

# 13th IBA London 2024 Finance & Capital Markets & Tax Conference

15-16 January 2024



## **Navigating between Tax Litigation and Dispute Resolution Mechanisms**

Tuesday 16 January 2024  
(4:15 pm - 5:15 pm)

# CHAIR AND SPEAKERS



## **GUGLIELMO MAISTO, ITALY (CHAIR)**

Guglielmo Maisto is founder of Maisto e Associati and a Professor of international and comparative tax law at the Università Cattolica di Piacenza. He is President of the International Fiscal Association and President of the Italian Branch of the same organization.



## **CAROLINE CIRAULO, US**

Caroline is a partner with Kostelanetz LLP and a founder of its Washington, D.C. office. Her practice focuses on federal and state civil tax controversies, including representation in sensitive audits, administrative appeals, and litigation, providing related tax advice, conducting internal investigations, and representing individuals and entities in criminal tax investigations and prosecutions.



## **RAMONA AZZOPARDI, MALTA**

Ramona heads the Tax and Private Client Departments within WH Partners. She regularly advises corporate clients in the technology, digital services, gaming, and financial services industries on their cross-border tax implications. She also assists HNWI families in estate and tax planning.



## **SONJA SCHILLER, US**

Sonja is Regulatory and Litigation Counsel in Alphabet's Regulatory Response, Investigations, and Strategy team, where she focuses her practice on tax-related enforcement actions, litigation, and other proceedings. Before joining Google, Sonja was Principal Corporate Counsel at Microsoft, where she was the lead attorney managing international income tax controversies.



## **GREGORY PRICE, UK**

Gregory is a partner in the Macfarlanes tax team. His practice focuses on tax consultancy, providing tax advice to UK and international clients. He has a particular interest in group and international tax matters, for example in the efficient structuring of mergers and demergers as well as group reorganizations.



## **MICHEL COLLET, FRANCE**

Michel is specialized in inbound and outbound investments. He assists French and foreign banks, funds, multinationals and high net individuals in M&A transactions, financings, reorganizations and real estate investments. Michel also represents clients in audits and dispute.

# AGENDA



- I. **Overall Tax Litigation Climate**
  - Reliability and predictability
  - Timing
  - Tax collection
  - Other dispute resolution mechanisms
  - Priority between mechanisms
  - Tax authorities' success rate

## II. **Selected Topics**

- **Litigation considerations**
- **Impact of pre-litigation**
- **Conflict between criminal and administrative outcomes**
- **The US criminal law perspective**
- **Functioning of MAPs in small/low tax jurisdictions**



## **I. Overall Tax Litigation Climate**

# OVERALL TAX LITIGATION CLIMATE



Aspects	UK	Malta	France	US
<b>Reliability and Predictability</b>	<ul style="list-style-type: none"> <li>Independent judiciary</li> <li>Uncertain tax system</li> </ul>	<ul style="list-style-type: none"> <li>Independent judiciary and specialised board of administration</li> <li>No predictability</li> </ul>	<ul style="list-style-type: none"> <li>Reliable and predictable (well-known and uniform interpretation of the law)</li> </ul>	<ul style="list-style-type: none"> <li>Results may depend on venue and judge</li> <li>USTC - 90%+ of federal civil tax cases</li> <li>Increased APA disputes lead to uncertainty</li> </ul>
<b>Timing</b>	<ul style="list-style-type: none"> <li>First tier tribunal: 12-18 months</li> <li>Upper tribunal: 9-12 months</li> </ul>	<ul style="list-style-type: none"> <li>Depending on the complexity of the case but lengthy process</li> </ul>	<ul style="list-style-type: none"> <li>~ 6 years to reach the final decision of the Supreme court</li> </ul>	<ul style="list-style-type: none"> <li>Administrative process - &gt;18 months</li> <li>USTC: 2-4+ years</li> <li>USCA: 1-2+ years</li> </ul>
<b>Tax Collection</b>	<ul style="list-style-type: none"> <li>Postponed until appeal resolved (save for exceptions)</li> </ul>	<ul style="list-style-type: none"> <li>Postponed until case is closed, however interest may still accrue.</li> </ul>	<ul style="list-style-type: none"> <li>Possible Deferral until 1<sup>st</sup> tier court's decision</li> </ul>	<ul style="list-style-type: none"> <li>USTC: no prepayment required</li> <li>USDC, CFC: refund suits</li> </ul>
<b>Other Dispute Resolution Mechanisms</b>	<ul style="list-style-type: none"> <li>ADR</li> </ul>	<ul style="list-style-type: none"> <li>Domestic Settlements</li> <li>EU Directive</li> <li>MAPs</li> </ul>	<ul style="list-style-type: none"> <li>Settlement during litigation</li> </ul>	<ul style="list-style-type: none"> <li>Administrative ADR</li> <li>Judicial mediation</li> </ul>
<b>Priority between Mechanisms</b>	<ul style="list-style-type: none"> <li>No priority</li> </ul>	<ul style="list-style-type: none"> <li>No priority</li> </ul>	<ul style="list-style-type: none"> <li>Settlement when criminal procedure exposure</li> </ul>	<ul style="list-style-type: none"> <li>Depends on the facts and circumstances of the case</li> </ul>
<b>Tax Authorities' Success Rate</b>	<ul style="list-style-type: none"> <li>~ 92% in 2022/2023</li> </ul>	<ul style="list-style-type: none"> <li>Revenue winning most cases</li> </ul>	<ul style="list-style-type: none"> <li>Revenue winning majority of cases.</li> </ul>	<ul style="list-style-type: none"> <li>DOJ Tax (USDC,CFC) – 95%</li> <li>IRS (USTC) – 70%+ (80%+ where TP is pro se)</li> </ul>
<b>Overall Assessment</b>				



