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MAP and the Exhaustion of Remedies for FTC Purposes

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After a long period of relative stability, in the past year we have witnessed major changes to the U.S. foreign tax credit regime and potential changes to the international tax certainty framework. New Treasury regulations have overhauled the definition of creditable income taxes,[1] and Pillar One of the OECD/G20 Inclusive Framework on BEPS is reimagining what tax certainty can and should be. Amid this change, it can be helpful to revisit one area where the rules have not undergone any material change: the role of mutual agreement procedure ("MAP") requests in compulsory payment determinations under the foreign tax credit rules.

I. OVERVIEW OF EXHAUSTION OF REMEDIES RULES

Section 901 of the Internal Revenue Code of 1986 (the "Code")[2] provides that, subject to certain limitations, a taxpayer may receive a credit for foreign taxes paid or deemed to have been paid.[3] For a domestic corporation, a credit is allowed for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country."[4] Prior to the passage of the Tax Cuts and Jobs Act ("TCJA"), a deemed credit was also allowed for taxes paid by certain foreign corporations under §902. Following the enactment of the TCJA, deemed credits for taxes paid by certain foreign corporations remain available under §960(a) with respect to Subpart F inclusions, and under §960(d) with respect to global intangible low-taxed income ("GILTI") inclusions.[5]

The exhaustion of remedies issue arises in the context of §901 for the purposes of determining what, exactly, constitutes a "tax" under that section. The core principle of the exhaustion of remedies concept is that taxes are by nature compulsory, and thus a payment that is voluntary is not truly a tax. Reg. §1.901-2(e)(5)(i) provides that "[a]n amount remitted to a foreign country . . . is not a compulsory payment, and thus is not an amount of foreign income tax paid, to the extent that the foreign payment exceeds the amount of liability for foreign income tax under the

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[1] T.D. 9959 (Jan. 4, 2022).

[2] All section references are to the Code or the Treasury Regulations thereunder, unless otherwise specified.

[3] §901(a).

[4] §901(b).

[5] §960(a), (d). The foreign tax credit associated with GILTI is limited to 80 percent of the foreign taxes. §960(d)(1).

ISSN 0090-4600

foreign tax law.''[6] Nor are penalties, fees, interest, and customs duties taxes within the scope of §901.[7]

Specifically, Reg. §1.901-2(e)(5)(i) provides that a taxpayer is required to do two things to ensure that a payment is compulsory. First, the taxpayer must determine the amount paid in a manner that reflects a reasonable interpretation and application of the foreign law (including any relevant procedural provisions and tax treaties), with the aim of reducing its reasonably expected foreign income tax liability over time.[8] An interpretation or application is not reasonable if the taxpayer has actual or constructive notice that it is likely to be erroneous.[9] Second, the taxpayer must ''exhaust[] all effective and practical remedies, including invocation of competent authority procedures available under applicable tax treaties'' to reduce its foreign income tax liability over time.[10] This includes remedies aimed at reducing or avoiding foreign audit adjustments.[11] Effective and practical remedies are those with respect to which costs (including the risk of additional or offsetting tax liabilities) are ''reasonable considering the amount at issue and the likelihood of success.''[12] The recent foreign tax credit regulations elaborate on this long-standing requirement,[13] providing that ''[a]n available remedy is considered effective and practical if an economically rational taxpayer would pursue it whether or not a compulsory payment of the amount at issue would be eligible for a U.S. foreign tax credit.''[14]

Taken at face value, the two prongs of the voluntary tax test impose a daunting challenge: taxpayers must interpret and apply the law in a manner that is ''reasonable,'' and undertake all remedies that are ''practical and effective.'' If a taxpayer misjudges where the hazy boundaries between those remedies that are practical and effective and those that are not, it will lose its eligibility for foreign tax credits to the extent that the omitted action could have reduced its foreign tax liability.[15] This creates tension: foreign tax credit regulations drive taxpayers to thoroughly pursue available remedies to protect creditability in the United States, but this potentially requires them to engage in costly and potentially fruitless proceedings, which risks aggravating and antagonizing foreign tax authorities.

