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Cross-border Tax Controversy: New Ways Forward

3 December 2021

Co-Chairs:

Yuval Navot, Partner – Herzog, Fox & Neeman

Loren Ponds, Member – Miller & Chevalier

Secretary:

Josh Kumar, Partner – Aird Berlis



Cross-border Tax Controversy: New Ways Forward

- Introductions
- Irish Competent Authority Overview
- Country Perspectives
 - Ireland
 - Italy
 - India
 - Mexico
- Wrap-up



Margaret Duggan - Competent Authority, Revenue Commissioners, Ireland

Margaret is a Principal Officer in the Transfer Pricing Branch of International Tax Division of the Irish Revenue Commissioners. Margaret is a Competent Authority for Transfer Pricing MAP and APA cases in Ireland. Margaret is a Fellow of Chartered Accountants Ireland, a Chartered Tax Advisor and has over ten years experience working with the Revenue Commissioners in Ireland.



Tomás Bailey, Senior Associate – Matheson

Tomás advises Irish and multinational clients on all aspects of Irish corporate taxation with a primary focus on tax-effective structures for inbound and outbound investment, cross-border transactions and tax controversy. Tomás has published articles and chapters in leading tax publications on international and domestic tax matters. Tomás is a qualified solicitor and Chartered Tax Adviser (CTA).



Giuseppe Zorzi, Counsel – Chiomenti

Giuseppe is member of the Milan bar since 2013 and has more than 13 years of legal experience. His practice is primarily focused on domestic and international corporate tax issues, financial transaction, private equity as well as tax dispute resolution, tax audits and tax litigation.



Charanya Lakshmikumaran, Partner – Lakshmikumaran & Sridharan

Charanya is a Partner handling tax disputes at the New Delhi office of the Lakshmikumaran & Sridharan. Since enrolling at the Bar in 2010, she has assisted key clients in automotive, FMCG and pharma sectors in Customs, International Tax and VAT/GST cases. She has been closely involved in guiding clients during highly contentious investigations by various tax authorities. She regularly appears before Tax tribunals, High Courts and the Supreme Court of India in tax disputes for various domestic as well as International clients.

Charanya has been recognized as a Next generation Partners by Legal 500 in 2019 and 2020 and as one of the Top 50 dispute resolution lawyers in Asia by Asian Legal Business.



Jorge López López, Senior Associate – Sanchez Devanny

Jorge has more than 10 years of legal experience. His practice is primarily focused on national and international corporate tax issues as well as wealth management issues. He has experience in a variety of tax matters, including M&A, corporate restructurings, transfer pricing and legal audits. His experience also comprises tax litigation, as well as the implementation of defense strategies before tax and judicial authorities

LL.M. in International Taxation, University Florida, USA (2020)

Master of Laws in Tax, Universidad Panamericana, Mexico City, Mexico (2016)

Law Degree, Universidad Panamericana, Mexico City, Mexico (2012)



Yuval Navot, Partner – Herzog, Fox & Neeman

Yuval Navot is a partner at Herzog, Fox & Neeman in Tel Aviv who leads the firm's corporate tax group.

Yuval focuses his practice on international tax planning and the tax aspects of mergers and acquisitions, private equity investments, restructurings and inbound and outbound business operations. Yuval has been the principal tax lawyer on many of Israel's largest M&A transactions, including strategic acquisitions and private equity buyouts. Yuval also has a great deal of experience in tax audits, rulings and other administrative proceedings in front of the Israel Tax Authority.

Yuval is recognized by Chambers Global as a leading individual in Israeli tax matters by Chambers Global, Legal 500, Who's Who Legal, World Tax and other ranking guides..



Loren Ponds, Member – Miller & Chevalier

Loren Ponds is a member at Miller & Chevalier in Washington, DC and co-chair of the firm's tax policy practice.

Loren centers her practice on providing strategic counsel to clients on legislative, regulatory, and other tax policy issues, as well as advising on technical tax matters. She has extensive experience representing clients seeking advance pricing agreements, mutual agreement procedure (MAP) relief and in other international tax controversy matters before the Internal Revenue Service (IRS), as well as advising on intangible property transactions and other transfer pricing and international tax issues.

