SUBMISSIONS OF ICAI

BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

Public consultation document

In 2013 the Organisation for Economic Cooperation and Development (OECD), on the request of G20 published its Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan). The Action Plan was to develop an international consensus on the actions against tax avoidance and evasion in cross-border transactions. An important feature of a good tax system is that it should ensure certainty and predictability for business. In order to achieve this goal, Action 14 seeks to improve the effectiveness of the mutual agreement procedure (MAP) in resolving treaty-related disputes. This shows the comprehensive and holistic approach of the BEPS Action Plan.

Article 25 of the OECD Model Tax Convention (OECD, 2014) provides a mechanism, independent from the ordinary legal remedies available under the domestic law, through which the competent authorities of the Contracting States may resolve differences or difficulties regarding the interpretation or application of the Convention on a mutually-agreed basis. This mechanism – the mutual agreement procedure (MAP) – is of fundamental importance to the proper application and interpretation of tax treaties, notably to ensure that taxpayers entitled to the benefits of the treaty are not subject to taxation by the Contracting States which is not in accordance with the terms of the treaty.

Action 14 aims to strengthen the effectiveness and efficiency of the MAP process. Countries have agreed to make important changes in their approach to dispute the evolution. The Action Plan sets up minimum standard which will:

- 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;
- Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- Ensure that taxpayers can taxes the MAP when eligible.

The minimum standard is complemented by a set of best practices.

The OECD mentions that all 137 members of the BEPS Inclusive Framework committed themselves to implement the Action 14 Minimum Standard and to have their implementation evaluated through a peer review process. Further, that for this purpose, terms of reference were developed that translate the Action 14 Minimum Standard into 21 elements that related to the four key areas of an effective dispute resolution mechanism: (i) prevention of disputes, (ii) availability and access to MAP, (iii) resolution of MAP cases and (iv) implementation of MAP agreements.

The consultation document contains items for consideration that could potentially be included as part of the 2020 review, next to the proposal for a review of the assessment methodology and the continuation of deferrals.

The responses in respect of various proposals contained in section 2 of the Consultation document are discussed hereunder.

PART 2- PROPSALS TO STRENGTHEN THE MI NIMUM STANDARD

Proposal 1	**Increase the use of bilateral APAs**

To prevent dispute and provide certainty to taxpayers, jurisdictions should have bilateral APA programme.

Question 2: ***Please share your views on this proposal***

Response: Arguably transfer pricing has been drawing the maximum attention of tax administrations across the world. There is a perception among the authorities that transfer pricing provides convenient tool to Multinational Enterprises (MNEs) to shift profits across tax jurisdictions thereby eroding tax bases in the countries concerned. The audit of transfer pricing cases is quite complex where differences in views between taxpayers and tax authorities are quite common. No doubt, countries have mechanism to resolve disputes through normal domestic judicial system. However, in many cases this process is time consuming and is based upon win-lose concept where neither side gets complete satisfaction. Considering this, Advance Pricing Agreement system has been adopted by many countries. India introduced this system in 2012 where certainty can be reached for prospective five years. Later rollback of the agreement for four earlier years was introduced. Most of the applications for APA filed in India are unilateral due to various reasons, such as Indian authorities not accepting applications for bilateral APAs (BAPA) in the absence of provisions as per paragraph 2 to Article 9 in the Model Tax Convention, smallness of taxing dispute, reluctant to involve the parent in the investigation process by the two tax authorities, time taken in bilateral APAs being more than in unilateral APAs, etc. Recently, due to the Indian authorities accepting applications for BAPA even in the absence of Paragraph 2 to Article 9 and other reasons, it is observed that companies are opting for Bilateral APAs.

The Indian tax authorities have successfully concluded a large number of unilateral as well as bilateral APAs. This is providing certainty to the MNEs and has been appreciated by all stakeholders.

No doubt, bilateral APAs provide not only certainty of taxation, but also provide relief from double taxation. Authorities should expedite the finalisation of BAPAs and ensure that compliance costs are kept as low as possible.

Proposal 2	**Expand access to training on international tax issues for auditors and examination personnel**

Introduce the obligation to roll-out the General Awareness Training Module or a similar training programme.

Along with strengthening MAP process, efforts can also be made to avoid having cases enter into the MAP process. Disputes can, however, also be avoided at the level of Tax Administrations by ensuring that no adjustments are made that would later need to be undone in MAP. To achieve this, the auditors may be trained to increase auditor's efficacy. This would potentially exert downward pressure on the number of MAP cases initiated each year and would provide certainty to taxpayers.