The regulation does provide a few clarifications that may be relevant to the exhaustion of remedies issue. When a taxpayer resolves multiple issues in a settlement, the resolution will be evaluated as a whole, rather than on an issue-by-issue basis.[16] In determining what is a reasonable application of foreign law, the regulations provide that taxpayers may ''generally rely on advice obtained in good faith'' from competent advisors with knowledge of the relevant facts. While the regulatory language regarding advice from competent advisors does not address exhaustion of remedies, the court in *Procter & Gamble* (discussed below) considered such advice relevant in an exhaustion dispute.[17]

II. OVERVIEW OF MAP

Where available, competent authority proceedings between two countries provide a mechanism by which taxpayers may seek — and in most cases obtain — relief from double taxation under the MAP article of an applicable tax treaty. Article 25 of the United States Model Income Tax Convention, and analogous articles in tax treaties between the United States and its treaty partners, provide the procedures under which the contracting states' competent authorities shall, if requested by the taxpayer, endeavor to reach an agreement eliminating double taxation and other taxation not in accordance with the applicable treaty.[18] Seven U.S. tax treaties — with Belgium, Canada, France, Germany, Japan, Spain, and Switzerland — include mandatory binding arbitration as a backstop to MAP, ensuring that an outcome eliminating double tax will be reached.

For a long time, MAP outcomes in much of the world were a black box — and what information could be gleaned did not paint a favorable portrait. That all changed with BEPS Action 14: the OECD now publishes MAP statistics for well over 100 juris-

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[6] This language accords with the rule in place under the regulations prior to T.D. 9959 in all material respects.

[7] Reg. §1.901-2(a)(2)(i).

[8] §1.901-2(e)(5)(i).

[9] §1.901-2(e)(5)(ii).

[10] §1.901-2(e)(5)(i).

[11] *Id.*

[12] §1.901-2(e)(5)(v).

[13] This article focuses on the role of MAP under the exhaustion of remedies prong. For discussion of how the new regulations updated the compulsory payment rules more generally, see Brian H. Jenn and Mike Tenenboym, *Compulsory Payments Under the Final FTC Regulations*, 106 Tax Note Int'l 745 (May 9, 2022).

[14] §1.901-2(e)(5)(v).

[15] *Cf. Procter & Gamble Co. v. United States*, 106 AFTR 2d 2010-5311 (S.D. Ohio 2010) (granting the taxpayer a foreign tax credit, but only to the extent the foreign tax liability would not have been eliminated by the measures the court held the taxpayer should have taken).

[16] §1.901-2(e)(5)(v).

[17] *Procter & Gamble*, 106 AFTR 2d 2010-5311 at *20–24 (''Because P&G has only produced evidence discussing the likelihood of tax liability appeal success in Korea, and because P&G has not produced any evidence of advice, analysis, or counsel regarding Japanese avenues of recovery, it can only recover the Korean tax credit to the extent that this credit exceeds what it had already claimed as the Japanese tax credit.'').

[18] United States Model Income Tax Convention (2016), art. 25.

ISSN 0090-4600

dictions annually, and the publication of MAP outcomes — combined with Action 14 peer views — has pushed jurisdictions to improve their performance in MAP.[19]

In fact, MAP outcomes are more favorable than the OECD statistics indicate at first blush, because the statistics include a number of outcomes that are not germane to meritorious cases that are actually resolved in MAP. (For instance, the statistics include cases that are resolved in parallel domestic proceedings, which say nothing about whether the MAP process was successful.)[20] What the statistics show is that with most treaty partners, the U.S. competent authority is highly successful at eliminating double taxation even in the absence of an arbitration provision.

III. MAP AND THE EXHAUSTION OF REMEDIES REQUIREMENT

Rev. Rul. 92-75 demonstrates the impact of the voluntary tax rules for taxpayers who are eligible for competent authority relief.[21] There, the IRS allocated income from a foreign subsidiary to its U.S. parent under §482, but the subsidiary did not seek refunds of tax previously paid on the reallocated income. Nor did either party request competent authority relief, although this was available under the applicable tax treaty. The Service ruled that the parent and subsidiary had failed to exhaust their effective and practical remedies by not invoking competent authority procedures. Specifically, the IRS noted that ''[i]f a taxpayer is aware . . . of the possibility of securing a refund or reduction of foreign income tax liability but fails to pursue its remedies to secure such an adjustment, the amounts for which no adjustment was sought may be treated as noncompulsory payments to the foreign government.''

