



Dispute resolution mechanisms

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The Organization for Economic Cooperation and Development (OECD) on October 5, 2015, released a final report on Action 14, “Making Dispute Resolution Mechanisms More Effective.” The goal of Action 14 is to develop solutions to address obstacles that prevent countries from resolving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties, and the fact that access to MAP and arbitration may be denied in certain cases. Although Action 14 is directed at tax authorities, taxpayers could benefit significantly from these actions by permitting timely resolution of disputes consistent with double tax treaties and the reduction in the number of cases of double taxation.

The Action 14 report includes references to Action 15, “Developing a Multilateral Instrument to Modify Bilateral Tax Treaties,” which will be critical to implementing the recommendations of Action 14. The multilateral instrument negotiations, which will include mandatory binding arbitration, have recently been joined by the United States.

Minimum standard and best practices

The guidance on dispute resolution includes a commitment by countries to implement a “minimum standard” or requirements on dispute resolution, consisting of specific measures to remove obstacles to an effective and efficient mutual agreement procedure (MAP). The specific measures include explanations and, in some cases, proposed changes to the OECD Model Tax Convention. Other suggested changes to the Commentary of the OECD Model Tax Convention will be drafted as part of the next update to the OECD Model Tax Convention to reflect the conclusions of the final report.

The dispute resolution final report also reflects an agreement that some responses to the obstacles that prevent the resolution of treaty-related disputes through the MAP are more appropriately presented as best practices rather than as part of the minimum standard for two reasons. First, unlike the elements of the minimum standard, these best practices have a subjective or qualitative character that could not readily be monitored or evaluated, and second, because not all OECD and G20 countries were willing to commit to them at this stage. Best practices are not requirements but are only suggestions that countries should consider adopting.

The report includes a peer review process that will encourage tax authorities to adopt the minimum standards and many of the best practices, and the first reviews will be published by the end of 2017. The OECD has had previous success with its peer monitoring program in relation to transparency and the Tax Information Exchange Agreement network, and it is intended that this publication of countries’ law and practice in relation to resolving disputes will be a useful enforcement mechanism.

Minimum standard

The minimum standard includes specific measures to ensure the timely, effective, and efficient resolution of treaty-based disputes. The minimum standards adopts three organizing principles:

1. Countries Should Ensure that Treaty Obligations Related to the Mutual Agreement Procedure are Fully Implemented in Good Faith and that MAP Cases are Resolved in a Timely Manner.

The guidance states that the dispute resolution mechanism provided by Article 25 of the OECD Model Tax Convention forms an integral and essential part of the obligations assumed by a contracting state in entering into a tax treaty; as such, the provisions of Article 25 must be fully implemented in good faith, in accordance with their terms, including providing taxpayers access to MAP. The guidance emphasizes that taxpayers should have access to MAP even in situations in which the tax authorities are applying domestic or treaty anti-abuse rules to determine if the application of the anti-abuse rule is consistent with the treaty.

Countries should commit to seek to resolve MAP cases within an average time frame of 24 months and that countries’ progress toward meeting that target will be periodically reviewed on the basis of the statistics prepared in accordance with the agreed reporting framework.

2. Countries Should Ensure that Administrative Processes Promote the Prevention and Timely Resolution of Treaty-Related Disputes.

The guidance provides that appropriate administrative processes and practices are important to ensure an environment in which competent authorities are able to fully

and effectively carry out their mandate to take an objective view of treaty provisions and apply them in a fair and consistent manner to the facts and circumstances of each taxpayer's specific case. The elements for this minimum standard are intended to address a number of different obstacles to the prevention and timely resolution of disputes through the MAP that are related to the transparency of the MAP process and the internal operations of a tax administration and the competent authority function. For example, the guidance recommends that countries should ensure that the staff in charge of MAP processes has the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue.

Moreover, the guidance states that countries should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue. More appropriate performance indicators could include the number of MAP cases resolved, or the time taken to resolve a MAP case.

3. Countries Should Ensure that Qualified Taxpayers can Access the Mutual Agreement Procedure.

The guidance suggests a number of changes to Article 25 to make it easier for taxpayers to access MAP, such as permitting a request to either competent authority or, in the absence of such a change, implementation of a bilateral notification system.

To ensure that qualified taxpayers can access the mutual agreement procedure, the guidance recommends, among other things, that countries' published MAP guidance should identify the specific information and documentation a taxpayer is required to submit with a request for MAP assistance. Countries should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information. Countries should also adopt measures to ensure that domestic law time limits do not prevent the implementation of competent authority mutual agreements.