***Question 3:* Do you have experience with inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAP? If so, what do you think would be the best way to address this situation? For instance, would you support elevating the best practice into Minimum Standard?**

***Question 4:* Do you have suggestions on how tax administrations can increase awareness on international taxation in the relevant audit and examination staff?**

Response: There is no denying the fact that a perfect tax environment is that where tax system has all the qualities of a good tax system and taxpayers voluntarily pay due amount of taxes. However, this is a utopian concept. In reality, neither the tax systems are perfect, nor all taxpayers are totally honest. Hence, disputes do occur. The effort has to be to minimis disputes on the one hand, to provide a reasonable and efficient dispute resolution system, including alternate dispute resolution mechanism.

Effectiveness and efficiency of the tax system depends on the quality of the human resources in the tax administration. With growth of MNEs as vehicle of international trade and their ability to get best tax advisers the tax planning is becoming more and more complex. To deal with such complexities it is essential that the tax administration should have suitably trained auditors. In India, National Academy of Direct Taxes is the apex training institute for the officers of Indian Revenue Service. Further, several regional training institutes have been established for the purpose of conducting training of offices and staff of the Income Tax Department.

It is also essential that tax advisers are equally trained in the finer points of taxation. In this direction the Institute of Chartered Accountants of India (ICAI) is providing yeoman services. It regularly conducts basic and advanced courses in International Taxation and Transfer Pricing for Chartered Accountants. Apart from this there are several other organisations which conduct seminars and short courses in taxation. The faculty at the Academy as well as with ICAI and other organisations are of international standard.

In order to build up the skill of officers as well as tax advisers on a regular basis local resources must be developed both by the tax department as well as by the private sector.

The Government should develop independent Research Centre(s) – both for tax policy and administrative aspects, including dispute revolution mechanism.

Export group of auditors may be built up for auditing cross-border transactions. This will lead to development of expertise within the country which will appreciate local issues in a comprehensive manner.

For a comprehensive and effective audit of cases in international taxation and transfer pricing dedicated workforce must be developed by countries. As the issues in these two lines of taxation are different from those in domestic taxation, not only training should be provided to the personnel, but they should have longer tenure in these branches, if not permanent posting. This will go a long way in minimising tax disputes as well as expediting audit and resolution of disputes.

It needs to be appreciated that in the recent time with the development of technology, the way of carrying on business has undergone paradigm shift. Brick-and-mortar business have given way to digital world. International transactions have increased several folds in the recent time. New ways of tax planning are being introduced across the globe. To understand the finer points of such planning it is necessary that auditors should be retained for a longer tenure in the branches dealing with matters of international taxation and transfer pricing. A shorter tenure neither motivates nor enables an officer to develop interest and expertise in the areas of international taxation and transfer pricing.

In India, transfers of officers are annual features and normally whereby, normally, the tenure of an officer in one post is for a period of three or five years. By the time they understand the basic features of international taxation and transfer pricing they are transferred out to a branch which may not have any case of these two areas of taxation. This works as impediment in development of skill in the areas of international taxation and transfer pricing. Similarly, officers even in the Competent Authority team and APA division have very short tenure (3/5 years).

In view of the above, it is suggested that officers in specialized divisions of international taxation and transfer pricing should be trained appropriately, exposure to the working in

advanced jurisdictions be given and they should be retained for a longer period in these divisions.

Proposal 3	Define criteria to ensure that access to MAP is granted in eligible cases and introduce standard documentation requirements for MAP requests

Action 14 Minimum Standard, for the first time, defined four circumstances in which access to MAP should be given: (i) transfer pricing cases; (ii) cases concerning the application of treaty and domestic anti-abuse provisions; (iii) cases in which there has been an audit settlement; and (iv) cases in which taxpayers have provided in the MAP request information and documentation as set out in a jurisdiction's MAP guidance. However, jurisdictions have denied access to MAP under additional circumstances. Hence, there is need to identify any additional circumstances in Action 14 to provide clarity to taxpayers.

To provide more uniformity and transparency, and to avoid different positions among jurisdictions regarding requirement of documentation for MAP request, a standard list of document required for the said purpose may be developed.

Question 5: ***Based on your experience, are there any particular situations or circumstances in which access to MAP was inappropriately denied and that are currently not covered by the Action 14 Minimum Standard? In addition, are there circumstances where you did not submit a MAP request because access would be denied according to available information? If so, please specify these situations or circumstances.***

Response: No case has come to light were tax authorities in India have not admitted MAP application which was in-line with the relevant tax treaty.

Question 6: ***Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.***

Response: Paragraph 1 of Article 25 of OECD Model Tax Convention, 2017 reads as follows:

"1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention."