However, simply going through the motions of a competent authority request is not enough: it appears that taxpayers must be willing to accept a reasonable settlement by the competent authorities. In Field Service Advisory (''FSA'') 1354818,[22] the IRS addressed the case of a taxpayer that had requested competent authority assistance but had represented to the U.S. competent authority that it was unwilling to accept a settlement with the Japanese competent authority that involved less than a complete concession by Japan. While the IRS demurred from deciding the issue conclusively, the FSA notes that the taxpayer's willingness to accept an agreement only under unreasonable conditions was probably grounds for denying competent authority assistance. More importantly, it states that the taxpayer could also likely be denied a credit for the foreign taxes, which Japan would presumably have conceded had the taxpayer been willing to accept a reasonable competent authority resolution. This makes sense: the point of the voluntary tax rules is not to furnish taxpayers with a rote checklist, but to force them to exercise reasonable efforts aimed at actually reducing their foreign tax liabilities. Further, the FSA notes that the burden of showing remedies have been exhausted rests on the taxpayer.[23]

Case law provides additional guidance. *IBM Corporation v. United States*[24] addressed the timing of the credit: while taxpayers contesting their tax liabilities abroad may need to wait for the conclusion of the contest for the tax liability to accrue or for their remedies to be truly exhausted, the court in *IBM* held that a taxpayer may claim a foreign tax credit under Reg. §1.901-2(e)(5)(i) while a contest is ongoing.[25] In *IBM*, which involved a disputed payment made under Italian law, no competent authority relief was available for the tax in question under the applicable treaty.[26] While the IRS contended that no foreign tax credit would be available until ongoing appeals in Italy were concluded, the Court of Federal Claims noted that neither the statute nor the regulations had been drafted to require exhaustion of the complete litigation process prior to claiming a credit, and that the IRS had previously adopted the position that taxpayers may claim a foreign tax credit in the year the tax is assessed, notwithstanding the fact that the tax-

[19] https://www.oecd.org/tax/beps/beps-actions/action14/.

[20] For a discussion of the MAP statistics and success rates for meritorious cases, see Martin et al., *MAP: Past, Present, and Future*, Tax Notes Int'l (Apr. 12, 2021).

[21] 1992-2 C.B. 197.

[22] 1992 WL 1354818, Apr. 30, 1992.

[23] *Id.* (citing *Gulf Oil Corp. v. Comm'r*, 86 T.C. 115 (1986), *aff'd in part, rev'd in part, and rem'd*, 914 F.2d 396 (3d Cir. 1990)). *See also* IRS LB&I Practice Unit, ''Exhaustion of Administrative Remedies'' at 3, 5, available at https://www.irs.gov/businesses/corporations/practice-units [hereinafter ''Practice Unit'']; Rev. Proc. 2002-52, 2002-2 C.B. 242, §11 (''Acts or omissions by the taxpayer that preclude effective competent authority assistance, including failure to take protective measures as described in section 9 of this revenue procedure or failure to seek competent authority assistance, may constitute failure to exhaust all effective and practical remedies for purposes of §1.901-2(e)(5)(i). Further, the fact that the taxpayer has sought competent authority assistance but obtained no relief, either because the competent authorities failed to reach an agreement or because the taxpayer rejected an agreement reached by the competent authorities, generally will not, in and of itself, demonstrate for purposes of §1.901-2(e)(5)(i) that the taxpayer has exhausted all effective and practical remedies to reduce the taxpayer's liability for foreign tax (including liability pursuant to a foreign tax audit adjustment).''). Rev. Proc. 2002-52 is a superseded ancestor of the current MAP revenue procedure, Rev. Proc. 2015-40.