Prior to joining Miller & Chevalier, Loren served as Majority Tax Counsel to the U.S. House of Representatives Committee on Ways and Means, where she developed, analyzed, and refined the international tax provisions of the Tax Cuts and Jobs Act.



Insider's View: Irish Competent Authority



Role of Irish Competent Authority

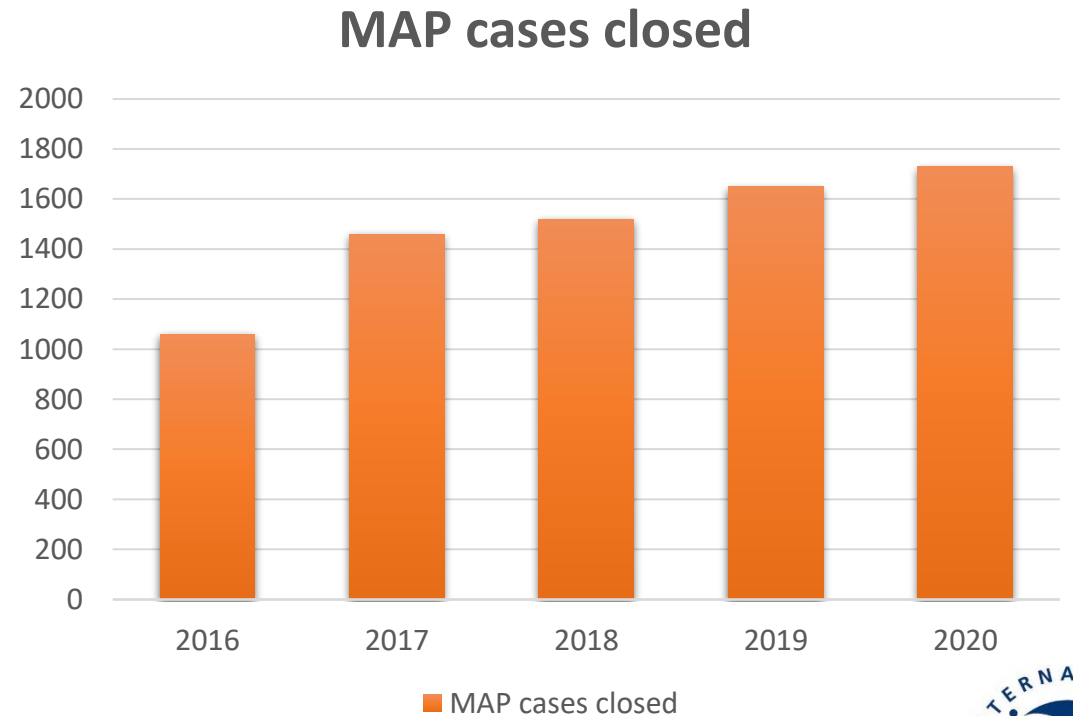
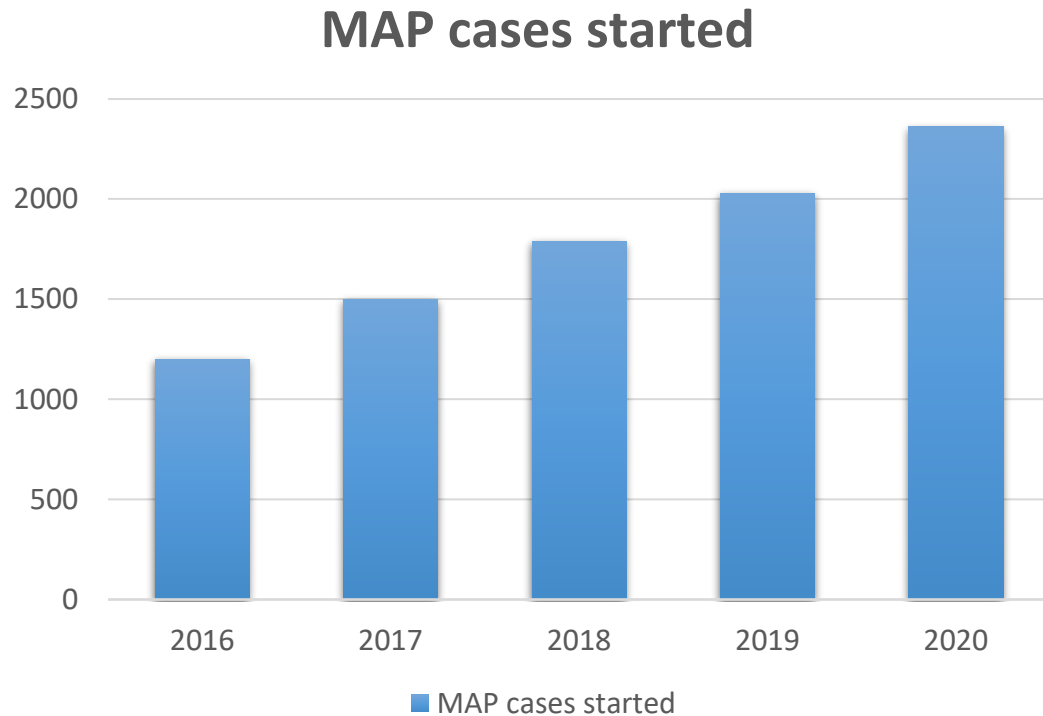
- Resolution of international transfer pricing disputes (MAPs)
- Negotiation of APAs
- Practical experience of MAP and APA process in Ireland



