

Tax Dispute Resolution in South Africa

Dr Craig West

Associate Professor: University of Cape Town

Managing Editor: IBFD



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD

Tax Treaty Dispute Resolution

- Mutual Agreement Procedure mainly
- Three treaties (of 75 comprehensive treaties) include voluntary arbitration in MAP article of DTC (Canada, Netherlands and Switzerland)
- Not SA policy to include provision on arbitration

AUS – SA DTC

5. For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of that Agreement may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this Article 24 or, if the Contracting States fail to resolve that doubt, pursuant to any other procedure acceptable to both Contracting States.

Mexico – SA Protocol 2009

- Notwithstanding any other treaties to which the Contracting States are or may become parties, any dispute over a measure taken by a Contracting State involving a tax covered by Article 2 or, in the case of non-discrimination, any taxation measure taken by a Contracting State, including a dispute whether the Agreement applies, shall be settled only under the Agreement, unless the competent authorities of the Contracting States agree otherwise.

SA-US DTC

3. Notwithstanding the provisions of subparagraph 2(b):

(a) the provisions of Article 25 (Mutual agreement procedure) of this Convention exclusively shall apply to any dispute concerning whether a measure is within the scope of this Convention, and the procedures under this Convention exclusively shall apply to that dispute; and

(b) unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the non-discrimination obligations of this Convention exclusively shall apply with respect to that measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.

(c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any other form or measure.

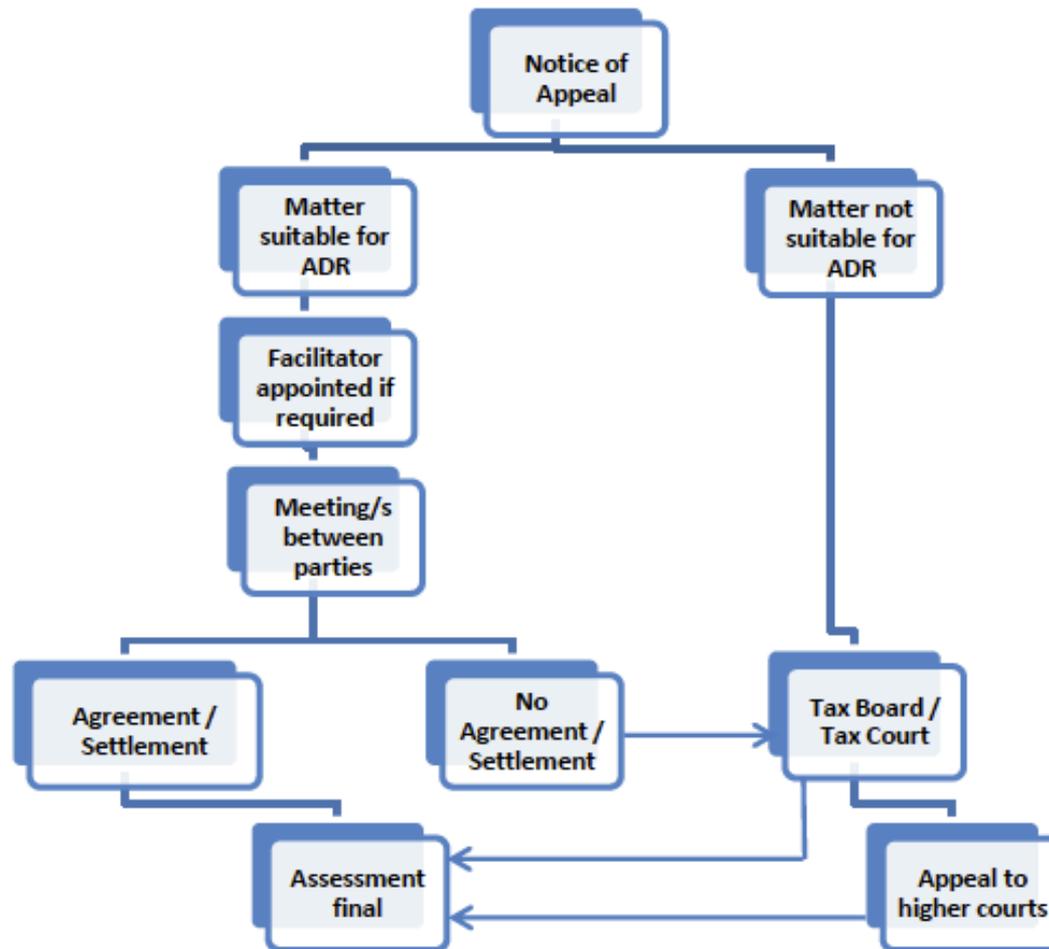
Dispute Resolution and MLI

- South Africa will opt out of the Article on Mandatory Binding Arbitration within the context of the MLI.
- South Africa has entered a reservation on Article 16(1) and will apply the alternative for the minimum standard to implement a bilateral notification or consultation process.
- No reservation for Article 16(2) and Article 16(3) but a notification of existing provisions in listed Agreements was included.

Mediation in domestic disputes

- Disputes on interpretation of the law tend to move through “objection and appeal, alternative dispute resolution, appeal to the tax board and/or the tax court, and further appeals to the Higher Courts”
- Disputes on the administration of the law tend to process through the internal complaints process and, if unsuccessful, to the Tax Ombud
 - Tax Ombud will attempt to resolve dispute through mediation, but Tax Ombud recommendations are not binding

Alternative Dispute Resolution



ADR cont.

- Facilitator only appointed if parties agree, otherwise ADR may take place between parties without facilitator
- Facilitator (if external to SARS) is bound by secrecy provisions for purpose of the facilitation
- Facilitator:
 - may be a SARS official
 - must be a person of good standing of a tax, legal, arbitration, mediation or accounting profession who has appropriate experience in such fields

When ADR considered unsuitable by SARS

- Examples of when SARS may decide an appeal is not suitable for ADR and subsequent settlement include:
 - It is not in the interest of the good management of the tax system
 - There are too many disputed facts involved and it is unlikely that agreement on the facts will be achieved
 - The action by the taxpayer that relates to the ‘dispute’ constitutes intentional tax evasion or fraud
 - Any settlement pursuant to ADR would be contrary to the law or a practice generally prevailing and no exceptional circumstances exist to justify a departure from the law or practice
 - The taxpayer has not complied with the provisions of a tax Act and the non-compliance is of a serious nature
 - It is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose
 - The pursuit of the matter through the courts will significantly promote taxpayer compliance with a tax Act the case is suitable for this purpose.