[24] 38 Fed. Cl. 661 (1997).

[25] *Id.* at 675 (1997). *Cf.* Practice Unit at 11.

[26] 38 Fed. Cl. at 673–74.

ISSN 0090-4600

payer is disputing its liability in the foreign country.[27] If the taxpayer receives a refund in the foreign country in a later year, it must reimburse the IRS for the credit taken.[28]

Competent authority proceedings, like litigation, often take several years to resolve. The most recent statistics indicate that the U.S. Competent Authority takes on average 23 months to resolve transfer pricing cases, and 18 months to resolve other competent authority cases.[29] Under the holding of *IBM*, taxpayers should not need to await the ultimate resolution of a competent authority case to obtain a foreign tax credit: if the circumstances indicate that a competent authority resolution would satisfy the exhaustion of remedies prong, then merely making the request — and indicating that the taxpayer would accept a reasonable resolution — should suffice to make the credits available. Of course, should MAP result in a complete or partial elimination of a foreign adjustment, a redetermination would need to be made under §905(c).

In *Procter & Gamble Co. v. United States*,[30] the court addressed a situation where no competent authority assistance had been requested. A subsidiary of Procter & Gamble (''P&G NEA'') had paid taxes on income in Japan, for which its parent (''P&G'') claimed foreign tax credits. Korea then subjected a portion of the same income to tax, and P&G claimed foreign tax credits for the Korean tax paid. Competent authority relief was available under treaties between the relevant countries, but no claim was made. While the taxpayer had secured the opinion of local counsel in Korea stating that further pursuing domestic Korean remedies was unlikely to succeed, the court found that this did not suffice to exhaust remedies with respect to the Korean tax:

> Thus, when in 2006 the Korean National Tax Service performed an audit of P&G NEA and concluded that the royalty income was ''Korean-sourced,'' P&G should have sought a redetermination of the source of the royalty income under Japanese law or competent authority proceedings with regards to P&G's liability in Japan.
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> P&G claims that it relied on the advice of its Korean tax counsel, the Yulchon law firm in Seoul, who counseled P&G that the Korean withholding tax had been assessed in accordance with Korean law and the US-Korea tax treaty. However, Yulchon offered an opinion only on the likely success of an administrative remedy in Korea. Yulchon did not address either the availability of competent authority review or potential avenues for relief in Japan. P&G has not produced any evidence of advice obtained from competent foreign tax advisors on which P&G relied when it declined to pursue a remedy in Japan or through competent authority procedures.[31]

Thus, the court held that the taxpayer had not exhausted its remedies and permitted an additional tax credit only to the extent the Korean tax exceeded the Japanese tax.

The exhaustion of remedies issue was taken up again in *Coca-Cola Co. v. Commissioner*,[32] a 2017 decision in which the Tax Court decided Coca-Cola's motion for summary judgment relating to one issue in Coca-Cola's larger transfer pricing dispute with the IRS, which culminated (for the time being) in the release of the Tax Court's decision in November 2020.[33] The December 14, 2017 opinion in *Coca-Cola* addressed the creditability of Mexican tax payments: specifically, the IRS denied Coca-Cola foreign tax credits on the ground that its Mexican subsidiary had not claimed sufficient deductions with respect to royalty payments.[34] The Tax Court looked at both the reasonable interpretation and exhaustion of remedies prongs of Reg. §1.901-2(e)(5)(i), holding that the former was satisfied because the taxpayer relied on expert counsel and did not have actual or constructive notice that its transfer pricing position was incorrect.[35]

With respect to exhaustion of remedies, the court's holding and discussion were unsurprising — after all, the IRS had failed to ''point to any effective and practical remedy that petitioner could now pursue to reduce its liability for Mexican tax.''[36] First, the court considered local remedies. The fact that the IRS had yet to adjudicate its §482 adjustments meant that the taxpayer could not yet seek a refund in Mexico.[37] Naturally, the court did not demand that the taxpayer futilely pursue remedies that were not actually avail-

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[27] *Id.* at 674–75 (citing Rev. Rul. 70-290, 1970-1 C.B. 160).

