SPI/11 Transfer pricing, mutual agreement procedure and arbitration

1. This statement describes the UK’s practice in relation to methods for reducing or preventing double taxation and supersedes Tax Bulletins 25 and 31 which previously provided guidance in this area.

2. The statement considers the use of mutual agreement procedure (MAP) under the relevant UK Double Taxation Convention and/or the EU Arbitration Convention and also describes the UK’s approach to the use of arbitration where MAP is unsuccessful. It has particular relevance to transfer pricing and multinational enterprises.

INTRODUCTION

OECD Model Convention and UK Tax Treaties

3. Chapter IV of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (The Guidelines) contains details of administrative approaches to avoiding and resolving transfer pricing disputes. One approach to which it refers is that provided for under MAP, which is described and authorised by Article 25 of the OECD Model Convention (the OECD Convention) and is discussed in the Commentary on Article 25 of the OECD Convention. Article 25(1) has broad application and provides for MAP where a taxpayer considers he has been or will be taxed other than in accordance with the Convention, for example in a way contrary to Article 24, the Non-Discrimination Article. Article 25(3) may be used to resolve any difficulties or doubts arising as to the interpretation of the OECD Convention and for the elimination of double taxation in cases not provided for by the Convention. More specifically, to eliminate double taxation in transfer pricing cases, tax administrations may consider requests for corresponding adjustments as described in paragraph 2 Article 9 of the OECD Convention. That paragraph recommends that the competent authorities of treaty partner states consult each other if necessary to determine corresponding adjustments. This demonstrates that the MAP of Article 25 of the OECD Convention may be used to consider corresponding adjustment requests. In 2010 the OECD introduced a new version of Article 7 to the OECD Convention. This Article deals with the attribution of profits to permanent establishments and the new version includes an avenue for entering MAP similar to that in Article 9 of the OECD Convention.

4. The UK has tax treaties with over 100 countries. These treaties seek to protect taxpayers from double taxation, provide for the appropriate allocation of taxing rights in relation to profits from cross-border economic activities, and prevent fiscal discrimination by their signatories. The UK seeks to encourage and maintain an international consensus on international tax treatment of cross-border activity, and plays an important role in this field through its membership of the OECD. Accordingly, where the other signatory is agreeable the UK frequently adopts the terms of the OECD Convention into its own tax treaties and is guided in its interpretation of those tax treaties by the Commentary on the OECD Convention (The Commentary).

5. In this respect MAP performs an important function, establishing a process by which the UK competent authority and the competent authorities of tax treaty partners to our conventions can consult each other to resolve matters relating to the application of our tax treaties. As part of
its work on improving the resolution of cross-border tax disputes the OECD has published a Manual on Effective Mutual Agreement Procedures (MEMAP) which highlights the best practices of the competent authorities of OECD Member countries in relation to MAP.

**European Arbitration Convention**

6. The European Union “Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises” 90/463/EEC (the Arbitration Convention), may provide an alternative to the MAP procedure under the UK’s tax treaties where residents of EU member states are potentially subject to double taxation. The UK and other member states are signatories to the Arbitration Convention which came into force on 1 January 1995. MAP may be invoked under one of the UK’s tax treaties, under the Arbitration Convention or under both simultaneously.

**ADMINISTRATION**

7. Presentation of cases to invoke MAP in relation to transfer pricing adjustments, under both the UK’s tax treaties and the Arbitration Convention, are dealt with by Business International with the exception of cases presented by enterprises in the North Sea sector which are dealt with by Large Business Service Oil & Gas Sector.

8. The MAP provided for in most of the UK’s tax treaties and the Arbitration Convention empower the competent authorities of the two tax treaty partners to consult each other when an enterprise claims that it is being taxed otherwise than in accordance with the convention as a result of the actions of one or both of the relevant fiscal authorities. MAP is a process of consultation, not litigation, between the two competent authorities. The taxpayer is not a formal party to these consultations as such, but may be invited to participate informally at the discretion of the competent authorities. Where it considers such participation likely to be useful the UK will press for, but cannot guarantee it; the position of the competent authorities of the UK’s treaty partners in this respect is outside the UK’s control.