Best practices

The work mandated by Action 14 also identified a number of best practices related to the three general objectives of the minimum standard. These best practices, which are not part of the minimum standards, include a recommendation for countries to implement:

- Bilateral advance pricing agreement (APA) programs.
- Appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests for the multi-year resolution through the MAP of recurring issues for filed tax years.
- Appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. The suspension should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

- Adequate training programs for tax examiners to make them aware of the MAP procedures and the consequences of making an international adjustment.
- Appropriate procedures to facilitate recourse to MAP.
- Procedures to permit access to MAP for taxpayer-initiated adjustments.

Countries should include in their published MAP guidance an explanation of the relationship between the MAP and administrative and judicial remedies under domestic law. Such public guidance should address, in particular, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice.

Framework for monitoring mechanism

The guidance on Action 14 reflects the consensus that implementation of the minimum standard should be evaluated through a peer monitoring mechanism to ensure that the commitments embodied in the minimum standard are effectively satisfied. Although the peer monitoring mechanism could be considered a soft enforcement tool, it is hoped that the implementation of the monitoring system will make it more likely that tax authorities will adopt the minimum standards quickly and effectively.

The guidance sets out the general features of the monitoring mechanism. All OECD and G20 countries, as well as jurisdictions that commit to the minimum standard, will undergo reviews of their minimum standard (including an evaluation of the legal framework provided by a jurisdiction's tax treaties and domestic law and regulations, the jurisdiction's MAP program guidance and the implementation of the minimum standard in practice). The core output of the peer monitoring process will come in the form of a report. The report will identify and describe the strengths and any shortcomings that exist and provide recommendations as to how the shortcomings might be addressed by the reviewed jurisdiction.

Commitment to mandatory binding MAP arbitration

The OECD and G20 countries did not reach consensus on the adoption of arbitration as a mechanism to ensure the resolution of MAP cases, as many in the United States had hoped. While the final report notes that a group of 20 countries has committed to adopt and implement mandatory binding arbitration, it is clear that even within this group of countries there are differing views on the scope of such a provision. These countries include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. These countries were involved in more than 90 percent of the outstanding MAP cases at the end of 2013, as reported to the OECD. It should be noted that the list does not include many developing (non-OECD) countries that have increased their transfer pricing enforcement activities in recent years. A mandatory binding MAP arbitration provision will be developed as part of the negotiation of the multilateral instrument envisaged by Action 15 of the BEPS Action Plan.

Multilateral instrument

BEPS Action 15 calls for the negotiation of a multilateral instrument to modify existing tax treaties to efficiently implement the tax treaty measures developed in the course of the BEPS project, and eliminate the need to renegotiate the existing global network of more than 3000 tax treaties. The inaugural meeting of an ad hoc group to develop the multilateral instrument began on November 5, 2015, with an ambitious schedule to complete its work in 2016. To date, 90 countries have announced their participation in the discussions. The United States, which initially declined to participate, has now indicated its willingness to do so.

The multilateral instrument is expected to include changes to the MAP including mandatory binding arbitration, where applicable.

Not all countries are expected to participate in all aspects of the multilateral instrument. For example, some countries may be willing to amend their tax treaties to include provisions on dual resident structures or treaty abuse issues, while other countries may believe that their current treaties adequately cover those issues, or they may simply decline to include those provisions in their treaties.

The multilateral MAP and arbitration provisions are particularly relevant to address transfer pricing controversy. While global experience with mandatory arbitration provisions is not reported publicly, it appears that in the United States such provisions have been somewhat successful in effecting MAP settlements in a timely manner.

Conclusion

The results of the OECD/G20 actions on BEPS in general, and the new rules on risk and intangibles in particular, have increased the importance and need for factual inquiries. Experience suggests that tax rules that rely on interpretation of the facts tend to increase the number of controversies between taxpayers and tax administrators. In this environment, the guidance on dispute resolution should be a welcome roadmap for tax authorities and taxpayers to improve MAP. The guidance will not directly help the process in many countries that are under pressure because of large caseloads and insufficient personnel resources. But the guidance, along with the peer review system, hopefully will encourage countries to devote the necessary resources for an effective and efficient MAP process that will result in real improvements to achieve the stated goal of ensuring certainty and predictability for business.

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