This shows that recourse to Article 25 is available when one or both of the Contracting States take actions which has resulted or will result, for the concerned taxpayer, in taxation not in accordance with the provisions of the Convention. This does not cover "domestic anti-abuse provisions" unless the action or proposed action of the tax authorities of the source country is not in accordance with the term of the tax treaty. Hence, there appears no

need to extend the provisions of MAP to the domestic anti--abuse provisions, in a general manner. On the other hand, the tax authorities may be advised to ensure that the auditors do not apply domestic anti--abuse provisions in a casual manner.

It may not be advisable to extend MAP provisions to the cases where there has been an audit settlement. Once the cases are settled under the domestic provisions, allowing MAP provisions may have undesirable consequences. Firstly, it may lead to forum shopping or forum jumping by taxpayers and may prolong uncertainty. This will also lead to adverse effect on the finality of settlement with the tax authorities. It needs to be appreciated that the finality has to be given to any process of dispute resolution.

Albeit, in order to safe guard proper implementation of tax treaties it may be suggested that MAP may be extended to "domestic anti-abuse" measure where the taxpayer is able to show that the actions of the tax authorities are not in the "spirit of tax treaty".

***Question 7*: We recognise differences between jurisdictions in the documentation that needs to be provided when a MAP request is filed. Have these differences led to problems in practice? If so, would a common list of minimum information that needs to be provided solve these problems? If so, please specify:**

a. Whether any particular items should or should not be included in such list; and

b. Whether there is a need to align the content of such (to be developed) list with any other international rules relating to tax-dispute resolution procedures. If so, please specify which rules and what items in particular.

Response: The list may include the following questions:

1. Has the tax authority not correctly interpreted the tax treaty?
2. How the actions of the authority not in accordance with the terms of the treaty?

***Question 8:* Any other comments on this proposal?**

No comments

Proposal 4	**Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules**

Allowing for the suspension of tax collection during the period a MAP case is pending, at least under the same circumstances as are otherwise available under domestic law, is currently a best practice as identified in the Final Report on Action 14.

***Question 9:* has the lack of suspension of tax collection in MAP cases created problems in specific cases? Should the best practice be elevated to a Minimum Standard?**

Question 10: ***If you support the elevation to a Minimum Standard, what can be reasonably expected from taxpayers to ensure that taxes due can be collected if the outcome of the MAP process confirms the taxes imposed?***

Question 11: ***Any other comment on this proposal?***

Response: Wherever assessments by auditors are high pitched, resulting in heavy tax demand pressing for its collection would result in difficulties in respect of cash flow for the business. Hence, tax collection should be suspended till the MAP is finalised.

In order to safeguard the interest of revenue bank guarantee or a similar guarantee may be insisted for by the authorities.

Proposal 5	**Align interest charges / penalties in proportion to the outcome of the MAP process**

Question 12: ***Have you experienced cases when interest and penalties have not been aligned with the outcome of the MAP process? If so, is this an important issue and should aligning interest charges and penalties with the MAP outcome become part of the Minimum Standard?***

Question 13: ***Any other comment on this proposal?***

Response: In MAP settlement interest and penalty may be negotiated if permissible within the framework of law. Else, this may be built into the domestic law or in the tax treaties through MLI.

Proposal 6	**Introduce a proper legal framework to ensure the implementation of all MAP agreements**

MAP resolutions reached may not be given effect to if the treaty does not have equivalent of Article 25(2), second sentence of the OECD Model Tax Convention or the domestic law of the concerned country has limited time limit for giving effect to the MAP resolution, which is finalised beyond that time limit. Action 14 Minimum Standard does not give any solution as it does not propose any obligation on the countries.

Jurisdictions should ensure that all MAP agreements can be implemented notwithstanding the expiration of domestic time limit.

There are several options to address the risk of non-implementation, amongst which the following three introducing the obligation for jurisdictions that:
a) All of their tax treaties contain the equivalent of Article 25(2), second sentence;

b) All of their tax treaties contain the equivalent of Article 25(2), second sentence, supplemented, if requested by one State, with a provision limiting the time during which a primary adjustment or an assessment is made; or
c) Their domestic legislation includes a mechanism that fiscal years are kept open until the MAP proceedings have been finalised or they have administrative procedures that allow for implementation notwithstanding domestic time limits for at least as long as not all treaties contain the equivalent of Article 25(2), second sentence.