9. In the UK the Commissioners for Her Majesty’s HM Revenue & Customs (HMRC), or their authorised representatives, are the competent authority. For cases under MAP the Commissioners have authorised to represent them:

   for matters relating to transfer pricing generally
   Judith Knott
   for matters relating to transfer pricing in the oil and gas industries
   Susan New

10. An enterprise may initiate MAP by presenting a case that it is subject to taxation, otherwise than in accordance with the tax treaty or the principles of the Arbitration Convention, to the competent authority for the country of which it is a resident or, in some cases, a national. In a transfer pricing case, a case might be presented by the enterprise which has had, or will have, an adjustment made to the price of goods or services transferred to or from a related party in another country. The enterprise may request that the competent authority of the first country reduce or withdraw the adjustment and/or that the competent authority of the second country allow a corresponding adjustment to the income of the related party to prevent economic double taxation. The UK is ready to receive the presentation of a case whether it is the state which has made a transfer pricing adjustment or whether it is the state being asked to make a corresponding adjustment for a transfer pricing adjustment made by its treaty partner. Treaty partners, however, may have their own practice and/or regulations regarding which competent authority should receive presentation of a case and taxpayers need to ensure compliance with those requirements.

11. The Arbitration Convention requires that at the same time an enterprise presents a case to the competent authority of the State of which it is resident or in which it has a permanent
establishment, it must at the same time notify the competent authority of any other States which may be concerned in the case. As a matter of good practice, the UK advises that a presentation of a case should also be copied to the competent authority of the other State in a MAP case even if it is outside the Arbitration Convention.

12. In the UK there is no set form of presentation. Specific treaties, however, may state that certain information must be provided before it is accepted that a case has been presented for the purposes of starting the period after which arbitration may be invoked. Other countries may also have more extensive domestic information requirements. It is therefore advisable to consult the relevant treaty and any public guidance on the matter provided by the UK’s treaty partner if presenting a case to that partner.

13. Otherwise, UK taxpayers may present their cases in writing to the person and the address set out at the conclusion of this Statement. A presentation should specify the year(s) concerned, the nature of the action giving rise, or expected to give rise, to taxation not in accordance with the convention, and the full names and addresses of the parties to which the MAP relates, including the UK enterprise’s tax office and reference number.

SCOPE FOR GRANTING RELIEF

14. The terms of the Article establishing MAP in UK tax treaties and the Arbitration Convention circumscribe the competent authorities’ freedom of action. The Article provides no guarantee of relief from double taxation via MAP, although in the future some UK tax treaties will provide for arbitration. The Arbitration Convention (where it applies - see ‘Arbitration Stage’ below), of course also provides for arbitration. However, the competent authorities are enjoined to consult each other and to endeavour to resolve each case with a view to the avoidance of double taxation. In the UK, MAP has proved very effective in doing this in cases involving transfer pricing adjustments.

15. On considering the case presented to it, the UK competent authority may conclude that the taxation of relevant transactions proposed or applied by a tax treaty partner is in accordance with the tax treaty and may grant relief on a unilateral basis at this point. This might be the case even if the treaty partner is unwilling to enter MAP or is unable to do so because it is unable to derogate from a decision reached in its domestic courts. Similarly, the competent authority of the tax treaty partner might decide to relieve unilaterally transfer pricing adjustments made by HMRC.

16. In respect of adjustments made by the UK’s tax treaty partners there are issues on which they and the UK hold different views. Some partners do not consider that the level of capitalisation of a corporate borrower, as opposed to the rate of interest paid on its debt, is an issue involving the arm’s length principle prescribed by the OECD and Arbitration Conventions. Because it does not view thin capitalisation as a transfer pricing issue, the tax treaty partner may be reluctant, or refuse, to enter MAP in respect of such adjustments. Conversely the UK takes the view that thin capitalisation is an issue requiring application of the arm’s length principle in order to achieve a correct transfer pricing result. To the extent therefore that the cost of funding in question exceeds what the UK considers to be an arm’s length amount the UK is prepared to enter MAP in respect of adjustments made by the tax treaty partner and will consider whether it is appropriate to give relief unilaterally for any disallowance of interest in excess of an arm’s length amount. One purpose of tax treaties is the elimination of fiscal evasion and in its considerations the UK will take into account all circumstances surrounding the decision of the treaty partner to make an adjustment, including issues such as the commercial purpose, or otherwise, of the funding provided.