Global evolution Transfer Pricing MAP cases

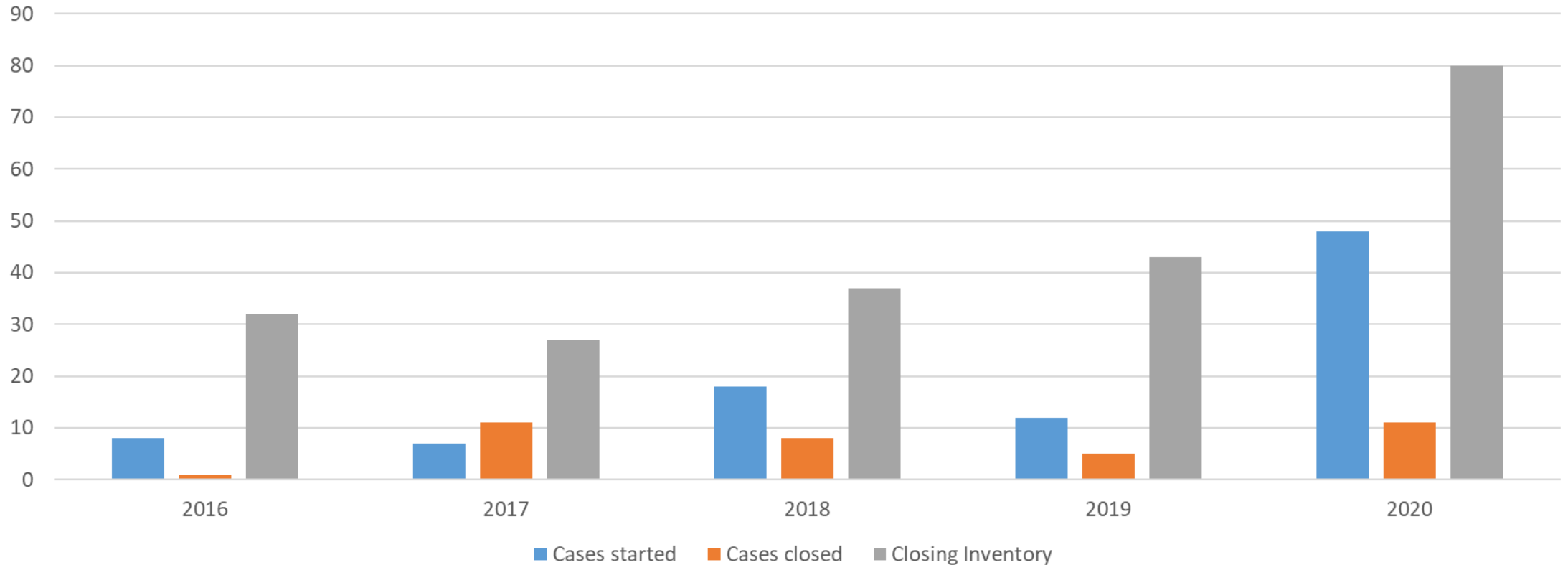
Transfer Pricing MAP cases started

Transfer Pricing MAP cases closed



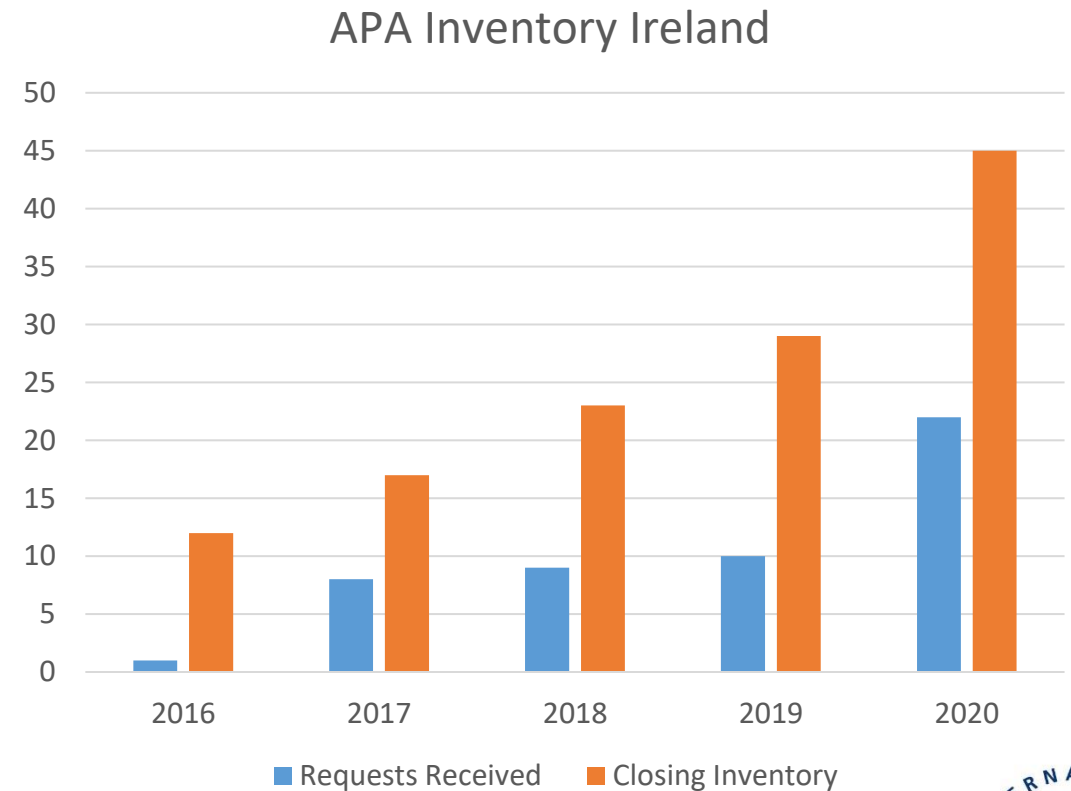
Ireland's MAP Inventory

Transfer Pricing MAP cases Ireland



APAs in Ireland

- Formal bilateral APA programme introduced June 2016
- Increasing demand for bilateral APAs
- Multilateral APAs
- No unilateral APAs



Recent developments regarding Dispute Prevention and Resolution

- BEPS Action 14 Making Dispute Resolution Mechanisms More Effective
- MAP Peer Review Process
- Tax Certainty Agenda
- Arbitration

Recent Practical Experiences – Ireland & Italy



Current Trends – Ireland

- Recent MAP cases and experiences
- Domestic enforcement of EU tax law
 - Domestic structure
 - Recent cases
 - Direct & indirect effect
 - Advantages for taxpayers

Implementation of MAP agreement in Italy

- Italian MAP legislative framework
 - Double Tax Treaties (Art. 25 del OECD Model Convention)
 - EU Convention no. 90/436/CEE (implemented by Law 22 March 1993, no. 99)
 - EU Directive no. 2017/1852 on dispute resolution (implemented by Legislative Decree 10 June 2020, no. 49)

See Circular Letter of the Italian Tax Authorities dated 5 June 2012, no. 21/E



Implementation of MAP agreement in Italy

- In case the taxpayer settles the claim through an administrative or judicial settlement procedure (thus benefitting from certain reduction of the administrative penalties), the access to the MAP would be limited
 - The MAP can only result in the acceptance of the outcome of the settlement by the competent authority of the other State (correlative adjustment)
- Based on the provisions implementing the EU Directive no. 2017/1852 only the execution of a judicial settlement would prevent the access to the MAP (no explicit provision for administrative settlement)
- Taxpayers are *de facto* prevented from reaching any unilateral settlement with the Italian tax authorities

