

Chapter 5

The role of the taxpayer

5.1. Introduction

90. The joint engagement of the participating tax administrations with the taxpayer is a key element of a Joint Audit compared to the conduct of a purely domestic audit. The experience from tax administrations shows that a close and early involvement of the taxpayer provides for the best outcome of a Joint Audit. The precise involvement of the taxpayer will of course depend on the circumstances and there will be differences between a Joint Audit in a co-operative and in a non-co-operative context, but even in the latter case open engagement by tax administrations can sometimes result in a change of taxpayers' behaviour.

91. This Chapter describes the role of a taxpayer in a Joint Audit procedure and outlines best practice for the case selection phase and the operational phase in which the audit is prepared, conducted and completed.¹ For each phase, the participating tax administration has to decide when and how to include the concerned taxpayer(s).

Taxpayer example – Swedish MNE

During the business consultation the representative of a Swedish MNE described the experience with a Joint Audit.

The German tax administration suggested inviting the Swedish tax administration to an envisaged audit of a MNE as circumstances of the case indicated that the audit would have a focus on transfer pricing issues. The MNE proposed to the Swedish tax administration to join the German audit and Sweden accepted. Both tax administrations therefore engaged in the audit from the very beginning and started on an equal footing.

The MNE reported that after the Joint Audit approach was agreed, they had a meeting together with both tax administrations discussing the relevant tax issues and the envisaged timeframe of the audit. During the conduct of the audit, the MNE was regularly consulted by the tax administrations and was asked for its opinion on difficult topics on which the tax administrations found it challenging to agree. The early and comprehensive engagement helped the MNE to gain an understanding of the perspectives of both tax administrations and to provide explanations with those in mind. Before the Joint Audit was completed, all participants met to discuss the final outcome and after the completion the MNE was provided with a copy of the report summarising the discussed outcome of the Joint Audit.

The MNE stressed that the joint approach had substantially changed the audit dynamic compared to the scenario of two separate domestic transfer pricing audits arriving much faster at a result acceptable to both tax administrations while avoiding double taxation for the taxpayer.

5.2. Case selection phase

92. The involvement of the taxpayer in the case selection process may come about in different ways. It could be that the taxpayer itself has suggested the Joint Audit or, more common, it could be that the tax administrations are considering selecting the taxpayer. In the latter case the taxpayer's involvement may depend on the legal requirements or the domestic practice as well as on the specific facts and circumstances of the case and the objectives of the Joint Audit.

93. Apart from a high-level description on how tax administrations can engage in the case selection process², international legal frameworks say little about the relationship between tax administration and taxpayers in Joint Audit procedures, which is left to domestic laws and procedure. In some jurisdictions, domestic law may require a tax administration to notify the taxpayer early in the selection process. For instance, in one jurisdiction, if the tax administration wants to propose a case to another tax administration and the information to be exchanged during the selection process exceeds publically available information, then a hearing or notification procedure³ is triggered before the tax administration can exchange the relevant information.

94. However, even if a jurisdiction is not subject to a legal requirement to notify the taxpayer before or during the case selection process, the question arises when and how to inform the taxpayer about the process. Tax administrations will adapt their approach depending on whether the Joint Audit was suggested by the taxpayer, is otherwise conducted with a co-operative taxpayer or whether the Joint Audit has the hallmarks of a non-co-operative Joint Audit.

5.2.1. Co-operative and non-co-operative taxpayers

95. The early involvement of the taxpayer has a number of benefits for all parties concerned and should be the guiding principle for participating tax administrations, unless there are reasons to the contrary (e.g. the Joint Audit has the hallmarks of a non-co-operative Joint Audit and there are reasons to believe that the taxpayer may take actions that could compromise the outcome of the audit).

96. Whether to inform the concerned taxpayer about a Joint Audit selection meeting will therefore mainly depend on the facts and circumstances of the specific case and should in any case be the result of a joint consultation of the participating tax administrations, that might have different concerns about an early involvement of the taxpayer(s).

Practice example

A participant reported that its practice was to arrange a brief consultation with the concerned taxpayer before reaching a selection agreement with another tax administration in cases where there were no concerns that the taxpayer will stall the process. This allowed the tax administration to verify their selection process and reduce any litigation risk as the taxpayer might either clarify certain aspects so that the conduct of an audit does not seem appropriate anymore or it helps to focus the attention of the tax administration to certain risk areas. This may be especially helpful in cases where taxpayers may assert trade, business, industrial, commercial or professional secrets may be affected by the joint process. They also found that the concerned taxpayer(s) might have valuable insights to share with the tax administration. The early notification also allowed all parties to embark on an equal footing and therefore strengthen the collaboration during the process.