17. If the UK considers that the adjustment does not accord with the provisions of the tax treaty, for example because it does not accept that a transfer pricing adjustment complies with the arm’s length principle, the UK competent authority will take up the matter with its counterpart in
the treaty partner state. If negotiations between the competent authorities provide adequate
evidence to satisfy the UK competent authority that an adjustment made by a tax treaty partner is
in accordance with the tax treaty, and was required in order to comply with the arm’s length
principle, there will normally be no difficulty in granting a corresponding adjustment. In many
cases, the competent authorities can establish that the primary adjustment was in an excessive
amount and agree a course whereby the primary adjustment is reduced and the remaining
adjustment is relieved in an amount that reflects an arm’s length result. If, however, the UK
remains dissatisfied, there is no obligation on it to grant relief and at the taxpayer’s request the
matter may progress to arbitration if the Arbitration Convention is applicable or if the relevant
treaty contains an arbitration article.

18. Experience has shown that it is advantageous for taxpayers involved in transfer pricing
enquiries to present a case early to invoke MAP because early action by the competent authority
can sometimes help to ensure that unrelievable double taxation does not arise from the actions of
one fiscal authority. This might be the case, for example, where the UK’s treaty partner is
adopting an inappropriate transfer pricing methodology during the course of an audit and the UK
is able to persuade it to use the most appropriate methodology. As noted above, the taxpayer is
not directly involved in the negotiations between the competent authorities but, as happens in the
UK, it may participate indirectly through discussions with the competent authority of the state of
residence/nationality. As is also stated above, the approach of the tax treaty partner in these
matters is not at the discretion of the UK.

19. It is important to note that even though the competent authorities may begin discussions
before a transfer pricing enquiry is completed, MAP is not an alternative to the normal enquiry
process. MAP will seek to determine in principle how the double taxation of profits will be
relieved by the tax treaty partners once the quantum of profits has been established by the transfer
pricing enquiry. The competent authorities will not, however, conduct a transfer pricing enquiry
as part of the MAP and MAP will not suspend or replace an enquiry. Equally, presenting a case
for MAP should not of itself give rise to the opening of a transfer pricing enquiry, and it will not
remove any of the UK’s protections surrounding the opening of such enquiries. It may, however,
be necessary for the UK to seek information from the taxpayer in order to determine whether a
transfer pricing adjustment made by a tax treaty partner conforms to the arm’s length principle.
Normally such information will exist as a result of the transfer pricing enquiry and/or be reflected
in the case presented for MAP, but clarification of fact and/or economic analysis may be required
as MAP negotiations develop.

20. Where a case has been settled under the UK’s judicial process before it is presented for
MAP, the UK competent authority would expect, on request, to take the matter up under MAP.
The UK considers that both a court and a tribunal form part of the judicial process.

21. MAP does not, however, provide a parallel avenue to the domestic appeals process,
though early entry into MAP may be useful in helping a taxpayer determine whether the appeals
process needs to operate. The UK follows the approach adopted by most countries and described
in the Commentary on Article 25 at Paragraph 76. Under this approach a person cannot pursue
simultaneously the MAP and domestic legal remedies. Thus a case may be presented and
accepted for MAP while the domestic remedies are still available. In such cases, the UK
competent authority will generally require that the taxpayer agrees to the suspension of these
remedies or, if the taxpayer does not agree, will delay the MAP until these remedies are
exhausted. Where the adjustment giving rise to MAP has been made in the other state the UK
competent authority does recognise that whilst a taxpayer may be willing to suspend domestic
legal remedies, the other fiscal authority may be unwilling to do so. Similarly, the UK
competent authority may recognise that pursuit of domestic legal remedies in another state may
take a considerable amount of time. In such cases the UK competent authority may be willing to
continue the MAP while the domestic legal process continues, but of course cannot guarantee that
the other competent authority will be willing to do so.
Where the MAP is first pursued and a mutual agreement has been reached, the taxpayer and other persons directly affected are offered the possibility to reject the agreement and pursue the domestic remedies that had been suspended. In such a case, the UK would consider that the efforts of the competent authorities to resolve the case by MAP to have been exhausted.

**TIME LIMITS**

In order to invoke MAP under a UK tax treaty it is necessary for a person to present a case showing why taxation has arisen that is not in accordance with the terms of the treaty (S124(1) TIOPA 2010, formerly S815AA(1) ICTA 1988). To invoke MAP under the Arbitration Convention it is similarly necessary to present a case showing that the arm’s length transfer pricing principles set out in Article 4 of that Convention have not been observed.