Implementation of MAP agreement in Italy

- The starting of a MAP does not prevent the taxpayer from filing an appeal before the competent tax court (and to deal with the relevant ramification in case an agreement is reached)
 - Although the MAP can be started in the lack of an actual notice of assessment, it is common for the taxpayers to postpone the starting of the MAP only following the issuance of such notice of assessment
 - In any case, also if the MAP is started upon the receipt of the first notification of the action potentially requiring the MAP (e.g., a tax audit report), the Italian tax authorities may serve a notice of assessment to the taxpayer in order to avoid the expiry of a limitation period, thus determining the starting of the tax litigation
 - Even in case of MAP based on EU Convention no. 90/436/CEE (where the taxpayer would be required to dismiss the judicial proceeding in order to benefit from the Arbitration Phase), tax litigation could be kept alive in relation to matters out of MAP's scope (e.g., in case specific arguments raised with respect to the administrative penalties applied)
 - Pending a MAP, the tax litigation can be suspended (suspension upon request of the sole taxpayer is granted only pursuant to a MAP based upon EU Directive no. 2017/1852, in other cases agreement with tax authorities is required)

Implementation of MAP agreement in Italy

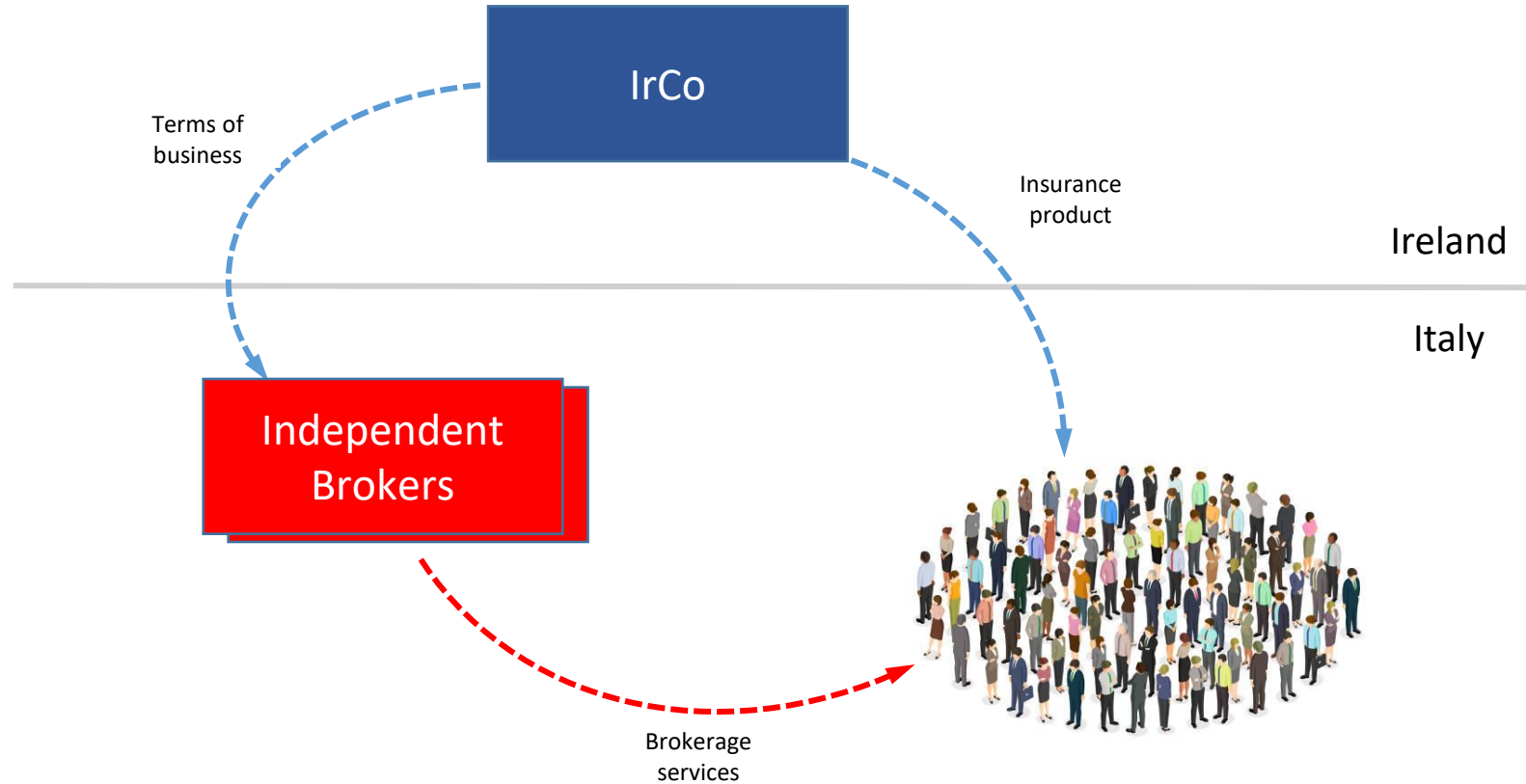
- Based on the latest approach followed by the Italian tax authorities, the implementation of the agreement reached under a MAP does not allow the taxpayer to benefit from any penalty discount
 - In case of reduction of the higher taxes originally claimed, the administrative penalties are reduced accordingly, but no further reduction can be granted
 - Only viable option is to continue the tax litigation only with respect to administrative penalties (in case there are sound arguments raised in the context of the appeal) and to reach a judicial settlement with the tax office