5.2.2. Request of the taxpayer

97. The experience of several tax administrations shows an increase in the number of instances where a taxpayer requests to be selected for a Joint Audit.

98. While taxpayers are free to suggest a Joint Audit to the tax administration(s) concerned, they have no right to request a Joint Audit under the laws of any of the participating tax administrations of the Project. It is the responsibility of the tax administration to ensure compliance with the tax laws, select cases to be audited based on risk assessment or other domestic selection criteria and to apply resources accordingly. This applies to all audit activities, including Joint Audits. For Joint Audits, there is also no international legal framework that contains an obligation for any contracting jurisdiction to take part in a Joint Audit. This means that even in cases where a tax administration follows the request of a taxpayer it has no means to obligate the other tax administration to participate.⁴

99. However, as taxpayers will be the first ones to notice that tax assessments of different tax administrations may lead to double-taxation or that an audit in one jurisdiction could affect the correct taxation in another jurisdiction, tax administrations may encourage taxpayers to come forward and suggest Joint Audits as a way to address these issues at an early point in time. Encouraging and acting upon such early intelligence may help to reduce instances of double taxation, reduce the MAP pipeline and reduce overall tax administration resources dedicated to the case.

100. If a tax administration comes to the conclusion not to proceed with the suggestion of the taxpayer, it should provide the taxpayer with the relevant reasoning. This allows the tax administration to verify its decision and increases the taxpayer's acceptance of the decision, especially if the envisaged double taxation materialises later on.⁵

Country example

Two tax administrations reported holding annual meetings with taxpayers that have significant cross-border transactions, in which taxpayers provide a summary of tax risks in order to discuss potential issues including a possible identification of transactions that could be examined more closely in a Joint Audit. This approach as part of a bilateral co-operative compliance approach provides the tax administrations with transparency on all cross border tax issues and allows achieving early tax certainty on their tax treatment.

5.3. Operational phase – preparation, conduct and completion

101. Once the participating tax administrations have agreed on a case to be subject of a Joint Audit, the preparation and the operational phase of the audit begins.

102. Again, there are legal aspects and process management aspects relating to the taxpayer's involvement during this phase. With respect to the legal aspects, there may be notification requirements linked to exchange of information⁶ and domestic laws may differ on whether they permit an "active presence" of foreign tax officials, whether such presence depends on a consent of the taxpayer and/or other conditions and whether foreign tax officials can be present at the premises of the taxpayer under audit.⁷

103. On the management and process side, tax administration will have to agree on the best approach to take, noting that early consultation with the taxpayer in the preparation

phase of the audit will improve efficiency. It allows the taxpayer to prepare for the envisaged procedure by gathering the relevant information and ensuring that relevant personnel is present when the audit is conducted. The Joint Audit procedure can be further supported throughout the process by scheduling joint fact finding meetings with the taxpayer.

104. The approach in any particular case will depend on the facts and circumstances of the case. Where a case has the hallmarks of a co-operative Joint Audit, participating tax administrations should engage with the concerned taxpayer as closely and as fully as possible. This also includes to manage the expectations if the taxpayer(s) regarding input and roles in the process. Drawing from jurisdictions' experience this includes:

- consulting on the best dates for calls, visits or other face-to face meetings
- engaging with the taxpayer at an early stage on an outline of the audit topics, the necessary documentation, an envisaged timeframe and agreeing on timelines when taxpayers should provide information and answers to all participating tax administrations; if tax administrations have concluded a Joint Audit exam plan this might be shared with the taxpayer
- giving taxpayers the possibility during the conduct of the audit activities to engage with representatives of both tax administrations and be updated on the progress of the audit, remaining areas of concern and to the extent possible interim results
- sharing results with the taxpayer before tax administrations agree on an outcome during the audit, to give the opportunity to correct possible misunderstandings and provide any missing documentation or other evidence.

105. If the case has the hallmarks of a Joint Audit on a non-co-operative taxpayer, the approach of the tax administrations can vary and the level of an engagement of the taxpayer can be limited to what is strictly necessary to conduct the audit. In such cases, a lack of consent by the taxpayer may also have implications for “active presence” and more generally the presence of foreign tax officials at the premises of the taxpayer. The individual approach falls within in the discretion of the participating tax administrations. In general, the involvement allows the taxpayer to understand the approach to the audit and to further engage in the process by providing additional information or clarify areas of uncertainty. A good engagement during the audit will also prepare the taxpayer for the (possible) subsequent adjustment of the tax assessment and therewith increase the acceptance of the outcome.