Where MAP is invoked under one of the UK’s tax treaties, such a case must be presented before the expiration of:

- the period of six years following the end of the chargeable period to which the case relates; or
- such longer period as may be specified in the tax treaty for claims after 27 July 2000.


The time limit for invoking MAP will therefore depend upon the specific terms of the particular UK tax treaty under which MAP is invoked. In older UK tax treaties the time limit for presenting a case invoking MAP is not addressed, so that the domestic limit of six years following the end of the chargeable period to which the case relates applies. More recent treaties do address the issue. In every case, the relevant tax treaty should be consulted, but generally UK tax treaties follow Article 25 of the OECD Convention. This provides that an enterprise must present its case “within three years of the first notification of the action which results or is likely to result in double taxation” (first notification). Because the first notification may occur after the expiry of six years following the chargeable period to which the claim relates, the relevant tax treaty article may thus extend the basic six year time limit.

Where MAP is invoked under the Arbitration Convention, the time limit for presenting a case is determined by Article 6(1) of the Arbitration Convention. This uses wording similar to Article 25 of the OECD Convention and therefore also provides that a case must be presented within three years of the first notification of the action which results or is likely to result in double taxation.

It should be noted that in the presentation of a case under UK tax treaties and the Arbitration Convention the time limit is interpreted to the advantage of the taxpayer. That is, the time limit of three years only commences once first notification has been given. It is not necessary to await the first notification before presenting a case to invoke MAP.

This is made clear in the Commentary on the OECD Convention which the UK follows when interpreting its own tax treaties. In discussing Article 25, the Commentary states:

- at Paragraph 14 “It should be noted that the mutual agreement procedure … can be set in motion by a taxpayer without waiting until the taxation considered by him to be “not in accordance with the Convention” has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the “actions of one or both of the Contracting States” will result in such taxation.”
- at Paragraph 21 “The provision fixing the starting point of the three year time limit as the date of the “first notification of the action resulting in taxation not in
accordance with the provision of the Convention” should be interpreted in the way most favourable to the taxpayer … Since a taxpayer has the right to present a case as soon as the taxpayer considers that taxation will result in taxation not in accordance with the provisions of the Convention, whilst the three-year limit only begins when that result has materialised, there will be cases where the taxpayer will have the right to initiate the mutual agreement procedure before the three year time limit begins …”

- at Paragraph 23 “There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of “notification” would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention.”

FIRST NOTIFICATION

29. Clearly the UK cannot leave itself exposed indefinitely to requests to enter MAP. For the purposes of both a UK tax treaty or the Arbitration Convention, HMRC will therefore regard the first notification as being the finalisation of a transfer pricing enquiry which gives rise to double taxation. This stage will be marked by the determination of the quantum of the additional profits arising from a transfer pricing adjustment such as the issue of a closure notice, or the amendment of a return during an enquiry (Paragraphs 30/31 Schedule 18 FA1998). HMRC considers that at this point, the taxpayer must be aware of the possibility that double taxation may arise and should therefore present a case to protect its position.

30. Because HMRC will admit a case to MAP prior to first notification, it may be that at the time the case is presented it is not certain that a transfer pricing adjustment will be made or that double taxation will arise. In particular, it may not be possible to gauge the quantum of profits that might be subject to double taxation. In such cases, HMRC may well defer MAP negotiations with the competent authority of the treaty partner until it becomes clear that such negotiations are likely to prove meaningful and effective in avoiding double taxation. Nevertheless, in cases of doubt, HMRC will contact the other state or states involved to explain why it does not consider it appropriate to commence MAP negotiations at that point and to seek the agreement of the other state as to the point at which negotiations should commence.

31. However, it should be noted that even if the UK is prepared to commence MAP negotiations, its treaty partner may not be and the UK has no power to compel it to enter negotiations.

OECD GUIDANCE

32. In determining whether taxation of relevant transactions will satisfy the arm’s length principle and thus result in taxation in accordance with the provisions of a tax treaty, the UK will be guided by the OECD Transfer Pricing Guidelines, the OECD Report on the Attribution of Profits to Permanent Establishments and the Commentary on the OECD Convention. These documents represent the consensus view of OECD Member Countries on the application of the arm’s length principle and are also expected to be influential outside OECD Member Countries.