[28] *Id.* at 674.

[29] Organisation for Economic Co-operation and Development, Mutual Agreement Procedure statistics per country for 2020: United States, https://www.oecd.org/tax/dispute/2020-map-statistics-united-states.pdf. These statistics relate to cases begun on or after January 1, 2016. The U.S. Competent Authority still has a number of pre-2016 MAP cases in its inventory, which naturally entail much longer resolutions.

[30] 106 AFTR 2d 2010-5311 (S.D. Ohio 2010).

[31] *Id.*

[32] 149 T.C. No. 21 (2017).

[33] *Id.* at 1. *See Coca-Cola Co. v. Comm'r*, 155 T.C. No. 10 (2020).

[34] 149 T.C. No. 21 at 11.

[35] *Id.* at 5–8.

[36] *Id.* at 8.

[37] *Id.*

ISSN 0090-4600

able.[38] Instead, drawing on *IBM* and related authorities, it held that the taxpayer could take a tax credit in the present year, and would be required to file an amended return if the foreign taxes paid were later refunded.[39]

The court in *Coca-Cola* separately considered the competent authority option in determining that the taxpayer had exhausted its effective and practical remedies. While both the U.S. taxpayer and its Mexican affiliate had requested competent authority assistance, the IRS refused to engage in competent authority negotiations to eliminate double taxation because it had designated the case for litigation.[40] While the IRS focused on the fact that merely invoking competent authority assistance does not suffice to exhaust remedies,[41] the Tax Court rightly pointed out the absurdity in its position: ''Respondent is in a poor position to contend that petitioner has failed to exhaust its remedies when respondent, by his unilateral action, has made it impossible for petitioner to pursue the only remedy that exists.''[42]

The court did not reject the rule that merely invoking competent authority assistance does not in itself exhaust all practical and effective remedies. Rather, it distinguished the hypothetical scenario discussed in administrative guidance, in which competent authority proceedings fail either because the competent authorities cannot reach an agreement or because the taxpayer rejects the proposed resolution.[43] By contrast, Coca-Cola could not obtain effective competent authority relief solely because the IRS had ''unilaterally refused to participate.''[44] Accordingly, the court granted the taxpayer's motion for partial summary judgment on the foreign tax credit issues.[45]

IV. IRS GUIDANCE

On April 17, 2018, the IRS's Large Business & International Division (''LB&I'') released a practice unit titled ''Exhaustion of Administrative Remedies'' (the ''Practice Unit''), which reviews the exhaustion of remedies rules and provides guidance for IRS examiners considering whether a foreign payment is voluntary or compulsory.[46] Although the Practice Unit predates the minor updates to the exhaustion of remedies rules introduced in the recent regulations, it should still provide a good overview of the IRS's thinking on these issues. The Practice Unit directs examiners faced with a voluntary tax issue to consider:

- Whether the payment is reasonably certain to be returned (e.g., refunded or credited),
- Whether the taxpayer pursued available means to obtain a refund,
- Whether there was a foreign audit which could be contested on several levels (e.g., administrative appeals, competent authority, or litigation), and
- Whether the taxpayer's efforts to use the available channels were adequate and comprehensive.[47]

While the Practice Unit provides an overview of the rules that may be extracted from the sources discussed above, it also distills them, providing a valuable summation of the IRS's stance on the necessity of requesting competent authority assistance. The Practice Unit notes that taxpayers are generally required to request competent authority assistance where this is available: ''If the taxpayer is subject to double taxation or taxation inconsistent with the treaty, the taxpayer must pursue reasonable remedies, including competent authority assistance, if the cost is reasonable in light of the amount in dispute and likelihood of success.''[48] However, cost is unlikely to render a competent authority request unnecessary: ''Because the cost of pursuing competent authority relief is generally low, taxpayers that fail to seek competent authority assistance where available must produce evidence to show why it would not have been an effective and practical remedy.''[49] The Practice Unit effectively embraces a presumption that taxpayers must seek competent authority relief if available and imposes an affirmative burden of justification on those who neglect to request it.