## II. Selected Topics

# LITIGATION CONSIDERATIONS



- Impartiality and due process
- Forum considerations
- Precedent
- Need for certainty
- Resource considerations
- Available confidentiality protections
- Publicity

# IMPACT OF PRE-LITIGATION



- Dealing with uncertainty, e.g. disclosure of uncertain tax treatments
- Enquiry process for complex/international tax matters is slow (but cf. DTP)
- Importance of establishing transaction “purposes”
- HMRC often focus on emails of key individuals
- Power to require disclosure (pre-litigation) – but within sensible limits (e.g. Parker Hannifin v HMRC, November 2023)
- Role of First tier tribunal in fact finding



# IMPACT OF PRE-LITIGATION: TRENDS IN UPFRONT PAYMENT AND SUSPENSION OF TAX



## **Accelerated payment notices**

- Designed to change economics of tax avoidance



## **VAT**

- Disputed tax paid upfront unless reasonable excuse or hardship



## **Diverted profit tax (DPT)**

- HMRC issues preliminary notice
- Company pays tax upfront within 30 days even if disputes assessment or intends to appeal
- DPT under consultation – concern may extend to other parts of corporation tax eg transfer pricing



## **MAP**

- UK does not generally suspend collection of tax in MAP cases unless exceptional circumstances or treaty allows it

# CRIMINAL VS ADMINISTRATIVE OUTCOMES (STASSART CASE)



- ❑ **May the criminal judge convict a taxpayer by considering the existence of a PE while the tax court had irrevocably ruled it out?**
  - Right of a fair trial and legal certainty (article 6 of the ECHR convention)
  - Effective protection against arbitrary prosecutions and convictions since the same facts cannot be qualified differently
  - Non bis in idem (not to be prosecuted twice for the same facts)
  
- ❑ **Strict independence between civil (tax) and criminal court**
  - Criminal judge may disregard the definitive tax decision
  - Not obligation to postpone the decision until the final tax decision
  
- ❑ **Position of the France**
  - recognized that “the divergence of assessment by the Criminal Court of an issue which had be settled through a final decision infringed the principle of legal certainty”
  - No different characterization of fact is possible from the one retained by a Court.
  
- ❑ **Issue at stake regarding the PE qualification**
  - An undisclosed PE (even disputed) always characterizes a hidden activity under French law, leading to automatic legal consequences:
    - An extended 10 year statute of limitation
    - 80% penalty on reassessed taxes
    - An automatic transfer of the tax case by the administration to the public prosecutor for launching criminal procedure for tax fraud
  - The criminal procedure and the tax procedure can happen simultaneously for the same PE qualification dispute.

# CHOOSING MAP VS ARBITRATION (A FRENCH PERSPECTIVE)



Procedure	Pros	Cons
<p style="text-align: center;"><b>MAP</b></p>	<ul style="list-style-type: none"> <li>• Efficient tool. In most cases, the MAP allows eliminating the double taxation either through a unilateral or bilateral agreement.</li> <li>• No disclosure of the MAP (confidentiality).</li> </ul> <p>→ <i>Favored by the French tax authorities</i></p>	<ul style="list-style-type: none"> <li>• No guarantee to reach an agreement between the competent authorities (no performance obligation)</li> <li>• Confidentiality of the exchanges between tax authorities.</li> <li>• Time consuming (26-30 months)</li> <li>• Litigation not prohibited but no Court decision should be rendered at the time of the MAP decision (dilemma)</li> <li>• Out of court procedure similar to a diplomatic channel: no interest paid to the taxpayer.</li> </ul>
<p style="text-align: center;"><b>Arbitration</b></p>	<ul style="list-style-type: none"> <li>• The competent authorities are required to find an agreement (performance obligation)</li> </ul> <p>→ solves any double taxation</p>	<ul style="list-style-type: none"> <li>• Few legal grounds for claiming an arbitrage procedure (few DTT and TP/EU arbitration convention).</li> <li>• Litigation not prohibited but arbitration not available as long as the litigation is pending (dilemma)</li> <li>• Only few cases per year</li> <li>• Considered as a last resort solution by the FTA</li> </ul>

# THE US CRIMINAL LAW PERSPECTIVE



## **i. Some Priority Enforcement Areas**

- Professional enablers
- Allegedly abusive structures and transactions
- International tax schemes and foreign financial account reporting obligations
- Alleged abuse of pandemic-related benefits
- High income non-filers

## **ii. Timing**

- Administrative investigations (18 months – several years)
- Grand jury investigations (1-3+ years)
- Plea Negotiations
- Indictment to trial (several months – 2+ years)

## **iii. Collection of tax**

- Benefits and perils of prepayment
- Restitution orders

## **iv. Collateral consequences**

- Licensing
- Immigration
- Civil tax assessments and fraud penalties

# DISPUTE RESOLUTION ISSUES IN SMALL/LOW TAX JURISDICTIONS



## Overview of MAPs in Malta

- MAP provision generally included in Malta's double taxation agreements
- No fees charged to taxpayers using MAP
- Domestic remedies available in parallel with MAP proceedings (but generally put on hold during MAP)
- Suspension of tax collection pending the MAP case
- Timing variable but tax authorities should aim at solving the case within 24 months from acceptance of the MAP case
- Malta Competent Authority to update the other competent authority on the case (at least every 90 days) and to prepare a position paper (within 180 days)

## MAP Statistics

- As from 2016, 19 MAP cases in total (18 of which on TP)
- As of 2022, only 1 case (started prior to 2016) closed → Double taxation eliminated but not in accordance with the tax treaty
- Main Jurisdictions for MAP cases: Austria (vast majority) and Italy
- Expected increasing in MAP proceedings because of new TP Rules as from 2024