Question 14: ***Based on your experience with the implementation of MAP agreements, has such implementation been prevented by the expiration of domestic time limit in any of the jurisdictions involved in the process? Alternatively, have you experienced cases where competent authorities did not come to an agreement because an agreement could no longer be implemented as a result of domestic time limit?***

Question 15: ***Based on your experience with the implementation of MAP agreement, have you experienced cases where solutions were found to implement the agreement despite time limit having expired? If yes, please describe those solutions.***

Question 16: ***Any other comments on this proposal?***

Response: Paragraph 2 of Article 25 should be an integral part of any tax treaty. The settlement reached in MAP should not be denied and the absence of paragraph 2 or the domestic law of the concerned country. To ensure this, either suitable provision may be introduced in the domestic law or paragraph 2 may be added with the help of MLI.

Proposal 7	**Allow multi-year resolution through MAP of recurring issues with respect to filed tax years**

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayers which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

Question 17: ***Please share any experience with the multi-year resolution of recurring issues through the MAP process, in particular whether this was possible and, if so, under what circumstances?***

Question 18: ***Are there any other option – based on your experience – that would allow recurring issues to be dealt with in MAP or another dispute prevention/resolution process (e.g. a roll-forward of the MAP agreement to future years vis bilateral APA?***

Question 19: ***Any other comments on this proposal?***

Response: Extending MAP resolution to the future years may not be line with the concept of MAP. It needs to be appreciated that the purpose of MAP is resolution of a dispute which has arisen or is likely to arise. The later has to be based on some action initiated by tax authorities. Where no action has been initiated by authorities, the matter may not be covered by the existing MAP provisions.

However, jurisdictions may build up mechanism within the domestic law to address the possible dispute in the future. Instead of making any change in the article on MAP countries may be advised to introduce:

1. Authority for Advance Ruling for purpose of providing certainty in respect of taxation of cross-border transactions to be initiated by the taxpayer.
2. Advance Pricing Agreement for the purpose of determining the applicable transfer pricing method and price/profit for a given set of international transactions in future years.

MAP may be initiated only when the resolution is not in accordance with the concerned tax treaty.

Proposal 8	**Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through the mutual agreement procedure**

Question 20: Based on your experience, how do tax disputes under treaties with MAP arbitration compare to tax disputes under treaties without MAP arbitration in terms of resolution time, effectiveness of the solution and costs of proceedings?

Question 21: Separately, do you have views or other suggestions regarding effective alternative approaches to dispute resolution that could provide taxpayers full and timely resolution of cases that remain unresolved in the MAP?

Question 22: Do you have other suggestions to strengthen the Action 14 Minimum Standard? In your response please also mention whether there are any other best practice that you think should be elevated to elements of the Minimum Standard.

Response: In order to increase the effectiveness of the MAP process and to minimise the costs of proceedings following steps may be taken by countries:

1. Treaty negotiating team and MAP team should be separate and should have the suitable strength in accordance with the pendency of cases in litigation. The MAP team should not only consist of officers of the tax department but also representatives from experts in outside the tax

department (such as Chartered Accountant, Lawyer, Retired Revenue Officers, etc.) with sufficient knowledge of international taxation and transfer pricing.

2. Many a time costs of the proceeding are high because the two competent authorities have to meet physically. This also increases the time taken for finalising agreements. Instead of physical meetings virtual meetings may be undertaken and physical meetings may be the last recourse.

PART 3: PROPOSAL TO STRENGTHEN THE MAP STATISTICS REPORTING FRAMEWORK

Input is requested on the following two points:

- Reporting of additional data to pending or closed MAP cases
- Providing relevant information on other practices that impact MAP – APA statistics

Proposal 1	**Reporting of additional data relating to pending or closed cases**

In order to increase transparency further and to obtain a more complete picture of a jurisdiction's MAP performance, some additional data points would be necessary.

1. The first data point would be the indication which jurisdiction made the adjustment or took the action at issue.
2. A second additional data point would be the breakdown of the time taken to close MAP cases per type of outcome.
3. A third type of data point would be the year the MAP cases pending at year-end were initiated.

<u>Question 23</u>: please share your views on the three proposals for the reporting of additional data under the MAP Statistics Reporting Framework, in particular whether they will provide more transparency and clarify on jurisdiction' MAP inventory.

<u>Question 24:</u> Are there any other item that could be reported under the MAP Statistics Reporting Framework to provide further transparency or to allow a more meaningful assessment of jurisdictions' progress towards meeting the 24-month target timeframe to resolve MAP cases?

No comments

Proposal 2	Providing relevant information on other practices that impact MAP -APA statistics

<u>Question 25:</u> Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.

<u>Question 26:</u> What, if any, other item should be added to the data categories for reporting of statistics on APAs to increase transparency?

No comment

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