Exceptions to the rule that a taxpayer must request competent authority relief are, in the IRS's view, ''few'' and ''narrowly drawn.''[50] The Practice Unit does acknowledge that ''[t]here are circumstances where competent authority assistance may not be necessary, such as de minimis cases, cases where other administrative remedies or litigation are successful, [and] cases where the taxpayer has received an opinion of local counsel or otherwise has complied with

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[38] *Id.*

[39] *Id.* at 9–11.

[40] *Id.* at 4, 8.

[41] *Id.* at 8 n.6 (citing Rev. Proc. 2006-54, 2006-2 C.B. 1035, *superseded by* Rev. Proc. 2015-40).

[42] *Id.* at 8.

[43] *Id.* at 8 n.6 (citing Rev. Proc. 2006-54).

[44] *Id.* at 8 n.6.

[45] *Id.* at 11.

[46] Practice Unit, *supra* note 20.

[47] Practice Unit at 3.

[48] *Id.* at 14.

[49] *Id.* at 15.

[50] *Id.* at 19.

ISSN 0090-4600

foreign laws to minimize taxes.''[51] For instance, MAP would not be a practical and effective remedy in cases in which a foreign tax authority offers a highly favorable settlement at the examination level, or cases where the cost of MAP would be prohibitive relative to a *de minimis* adjustment. Furthermore, if a tax treaty between the United States and another country has existed for several years, but the two competent authorities have never interacted, the taxpayer would presumably be excused from having to seek competent authority assistance under the ineffective treaty. The treaty between the United States and Venezuela, for example, has never been supplemented with a working competent authority relationship, and a request for competent authority relief under that treaty should likely be regarded as ineffective or futile, and thus dispensable.

V. TAKEAWAYS

The availability of MAP statistics changes the voluntary tax calculus considerably, not least because the statistics show that with most U.S. treaty partners, MAP is extremely successful at eliminating double taxation. In many cases, then, there is no need for guesswork or expert advice: absent unusual circumstances, MAP is demonstrably effective.

Yet the same logic does not hold in the inverse scenario. Taxpayers could easily be excused for thinking that, where the statistics report that a treaty partner has no MAP activity, there is no effective MAP relationship between the United States and that treaty partner, and thus no need to pursue MAP. Nevertheless, we are aware that, in a similar case, the U.S. competent authority has required the taxpayer to request MAP relief in order to satisfy the exhaustion of remedies requirement.

In doubtful cases, therefore, taxpayers should discuss the matter with the IRS before choosing not to pursue MAP. For instance, a particular MAP relationship may prove to be effective, even if it is seldom invoked. Rev. Proc. 2015-40 provides that the U.S. Competent Authority is available for informal consultations with taxpayers regarding exhaustion of remedies issues.[52] These consultations need not relate only to the possibility of requesting competent authority relief but may extend to ''considerations surrounding administrative or other steps that may be available to the taxpayer in the foreign jurisdiction.''[53]

For taxpayers facing difficult or unusual situations, such consultations may yield valuable taxpayer-specific guidance on whether a formal competent authority application is likely to be required. While taxpayers should bear in mind that the competent authority's informal advice is not technically binding on the IRS, our experience has been that the IRS will respect the outcomes of these informal consultations.[54] Consulting with the U.S. competent authority ultimately provides the safest means of evaluating whether a MAP request will be necessary and is likely less costly than securing a formal opinion regarding the (in)effectiveness of a MAP relationship.

VI. CONCLUSION

To exhaust remedies for foreign tax creditability purposes, taxpayers need to request competent authority assistance where available, subject to the general caveat that only practical and effective remedies need to be pursued. The high effectiveness of MAP with most U.S. treaty partners makes it an important dispute resolution tool, all the more so because its role in satisfying the exhaustion of remedies requirement. Of course, there remain circumstances where MAP would not be a practical and effective remedy. To gain certainty in those cases, consulting with the U.S. competent authority is recommended.

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[51] *Id.*

[52] Rev. Proc. 2015-40, 2015-35 I.R.B. 236, §2.03.

[53] *Id.*

[54] *Id.*

ISSN 0090-4600