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2017 APPEA Taxation and Commercial Conference

Tax treatment of offshore hubs – some
practical and commercial considerations

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➤ Offshore hubs – hot issues

Primary focus: offshore marketing and trading hubs

But also:

- core procurement hubs
- non-core procurement hubs
- shipping hubs

ATO perspective 1: that the hypothetical independent Australian producer would never have outsourced the hub function to a third party

ATO perspective 2: that the hypothetical independent Australian producer would use its relative bargaining power to extract and retain a large slice of the value contribution of a third party hub entity

➤ PCG 2017/1: getting into the green zone

Low risk benchmark for offshore marketing hubs:

- cost plus: hub profits to be no more than 100% mark-up on hub costs (excluding revenue and costs associated with freight function)
- commercial realism test: [work in progress: would an independent party ever outsource this function to a third party?]

➤ PCG 2017/1: practical issues in the green zone

There is a mismatch between the cost plus model, and the commercial terms in the contract with the hub entity.

- How does the MNE craft a performance-based contract based on a cost plus rem model?
- How does the MNE constrain costs yet adequately reward the hub entity?
- How does the MNE deal with pre-existing performance-based terms?

➤ PCG 2017/1: destined for double taxation?

PCG 2017/1 is superimposing a cost plus rule over the top of the arm's length principle.

“commercial or financial relations which might be expected to operate between independent enterprises dealing wholly independently with one another”

Offshore Revenue Authorities will expect profit allocation outcomes consistent with the arm's length principle.

➤ DTA: relieving double tax via MAP

Some practical considerations

- worthy of consideration: Position Paper or assessment
- best efforts and no more
- ATO benchmark is 2 years, but data says longer
- MAP may be discontinued when Austco files appeal proceedings (case by case basis)

➤ DTA: relieving double tax via MAP

Divergent positions:

- Australian CA: under the DTA, the profits are reallocated to and taxed in Australia, and the onus is on Singapore to relieve the double tax by way of adjustment or credit
- Australian taxpayer: the double tax arises from the ATO's transfer pricing adjustment, and should be relieved by unilateral action of the ATO

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