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Comments on the public consultation document "*BEPS Action 14: Making Dispute Resolution Mechanism More Effective – 2020 Review*"

Dear Sirs,

We would like to thank you for the opportunity to submit our comments on the OECD public consultation document "*BEPS Action 14: Making Dispute Resolution Mechanism More Effective – 2020 Review*" released on 18 November 2020 (the "**Proposal**").

In this respect, please find hereinafter our observations that are focused on some selected technical aspects addressed in the Proposal, by reporting some experiences with particular respect to Italy.

A. PROPOSALS TO STRENGTHEN THE MINIMUM STANDARD

1. COMMENTS ON PROPOSAL 1

2) Please share your views on the proposal.

Any effort to increase the use and efficacy of bilateral APA procedures is welcome.

In this respect, we would like to submit your attention to the difficulty of MNEs to rely on bilateral APA procedures for one-time transactions.

One-time transactions, such as business restructurings and transfers of intangibles, may be particularly relevant for MNEs. That relevance, however, is generally associated with significant complexities in determining the arm's length value of those transactions. Despite this, MNE groups rarely decide to opt for bilateral APA procedures to define transfer prices in agreement with the relevant competent authorities, since the time length inherent to these procedures can hardly be reconciled with the non-recurrent nature of the transactions. This entails that such transactions are typically reviewed only during tax audits and possibly become the object of MAP cases. In order to reduce the MAP backlog, it would be worthwhile to recommend that competent authorities prevent cases by allowing a fast-track in the context of bilateral APAs so that MNEs can get advance certainty on these types of transactions and thus avoid going through tax audits and generating MAP cases.

2. COMMENTS ON PROPOSAL 4

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?

Where MAPs are not alternative to domestic litigation (or where they are alternative and the tax litigation is stayed), it is in principle possible for taxpayers to obtain suspension of tax collection under the applicable domestic litigation procedure. In many jurisdictions, pending a MAP, tax collection is suspended by an order of the competent tax court, but in some cases, the suspension is subject to the discretion of the judges.

On the other hand, where MAPs are alternative to domestic litigation and the taxpayer has not appealed the tax assessment before the court, or has withdrawn from litigation (which could be the case under the EU Arbitration Convention or Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (the "**Directive**")), absent a tax litigation the only way to obtain suspension of tax collection would be to file a request with the Tax Office that issued the

assessment. In these circumstances, the decision whether or not to grant a suspension (or at what conditions)[1] is at the discretion of the tax authority, which cannot be considered a third party.

Moreover, the fact that tax litigation is in place (or not) may influence the amount of provisional tax payments that are due and need to be suspended. In Italy, for instance, it is generally provided that, during first-tier litigation, the provisional tax collection is limited to 1/3 of taxes and interest due based on the tax assessment. In situations where no court appeal has been filed, instead, the taxpayer may in principle be required to pay the whole amount provided in the notice of assessment (tax, interest and penalties).

In the light of the above, we would strongly recommend that the best practice is elevated to Minimum Standard in order to avoid differences between those who have initiated litigation and those who have not, and to ensure that the starting of a MAP does not expose companies to a financial distress due to the failure in obtaining the suspension of tax collection. The preferred solution would be to provide for an automatic suspension of the tax collection (including interest and penalties) during the MAP, in all cases where a MAP application has been declared admissible[2]. As a result, there would be a simplification (and elimination of significant administrative and procedural burdens, both on taxpayers and on tax administrations/courts), as well as the elimination of financial detriments deriving from MAPs.

While adopting such Minimum Standard, to avoid abusive recourse to MAPs, it could be provided that, in case of declared final inadmissibility of the MAP application, the collection procedure will be restarted according to ordinary rules.

10) If you support the elevation to a Minimum Standard, what can be reasonably expected from taxpayers to ensure that taxes due can be

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[1] For instance, it is up to the tax authority to decide to grant the suspension of the tax collection subject to the filing of a bank guarantee.

[2] With Legislative Decree No. 49 of 10 June 2020, the Italian Legislator transposed the Directive into national law and introduced a specific provision whereby, in the event that a request for the opening of a MAP has been filed under the Directive, the suspension of the litigation proceeding granted by the judge entails automatically the suspension of the collection.

Such rule resolves a part of the issues, but not all of them as it is exclusively applicable to the MAP based on the Directive and does not cover, therefore, MAP cases started under double tax treaties and under the EU Arbitration Convention (until when this will be used).

collected if the outcome of the MAP process confirms the taxes imposed?

In our view, such issue is strictly related to the rules of each Country for the implementation of the MAP.

In general, if a taxpayer accepts the outcome of a MAP process (also in cases the MAP agreement was to confirm the taxes originally assessed) each Country should regulate the collection process as it would have done in the case a notice of assessment became final after a litigation process.