Implementation of MAP agreement in Italy

- The actual Italian framework may determine the existence of barriers for the taxpayer to start a MAP and then to pursue the MAP reliefs
 - Starting a MAP may result in the end to the application of higher administrative penalties that may make the correlative adjustment granted by the other State useless or less convenient (no effective resolution of disputes?)
 - In case the MAP agreement would lead to similar result that could have been reached in the context of an administrative or judicial settlement, the starting of the MAP should be carefully evaluated (for example in case of claims recurring in multiple fiscal years)
 - No coordination between criminal proceeding and MAP

Case Study – Italy/Ireland MAP Failure

Barriers to MAP – Case Study



Barriers to MAP – Case Study

- Ongoing criminal proceedings
- No MLI
- Limited EU arbitration convention
- Constitutional limitations
- Outcome = double taxation

Recent Practical Experiences - India



Investigations in India

- Tax authorities in India actively pursuing tax evaders
- Enacted various local legislations such as Black Money Law to counter the problem of undisclosed foreign incomes
- Also moving towards faceless assessments and appeals for transparency and optimum utilization of available resources
- Various comprehensive and information sharing treaties signed by India



Investigations in India

- With increasing automation, information exchange is also faster
- India seeking information from other jurisdictions and using data to verify claims made by taxpayers
- Investigations are more dynamic and data oriented than before

Arbitrations in India

- No arbitration clause in fiscal statutes
- Decision of tax authorities to be reviewed by judicial forums only
- India has signed various Bilateral Investment Treaties ('BIT') in terms of which investors of other countries have been assured a fair and equitable treatment in India
- BIT entered by India contain arbitration clause to resolve disputes with investor of other country



Arbitrations in India

- Non-resident taxpayers in certain cases had alleged breach of BIT on account of retrospective amendments in tax laws
- Awards were granted in favour of investors. Matter sought to be settled by removing retrospectivity from the statute
- Pillar 1 also contains proposal for a binding mechanism to determine profits in scope MNE.
- India may have to make amendments to validate these compulsory mechanisms.

Mutual Agreement Procedure in India

- MAP proceedings not published in public domain
- Clause may be invoked more than even ever before on account dual residency post pandemic and lockdowns
- MAP is generally seen as an administrative action and not subject to judicial review
- Position post expiry of agreed period under MAP examined by Supreme Court
- Held that it is open to taxpayers to re-visit their liability to pay tax. Position bilaterally agreed under MAP does not act as an estoppel against taxpayer from taking a different position post the agreed period



