or association bylaws, are equated with legal persons in no. 1 and para. 3.

Tax Assessment Act § 2, para. 6

It is a prerequisite for reducing the assessment of taxable or distributable income in accordance with para. 1 **that a corresponding increase is made on the other party**. It is a prerequisite for an increase in acquisition amounts that a corresponding assessment is made on the other party. In controlled transactions with foreign natural or legal persons and permanent establishments, it is a prerequisite that the corresponding income is included in the income statement in the respective other country.

Reopening



Tax Administration Act § 26, para. 1.

The Customs and Tax Administration cannot issue a notice as mentioned in § 20, para. 1, regarding the making or amendment of an assessment of income tax or property value tax later than May 1st in the fourth year after the end of the income year. The assessment must be made no later than August 1st in the fourth year after the end of the income year. This deadline does not apply to the tax calculation resulting from the assessment. If it is relevant to the taxpayer's ability to safeguard their interests that the deadline for making the assessment is extended, a request for a reasonable extension must be accommodated. The Minister of Taxation can establish shorter deadlines than those specified in points 1 and 2 for groups of taxpayers.

Tax Administration Act § 26, para. 2.

A taxpayer who wishes to have their assessment of income tax or property value tax changed must present information of a factual or legal nature that can justify the change no later than May 1st in the fourth year after the end of the income year.

Extraordinary reopening



Tax Administration Act § 27, para. 1.

Regardless of the deadlines in § 26, an assessment of income tax or property value tax can be made or changed upon request from the taxpayer or at the discretion of the Customs and Tax Administration if:

(4) A foreign tax authority has made a decision that is relevant to the taxation of the taxpayer. It is a condition that the Danish tax authority recognizes the decision

Tax Administration Act § 27, para. 2.

An assessment can only be made in the cases mentioned in para. 1 if it is notified by the Customs and Tax Administration or a request for reopening is submitted by the taxpayer within 6 months after the Customs and Tax Administration, or respectively the taxpayer, becomes aware of the circumstances justifying the deviation from the deadlines in § 26. An assessment notified by the Customs and Tax Administration must be made no later than 3 months after the day the notification is sent. This deadline does not apply to the tax calculation resulting from the assessment. If it is relevant to the taxpayer's ability to safeguard their interests that the deadline for making the assessment is extended, a request for a reasonable extension must be accommodated. The Customs and Tax Administration may process a request for reopening received after the deadline in the first sentence if special circumstances warrant it.

Key steps in a MAP case

The Danish MAP and APA process follows a consistent pattern:

1. Receiving a request
2. Notifications
3. Register the case in our WorkZone system
4. Register the case in our OECD statistics table
5. Review of the information submitted by the taxpayer
6. Request for minimum information
7. The first position paper
8. Subsequent position papers
9. Negotiation with the other competent authority
10. Request of the taxpayer's acceptance of the result
11. Implementation of the MAP solution
12. Ensuring that the administrative tasks are up to date



The Good MAP Process

- Dialogue
- MAP request in a neutral form
- MAP send to both countries more or less at the same time
- Qs that are asked by the CAs are answered and the Qs and answers are send to both CAs
- The taxpayers sole interest is to get rid of the double taxation
- The audit has been conducted in a good atmosphere with good cooperation on both sides
- The adjustment is well founded and in accordance with an AL result – it is fair
- The audit also took the company on the other side of the adjustment into consideration
- There are no big differences in the opinion of the FACTS
- It is clear which country should give the corresponding relief



The Difficult MAP process

- The MAP is just another complaint
- Any conflict from the audit continues
- Qs are not answered
- The FACTS are disputed
- As CA it is a bit annoying to have cases where the double taxation has been avoided but:
 - The company had hoped for a better result after taxes
 - The company still thinks that some interests should not be paid
- Cases where there is an asymmetry (the sole interest is to get rid of the Danish adjustment)
 - Thin cap
 - No deductions
 - Losses carried forward etc.
- Remember also to ask the other country for progress
- APA that looks like ATP and not Tax certainty I will not support