If the taxpayer does not accept the outcome of the MAP process and continues litigation (where applicable) any suspension originally granted should fail to be applicable, so that the taxpayer would be required to pay the taxes (plus interest and penalties) based on the ordinary rules provided for the collection (provisional or final, as the case may be).

3. COMMENTS ON PROPOSAL 5

12) Have you experienced cases where 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?

In most cases, even if MAPs do not directly have an impact on the determination of interest and penalties, any different quantification of a tax claim following the outcome of the MAP would entail a re-determination of the amount of interest and penalties due, as interest and penalties are generally a function of the taxes claimed.

What is not accepted in all cases is that – aside to the re-determination of the applicable penalties – the fact that the competent authorities reached an agreement for a specific outcome of a MAP should be qualified, for the purpose of penalty application, as a "new" determination of the taxes due by the taxpayer and that, consequently, the taxpayer should be put back in the scenario where he had received an original assessment for such redetermined claim. If, upon receipt of an assessment notice for such amount, the taxpayer had been in the position to settle the claim with a further reduction of penalties, the same effects should apply on the re-determination of a claim based on the outcome of a MAP process.

For instance, in Italy, upon receipt of an assessment the taxpayer can settle it by paying penalties reduced to one-third and there are also a number of remedies in order to prevent or settle a possible litigation that make it

possible to reduce the penalties with respect to the amount of taxes settled. In the case of a MAP, given that the implementation of the outcome of a MAP would entail a "revisiting" by the competent authority of the original claim, the taxpayer should be allowed to settle such "revisited" claim with a settlement at reduced penalties (to one-third)[3].

In the light of the above, we believe in any case that the Minimum Standard to be implemented could also address this issue and establish a principle whereby, even if the imposition of penalties and interest is in the scope of the domestic legislation of each country, still the determination of interest and penalties should automatically be aligned with the MAP outcome and that the taxpayer should be left in the position to benefit from any further reduction of penalties that would have been applicable if the original assessment notice had been originally issued with the redetermined amount and the taxpayer had accepted to settle it.

4. COMMENTS ON PROPOSAL 8

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 practices that you think should be elevated to elements of the Minimum Standard.

In general, the MAP procedure focuses on the resolution of primary transfer pricing adjustments. However, best practices should require that the competent authorities also discuss whether a secondary adjustment can be justified, and if so, identified/quantified. We have witnessed that there are cases where competent authorities tend not to cover in their negotiations the elimination of the double taxation arising from secondary adjustments (as they tend to consider such adjustments as out of scope of the MAP).

This issue may be relevant for those countries where domestic legislation requires a secondary adjustment and the application of a withholding tax

[3] It must be noted that the Italian tax system already contains a provision whereby the taxpayer can reduce the penalties to one-third in case of a partial withdrawal of an assessment notice by the same tax authorities as a unilateral correction (even after a litigation process).

Such rule is generally not applied by the Italian Tax Authorities in case the outcome of the MAP leads to a reduction of the claim contained in the original notice of assessment because the redetermination of the claim based on the agreement reached with the other competent authority is not perceived as a unilateral correction.

thereon, e.g. based on a hidden dividend distribution. In such cases, the taxpayer ultimately ends up suffering a further double taxation due to the effects of the secondary adjustment, even though the MAP procedure was successful in resolving double taxation with regard to the primary adjustment.

In this context, a further point concerns repatriation. Taxpayers should also have the possibility of obtaining certainty regarding the tax treatment of the subsequent repatriation of the funds relating to income flows that have been regarded as not in line with the arm's length value of the relevant transactions. In some cases, the treatment of such repatriation is seen differently by the Countries involved with the creation of an additional layer of double taxation. To improve efficacy of MAPs in contributing to the prevention of (further) double taxation, one could foresee the possibility for taxpayers to specify the intention to make a repatriation of funds in the MAP application, by requesting that the competent authorities within the MAP agree on the tax treatment thereof.

B. PROPOSALS TO STRENGTHEN THE MAP STATISTICS REPORTING FRAMEWORK

5. COMMENTS ON PROPOSAL 2

25) Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.
26) What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?

We welcome the initiative to increase the statistical data provided as part of the Statistics Reporting Framework. We believe that in order to limit tax disputes, it is also important to improve the capacity of MNEs to observe trends and anticipate to these trends adapting their transfer pricing practices. This can be achieved also by increasing the statistics and information available to them.

In this regard we would add the followings information and categories to those already indicated: industry concerned, type of transaction (e.g. manufacturing, distribution, business restructuring, royalty; etc.), transfer pricing methods applied.

* * *

Please feel free to contact us at public-consultations@maisto.it with any questions or comments concerning this letter.

Sincerely yours,

Maisto e Associati