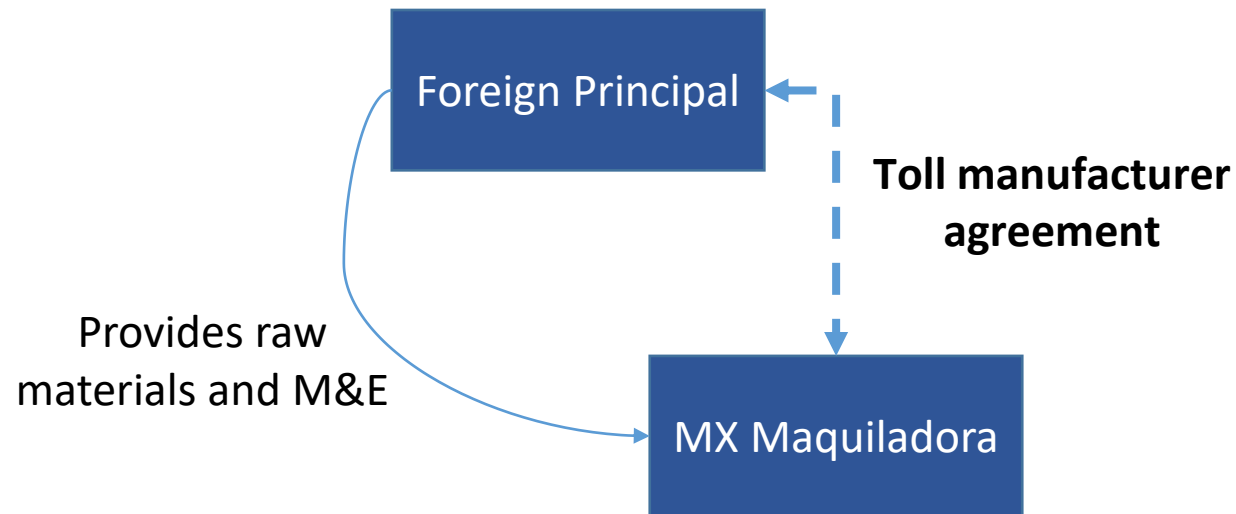
Recent Practical Experiences - Mexico



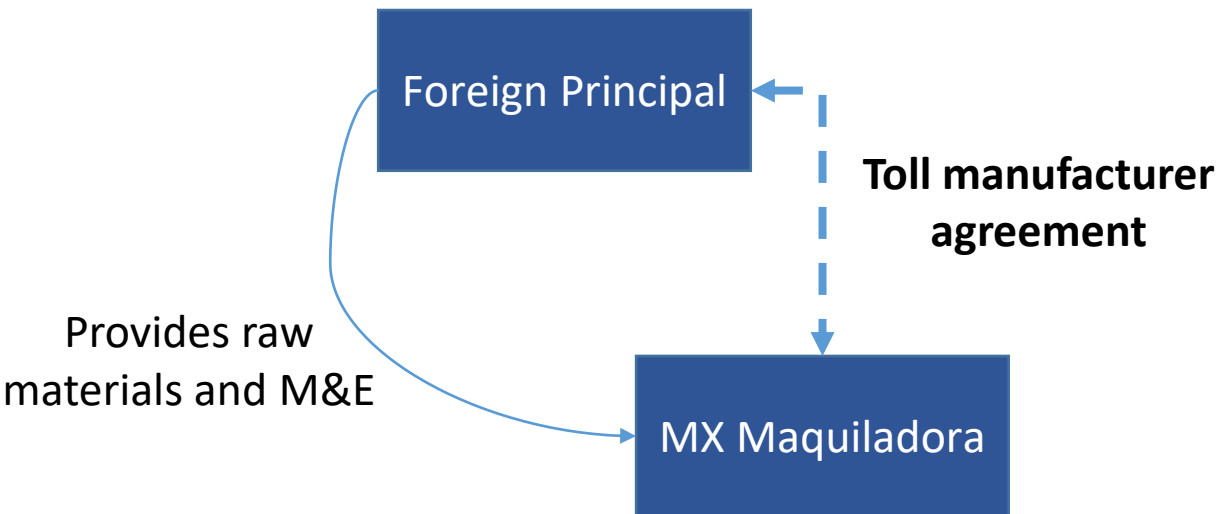
2022 Mexican tax reform – Maquiladora regime

What is the “Maquiladora” regime?

Foreign trade and tax regime designed to promote exports and encourage foreign investments into Mexico.



