

## UNITED STATES

KPMG US



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## ICAP: Taking disputes off the MAP

**Mark Martin and Thomas Bettge of KPMG in the US explore the International Compliance Assurance Programme as a tool for preventing disputes that would otherwise need to be resolved through traditional mechanisms.**

February 2021 saw the publication of the OECD Forum on Tax Administration's handbook on the International Compliance Assurance Programme (ICAP) and the launch of ICAP as a full-fledged, permanent dispute prevention programme.

ICAP provides a framework for multilateral risk assessment, allowing a multinational enterprise (MNE) to present its transfer pricing (TP), permanent establishment, and other international tax positions to a number of participating tax administrations.

ICAP was first explored during two rounds of pilot programmes. The initial 2017 pilot involved eight tax administrations, while 19 participated in the 2019 'ICAP 2.0' pilot. It is a voluntary programme that is open by application; MNEs interested in potentially participating are invited to confer with the tax authority of the jurisdiction where their ultimate parent entity resides prior to the next application deadline of September 30 2021. Participation is only granted to those that are considered suitable for the programme. ICAP may particularly appeal to companies focused on positive environmental, social, and corporate governance (ESG) considerations with respect to tax issues.

ICAP involves three stages: selection, risk assessment and issue resolution, and outcomes. In the first stage, the issues to be reviewed and the tax authorities that will participate are determined. In the second, the tax authorities assess the issues and, where they disagree with the company's position, seek to reach an agreed resolution with the company. In the final stage, the company receives outcome letters reflecting the results of the process.

Importantly, ICAP does not provide certainty. ICAP outcome letters will state whether each tax authority agrees with the outcomes of the process, but unlike a bilateral or multilateral advance pricing

agreement (APA), these outcome letters do not prevent tax authorities from subsequently changing their stated position and initiating an audit.

Rather, a taxpayer's reward for participating in ICAP is the chance to present its TP and international tax positions in a non-confrontational environment, and to present them simultaneously to multiple tax authorities that will work through them collaboratively. Instances in which tax authorities change their positions after ICAP is concluded will presumably be rare and limited to exceptional circumstances.

ICAP provides an important forum for tax authorities, with the taxpayer's involvement, to work through any differences in view, and allows treaty partners to work through disagreements before mutual agreement procedure (MAP) cases arise. Even where ICAP does not result in complete agreement from all tax authorities with respect to the 'correct' answer to a TP issue, it is hoped that a dissenting tax authority will often nonetheless consent in the majority view, recognising that any adjustment based on its own position could be the subject of a later MAP case which would consume additional resources going back over the same ground. ICAP, if approached in the right spirit, could therefore prove instrumental in assuaging the problem of rising MAP inventories.

Of course, ICAP may in itself be a resource-intensive process for tax authorities, and adequate resources will need to be made available if the programme is to function as intended. Tax authorities that, because of resource constraints, have only been able to give cursory consideration to complex issues in ICAP may be more likely to subsequently reconsider their views and initiate audits, undermining the benefits of the programme. Similarly, if resources are simply diverted to ICAP from MAP and APA programmes, this will not alleviate strains on the overall dispute prevention and resolution infrastructure.

ICAP offers some benefits that MAP and APAs cannot. As of April 27, 20 countries had formally indicated that they will participate in ICAP, including the US and some of its key treaty partners such as Canada, Japan, and the UK.

Also among the participants is Singapore, with which the US does not have a bilateral tax treaty. While it is sometimes possible to obtain certainty with respect to TP arrangements involving non-treaty partners by seeking unilateral APAs in both countries, this can be a difficult exercise.

For MNEs with significant TP arrangements that implicate both Singapore and the US, ICAP may provide a unique venue to facilitate discussion and obtain assur-

ance regarding risk levels.

Reported taxpayer experiences have been largely positive thus far, and ICAP has the potential to take the pressure off MAP inventories by addressing disputes up-front in a collaborative fashion. Indeed, ICAP has been hailed as a tool for reducing disputes in the discussions around BEPS 2.0's Pillar One. Yet for all its promise, success is not guaranteed.

In addition to the need for adequate resources, ICAP's success will hinge on taxpayers and tax authorities alike approaching the process in a spirit of transparency, cooperation, and compromise.

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