MEMAP 3.6

- Competent authority agreements or resolutions are often case and time specific. They are not considered precedents for either the taxpayer or the tax administrations in regard to adjustments or issues relating to subsequent years or for competent authority discussions on the same issues for other taxpayers. In fact, the letters exchanged between competent authorities to resolve a case often state as much. This is because the competent authorities have reached an agreement that often takes into account the facts of the particular taxpayer, the differences in the provisions of the tax law in each country, as well as the effects of the economic indicators on the particular transactions at the relevant time. Any review or adjustments of subsequent years by a taxpayer or tax administration is best based upon the particular circumstances, facts and documentary evidence existing for those years.
- In most cases, a taxpayer cannot accept the terms of an agreement for only some issues or taxation years involved, unless both competent authorities agree. This is due to the fact that the competent authorities commonly consider the original request by the taxpayer, which is usually multifaceted, in its entirety and often consider all aspects (issues and taxation years) involved at one time and as one case, and ultimately one outcome. Practical and pragmatic solutions to contentious MAP cases are regularly the result of compromise and concessions made by parties involved and therefore a holistic approach is routinely used.
- As mentioned in the Section 3.8. What Happens When an Agreement is Reached?, if a taxpayer is not satisfied with the agreement arrived at by the competent authorities, the taxpayer may reject it. If this occurs, the competent authorities may consider the case closed and advise the taxpayer accordingly or they may reconsider any new, reasonable, alternative position proposed by the taxpayer at that time. **Assuming a competent authority agreement has been rejected and a valid notice of objection or an appeal has been lodged under applicable domestic procedures, the taxpayer typically has the option to proceed through the appeals process and/or to court, if applicable.** If the other redress mechanism (appeal or court decision) does not reverse the adjustment in its entirety, double taxation may remain.
- In such cases, it would be appropriate for the competent authority to accept another request (or reconsider the original request) by the same taxpayer on this same issue and years to address any remaining double taxation. For the most part, competent authorities only present the case to the other competent authority for the latter to provide relief to the extent it believes is warranted and will not themselves consider the provision of relief on a second request. **Taxpayers should be cautioned that both competent authorities may share the same view or policy that relief will not be provided on a second request when full relief was offered and rejected by the taxpayer on the initial MAP case.**

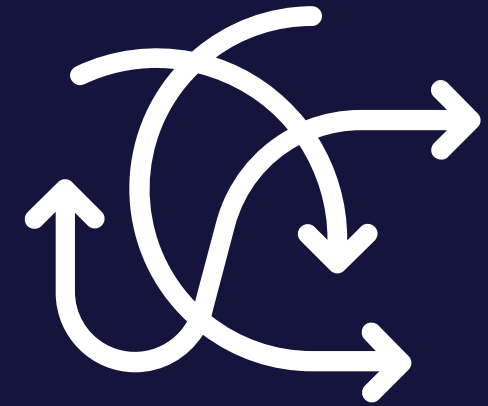
Processes from my perspective

- Make sure that there are no lead time
- Make sure that we are working together
- Make sure that all cases are allocated to a casehandler immediately
- Don't wait for information from the taxpayer, the adviser or the other CA, follow up
- Don't always wait for the other CA to provide PP, make your own
- Discuss cases with other CA's without PP
- Have a combination of face to face, video, telephone and case by case meetings



Difficulties

- Require **ressources** on both sides
- Domestic legislation not transfer pricing
- 3 years but different DTT Argentina (audit 6 years back), Canada (audit 5 years back),
- Mexico (10 years implementation limit), Switzerland (10 years implementation limit),
- US (no time limit, interests can be negotiated)
- Preliminary/final assessment Chile
- Do not follow court decisions for next years, do not implemet down India
- Special benchmarking Compustat, UAPA US



DK Development in number of MAP and APA cases

MAP												Estimate
Year	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Stock	89	105	129	149	148	138	136	180	194	112	123	100
Closed	17	23	25	27	51	65	71	45	68	143	48	60
Number of Meetings									34 Video 4 face to face	17 Video 12 face to face	16 Video 18 face to face	17 Video 15 face to face
BAPA												
Year	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Stock	11	19	19	21	27	27	34	36	33	44	40	50
Closed	5	3	8	7	6	10	8	14	16	11	20	25



Tasks CA DK

- MAP
- APA
- OECD WP6 TPG in Paris
- OECD Pillar 1 & 2 in Paris
- OECD Mapforum in Paris
- Nordic Agenda – several workshops Denmark, Norway, Sweden, Finland
- TP educations internally og externally,
- Several seminars in DK and abroad etc.



Recommendations – New to MAP?

- Organization in place
- CA that can decide on negotiated results – preferable at the meetings
- Resources equals the number of cases – aware of the OECD recommendations on timing etc.
- Reach out to other CA in the cases asap.
- Guide the taxpayer on:
 - The written map application
 - Courts or MAP or both
 - The taxpayer is not part of the negotiations – it is a case between the two CAs
- Discuss without PPs in open and shut cases
- Send small email PPs
- Bigger papers when necessary
- Joint Qs when necessary
- Joint meetings with the taxpayer and the advisor when useful
- Short minutes from meetings
- MAP result – no double taxation – taxpayer must agree within 30 days and withdraw any appeal
- Implementation asap
- Be as pragmatic as your legal system allows
- Be the new set of eyes

Qs

- 1) What do you see being the biggest obstacle solving MAP cases?
- 2) What is the trend MAP versus APA cases?