2022 Mexican tax reform – Maquiladora regime



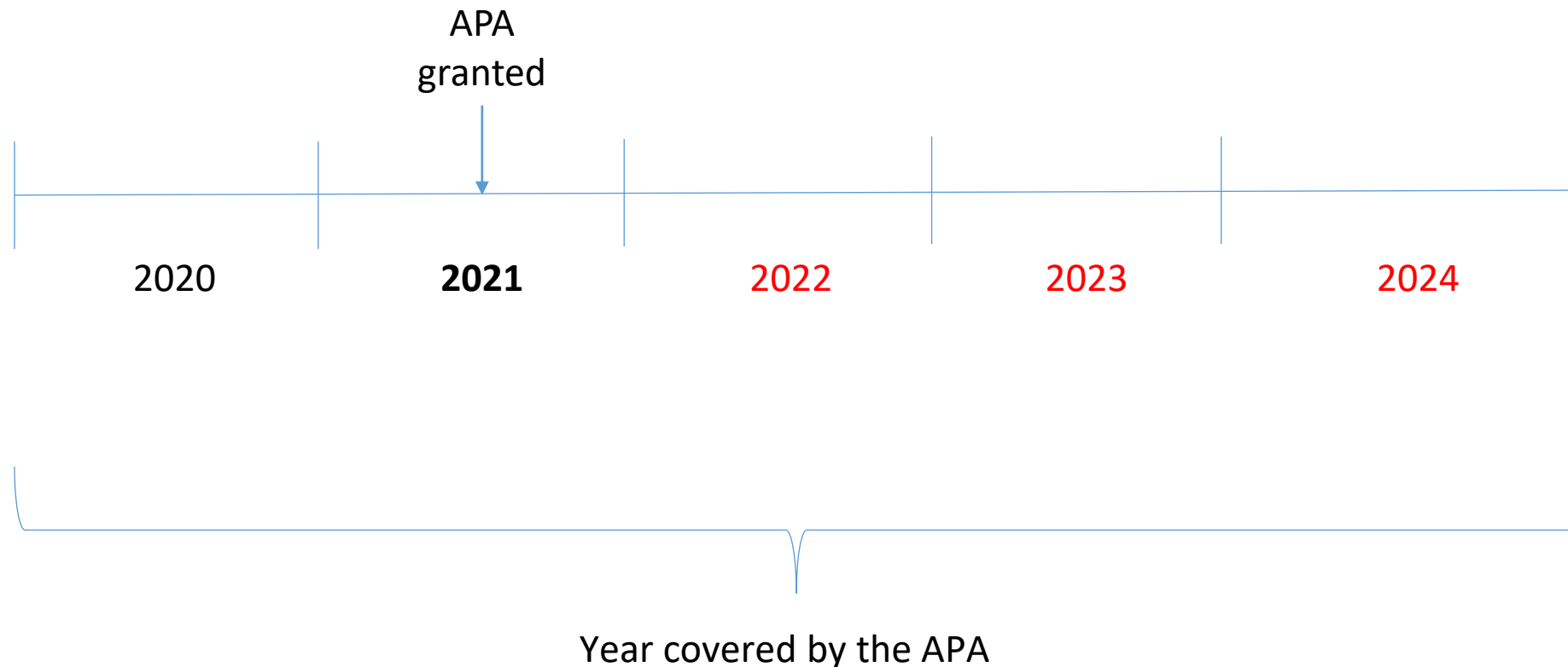
Distinguishing features:

- Prevents the Foreign Principal of having a Permanent Establishment in Mexico.
- MX Maquiladora can determine its taxable income based on either:
 - A. Thresholds (6.9% of assets or 6.5% of costs).
 - B. Advanced Pricing Agreement**

2022 Mexican tax reform – Maquiladora regime

What happens with APAs granted in 2021?

An APA granted under the basis that the Principal have no PE status covers protects the Principal against triggering a PE status?



2022 Mexican tax reform – Maquiladora regime

What is next?

- Assume the Mexican thresholds
- Convert the maquiladora to a toll or full-fledged maquiladora
- MAP?

2022 Mexican tax reform – International tax controversies

- Term to file an administrative appeal will be suspended if a MAP is initiated. The taxpayer is required to guarantee the tax assessment.
- During the APA procedure the statute of limitation will be suspended.



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