106. Participants of the survey also reported that the attitude of a taxpayer often changes during the conduct of the audit. This is when taxpayers realise that not consenting to a Joint Audit does not prevent the procedure as such and that tax administrations will in any case draw their conclusion from the gathered facts and exchanged information, whether the taxpayer participates in the procedure or not. Therefore, several taxpayers changed their posture towards the Joint Audit during the conduct of the audit.

107. After the Joint Audit is completed, the agreement that tax administrations achieve on the outcome of a Joint Audit will be the basis for any adjustment of the respective domestic tax assessment. The outcome is therefore of particular importance for the taxpayer and thus tax administrations should ensure that taxpayers are informed about a possible outcome before it becomes final to allow a final consultation on the relevant topics. This allows the taxpayer to understand the reasoning of the tax administration and to provide a final observation, if the taxpayer is of the opinion that the outcome as presented by the tax administrations is not correctly reflecting the taxable status. Furthermore, it enhances the acceptance of a subsequent tax adjustment.

108. The completion of the Joint Audit does not require the consent of the taxpayer and the findings and the outcome of a Joint Audit cannot be contested as such. When the taxpayer disagrees with the Joint Audit outcome reached by the participating tax administrations, the taxpayer can appeal the adjustment of the domestic tax assessment following the conduct of a Joint Audit.

109. To the extent that the tax administrations do not reach a common view on the outcome, a final report might be limited to a summary of the agreed facts and outcomes. A clear description of the facts and circumstances is important to accelerate potential subsequent procedures (e.g. a MAP) and the taxpayer should also be informed about such a disagreement so that the taxpayer can prepare for further procedural steps.

110. When the Joint Audit is completed, tax administrations should also share the outcome of the Joint Audit and the reasons that have led to the outcome with the taxpayer.

5.4. Recommendations

1. Tax administrations should engage with the taxpayer early during the case selection phase unless the facts and circumstances of the case suggest otherwise.
2. The decision when to inform the concerned taxpayer should be the result of a joint consultation of the participating tax administrations that might have different concerns about an early involvement of the taxpayer(s).
3. While taxpayers have no enforceable right to request a Joint Audit, tax administrations may encourage taxpayers to come forward and suggest cases for Joint Audits.
4. If a tax administration rejects the suggestion of a taxpayer to be selected for a Joint Audit, the tax administration should provide the taxpayer with the relevant reasoning of its decision.
5. Taxpayers should co-operate with the participating tax administrations as close as possible and provide requested information in a timely and complete manner.
6. Tax administrations should consult on the best dates for calls, visits or other face-to-face meetings.
7. Tax administrations should engage with the taxpayer at an early stage and provide an outline of the audit topics, the required documentation and an envisaged timeframe, unless the facts and circumstances suggest otherwise. If tax administrations have concluded a Joint Audit exam plan this might be shared in a Joint Audit with a co-operative taxpayer.
8. Tax administrations should give taxpayers the possibility during the conduct of the audit activities to engage with representatives of both tax administrations and, if there is a co-operative situation, be updated on the progress of the audit, remaining areas of concern and to the extent possible interim results.
9. Tax administrations should share results with the taxpayer before tax administrations finalise audit, to give the opportunity to correct possible misunderstandings and provide any missing documentation or other evidence.
10. Tax administrations should hear taxpayers before finalising the audit report and provide taxpayers with the final reasoning.

Notes

1. See Chapter 7 for a detailed description of the different audit phases and a more detailed guidance on the selection process.
2. See Commentary to Article 8 para 76 seq. of the Mutual Assistance Convention.
3. Under the Global Forum standards jurisdictions should be able to waive the requirement to notify the taxpayer before exchanging information if such a requirement affects the effectiveness of the exchange of information as rights and safeguards should not unduly prevent or delay effective exchange of information. For a positive assessment the Global Forum expects that exceptions from prior notification should be permitted, notably, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting tax administration, as well as time-specific post exchange notification, for example when such notification is likely to undermine the chance of success of the investigation conducted by the requesting tax administration.
4. This is different in a subsequent mutual agreement procedure under Article 25 Model Taxation Convention, which obligates contracting states to undertake in good faith to resolve by mutual agreement cases of taxation not in accordance with the Convention.
5. This may also have relevance in cases where taxpayers are subject to fines and penalties that are not discharged even after a positive outcome in MAP.
6. See above para 1.2.
7. Particularities of this kind should be addressed at the beginning of the collaboration. A template of a “Joint Audit profile” that provides an overview about the particularities per jurisdiction is included in a Joint Audit Implementation Package, available at www.oecd.org/tax/forum-on-tax-administration/publications-and-products/. Some jurisdictions limit active presence to cases where taxpayers consent while others forbid active presence as such.



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