ARBITRATION STAGE

33. The Arbitration Convention obviously provides for arbitration in certain circumstances, but the OECD Convention and Commentary thereon also contemplates the inclusion of arbitration provisions within tax treaties. The UK is now beginning to incorporate provision for arbitration in some of its tax treaties.

34. It will be necessary in every case to have regard to the relevant tax treaty, but generally for treaties with an arbitration provision, where a person has presented a case and the competent
authorities are unable to reach an agreement to resolve that case within two years from the presentation, the person can request that any unresolved issues be submitted to arbitration.

35. The relevant provision in the OECD Convention precludes the availability of arbitration where a decision on these issues has already been rendered by a court or administrative tribunal of either treaty partner state. However, where possible the UK will seek when agreeing treaties to have terms more favourable to the taxpayer included in the treaty.

36. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, it shall be binding and shall be implemented notwithstanding any time limit in the domestic law of either treaty partner state.

37. The competent authorities will decide the mode of application of the arbitration provision. This will include matters such as the form of the request for arbitration, the information that must have been provided to both competent authorities when the case for MAP was presented, terms of reference and the selection of arbitrators.

38. For MAP cases within the Arbitration Convention, Article 7(1) provides that if the competent authorities fail to reach an agreement that eliminates double taxation within two years from the date on which the case was first submitted they shall set up an advisory commission to deliver its opinion on the matter. Article 7(4) provides that the competent authorities may, with the agreement of the associated enterprises concerned, waive the two year time limit. Where the UK competent authority considers that continuation of the MAP is likely to result in earlier resolution of a case than referral to an advisory commission, it will assume the tacit agreement of the other competent authorities and the associated enterprises to waiving of the time limit. MAP will therefore proceed accordingly.

39. The associated enterprises, of course, retain the right to invoke the two year time limit when it expires. If the enterprises, or the other competent authority, notify the UK competent authority of their wish to invoke the time limit, the UK will cooperate fully in establishing an advisory commission. Similarly, when the UK competent authority does not consider that MAP will result in earlier resolution of the case, it will ask the other competent authority to cooperate in setting up an advisory commission.

40. The two-year time limit before a case proceeds to the second stage may also be extended where the case is still under appeal through domestic procedures in one of the treaty partner states.

41. The submission of a case to the advisory commission does not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters (Article 7(2)).

42. Article 7(3) provides that, where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, the second stage will not commence until the time provided for appeal has expired without an appeal having been made, or the taxpayer has withdrawn the appeal or settled it by agreement. This might effectively present the taxpayer with a choice between pursuit under the domestic appeals process or arbitration. Although the UK has previously decided to apply Article 7(3) it no longer sees the need to do so. For the purposes of the Arbitration Convention the UK will be prepared to consider reference of a case to an advisory commission notwithstanding a prior decision within the UK judicial process.

43. The UK will adopt a similar approach where arbitration is provided for under its treaties unless the relevant treaty prevents it.

44. The advisory commission, constituted in accordance with Article 9 of the Arbitration Convention and before which the taxpayer may appear (Article 10(2)), must deliver within six
months a decision which will eliminate the double taxation (Article 11). The competent authorities must then act within six months in accordance with the decision, unless they agree to eliminate the double taxation by some other means (Article 12).

45. Article 8 of the Arbitration Convention provides that the competent authority of a Contracting State is not obliged to initiate either of the two stages, MAP or advisory commission, where one of the enterprises involved is liable to a serious penalty. The UK has declared that it will interpret the term ‘serious penalty’ as comprising criminal sanctions and administrative sanctions in respect of the fraudulent or negligent delivery of incorrect accounts, claims or returns for tax purposes.

46. The UK’s domestic provisions on penalties for inaccuracies were revised in Finance Act 2007, replacing the terms ‘fraudulent’ or ‘negligent’ with ‘deliberate’ or ‘careless’. In the light of its experience since 1990 the UK will, in practice, only exercise its discretion under Article 8 in cases involving the imposition of penalties for deliberate inaccuracy. In considering whether to proceed under the Arbitration Convention the UK will take into account the facts and circumstances which have led to the taxpayer becoming liable to such a sanction. There is no provision equivalent to Article 8 of the Arbitration Convention affecting MAP or arbitration in the OECD Model on which the UK seeks to base its tax treaties.

47. The UK and other EU Member States subscribe to the “Code of Conduct for the effective administration of the Arbitration Convention” (90/436/EEC and revised by 2009/C 322/01). The Code provides that the two years period from the presentation of the taxpayer’s case to the time at which arbitration can be invoked is started when the competent authorities receive certain information from the taxpayer. This includes identification of the enterprise concerned, details of the relevant facts and circumstances of the case, identification of the relevant tax periods, copies of any assessments, tax audit reports or similar giving rise to double taxation, details of any appeals and litigation initiated by the enterprise or other parties to the relevant transactions, an explanation of why the principles of the Convention are considered not to have been observed. The enterprise must also undertake to respond completely and quickly to requests by the competent authority for further information.

48. Although the Arbitration Convention is regularly invoked, it has generally been possible for States to arrive at agreement under MAP without proceeding to the secondary stage of the advisory commission. Enquiries about the provisions, or about presenting a case, should be addressed to the people named at the end of this statement.

METHODS OF GIVING RELIEF

49. Where a solution or mutual agreement is reached under the terms of a UK tax treaty, it will be given effect notwithstanding anything in any enactment in accordance with S124(2) TIOPA 2010, formerly S815AA(2) ICTA 1988. Where normal time limits may have expired before a solution or mutual agreement is reached, a claim for relief consequential to that solution or mutual agreement, for example to losses, group relief, capital allowances etc., must be made within twelve months following the notification of the solution or mutual agreement (S124(4) TIOPA 2010, formerly S815AA(3) ICTA 1988).

50. Where a claim for relief is made in pursuance of an agreement or opinion reached under the Arbitration Convention, normal time limits for claiming relief under the Taxes Acts do not apply so there is no time limit for claiming the appropriate relief (S127(5) TIOPA 2010, formerly S815B(3) ICTA 1988).

51. The manner in which relief is granted by the UK depends on the facts and circumstances of the particular case. Relief may be granted either by deduction against UK profits or by tax credit. Following agreement between the competent authorities, the UK taxpayer will usually be invited to submit revised computations reflecting the agreed relief.
52. The UK does not accept that it is permissible for a taxpayer to make, unilaterally, an adjustment through its accounts and return to obtain corresponding relief for an adjustment which reduces its UK tax liability either when self-assessing or in response to an adjustment imposed by another jurisdiction. The only avenue to relief is presentation of a case invoking MAP.

SECONDARY ADJUSTMENTS

53. Secondary adjustments are discussed in Chapter IV of the Guidelines. Complexities sometimes arise where an overseas jurisdiction makes a secondary adjustment following a transfer pricing settlement. Secondary adjustments may be defined as adjustments that are intended to restore the financial situation of the associated enterprises which have entered into the transactions giving rise to the transfer pricing adjustment to that which would have existed had the transactions been conducted on arm’s length terms. Such secondary adjustments recognise that while the primary transfer pricing adjustment is to the taxable profits of the associated enterprises, it does not rectify the situation where one enterprise actually retains funds that it would not have held had the transactions in question been conducted on arm’s length terms. A secondary adjustment seeks to rectify this, most commonly by assuming that a constructive dividend, constructive equity contribution or constructive interest-bearing loan has been made in an amount equal to the transfer pricing adjustment. For example, a jurisdiction making a primary adjustment to the income of a subsidiary of a foreign parent may treat the excess profits in the hands of the foreign parent as having been transferred as a dividend, in which case it may consider that withholding tax should be levied.

54. A secondary adjustment, however, may itself give rise to double taxation unless a corresponding credit or some other form of relief is provided by the other country for the additional tax liability resulting from the secondary adjustment. The UK will consider the merits of claims to deduct interest relating to the deeming of a constructive loan by a treaty partner following a transfer pricing adjustment. The issue would, however, be subject to the arm’s length principle and would be considered in the light of any relevant provisions relating to payments of interests. Where a treaty partner applies a secondary adjustment by deeming a distribution to have been made, the UK neither taxes the deemed distribution nor grants relief for tax suffered on the distribution in the other jurisdiction.

ADVANCE PRICING AGREEMENTS

55. An Advance Pricing Agreement (APA) is a written agreement that determines, for a fixed period, a method for resolving transfer pricing issues in advance of a return being made. Guidance on APAs may be found at SP2/10 – ‘Advance Pricing Agreements’ issued on 17 December 2010.

FURTHER INFORMATION

Requests for further information should be addressed to:

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