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Inputs for Recommendations to OECD on Public Consultation request by OECD for Action Plan 14[1].

The intent to provide greater tax certainty to the taxpayers through dispute resolution mechanism is clear from the instant public consultation document on Action Plan 14. In our view, it is of utmost importance that taxpayer rights are not neglected in a Mutual Agreement Procedure (MAP). Although MAP is conducted between competent authorities of two treaty partners, taxpayers are directly affected by its outcome. Taxpayer rights may, *inter alia*, include the right to be heard, the right that the procedure is conducted fairly and is not discriminatory, the right of confidentiality etc. Currently, the level of protection guaranteed to taxpayers varies between different countries and it may impact voluntary taxpayer compliance negatively.

Hence, at the outset, the OECD may consider introducing a *de minimis* standard for countries to statutorily adopt a set of specific taxpayer rights to re-instate the taxpayer's faith in international dispute resolution process. This may be done by adopting country best practices in this area.

Recent statistics[2] from the OECD reveal an increase in the number of cross-border tax disputes with 4,726 new cases in 2019. This represents an addition of approximately 55% to the number of cases as on January 1, 2019. With the average number of cases settled at approximately 35%, this represents a disproportionate increase in the inventory of outstanding disputes. The need for introduction of pragmatic measures for greater effectiveness and efficiency to the existing MAP mechanism is a crucial step in such times, with Action Plan 14 being a minimum standard under the Inclusive Framework comprising 137 countries.

We have additionally outlined below our comments on some of the specific points raised.

Specific Comments

1. **Please share any general comments on your experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with jurisdictions that obtained a deferral of their peer review.**

The quantum of dispute resolution under MAP remains fairly low. A significant amount of time is spent in procedural hurdles and the initial communication process. The actual time spent by the Competent Authorities in a mutual discussion on the merits of the case is disproportionate compared to the amount of time taken to arrive at a resolution.

[1] *https://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf*
[2] *OECD Statistics on Mutual Agreement Procedures for 2019*

The recent statistics from OECD on MAP position for India vis-à-vis the Top Nations with whom India has the greatest number of MAP cases are tabulated below[3]

Country	Total cases as on start of January 2019	Cases started	Cases closed	Cases Pending	Closing Ratio %, 2019	Time (in Months 2019)
India	866	206	121	951	10%	33.43
United Kingdom	450	409	299	560	50%	9.73
United States	975	350	303	1,022	30%	24.66
Sweden	234	118	113	239	40%	22.69
Switzerland	349	208	180	377	40%	21.4
Japan	90	51	57	84	50%	21.63

As can be seen from the chart above, the closure percentage as a number of open cases during the year is low across all countries.

Therefore, there is an imminent need to bring greater consistency in how MAP issues are dealt, as well as improving the timeliness and effectiveness of the MAP process.

The inclusion of a mandatory arbitration mechanism in the MAP process may be a suitable measure to alleviate the low resolution, even though some countries have made certain reservations in this regard.

Mandatory MAP arbitration could serve as a significant assurance that MAP disputes shall be resolved in a timely manner and provide greater certainty for taxpayers and relief from double taxation.

To summarize, our general comment on the experience is a significant amount of time of the MAP processes is due to procedural and communication delays. Our general suggestion for improvements are (i) make the MAP application process seamless by taking it online through a centralized OECD portal (ii) seeking consensus on mandatory arbitration if MAP cases are not resolved beyond a period of 36 months of the taxpayer's filing for MAP (iii) publishing a dashboard providing indicative ranges for commonly disputed issues, especially transfer pricing.

Proposal 1: Increase use of Bilateral APAs

1) **Increasing dispute prevention via greater use of bilateral APAs and more focus on training on international tax issues for auditors.**

Greater use of bilateral APAs could go a long way in providing certainty to taxpayers and reducing the workload under MAP. However, the timelines for concluding a bilateral APA is a constant source of concern. As an example, in India approximately 12% of bilateral APA requests have been concluded – the time frame for the same is an average of 44 months. Some measures proposed are as follows:

[3] https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2019-per-jurisdiction-all.htm

- Introduction of a common online platform for filing of bilateral APAs. Greater use of bilateral APAs can be promoted by enabling online filing of APAs, wherein competent authorities get real time intimation of bilateral or multilateral APAs requested. This shall help reduce time-lags in notifications by jurisdictions to each other. It can also serve as a measure towards improving the taxpayer's experience with the filing process thereby ensuring greater readiness for applying for a bilateral APA.

- Indicative benchmarks for royalties, financial transactions and routine transactions could be published by OECD on an annual basis under a standard template. It shall seek to provide an indicative reference of ranges for parties entering into bilateral APAs.

- A global dashboard platform for providing indicative information on settlement ranges agreed under bilateral APAs, while ensuring that the confidentiality of taxpayers' information is preserved.

- Guidance for countries in nascent stages of implementing APA programs (less than five years) could be published.

- Revenue Authorities may consider setting up timelines for each stage of the APA process and should commit to adherence of such timelines. Countries that take more time to conclude APA should be encouraged to meet a broad timeline range – e.g., countries taking more than 25% of the average timeframe to be encouraged to move with the 25% range of the average. A review mechanism to evaluate reasons for delays in processing of APA applications could be established.

- Fast track of renewal of APA applications, where renewal applications are considered as a fresh application. In cases where there are no material changes in its FAR analysis vis-à-vis previously accepted APAs, processing of such applications can be expedited via adequate disclosures at the time of renewals.

- Delay in finalizing of bilateral APAs, beyond specified time limits, resulting in finalization of an audit in either of the jurisdictions, could be compensated by way of an automatic process by virtue of which such tax demands cannot be recovered, until the completion of the APA process.

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

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 the Minimum Standard?

Initial years of transfer pricing audits may prove to be challenging for both taxpayers and tax authorities. As an example, in India, the initial years resulted in ad-hoc forms of adjustments, primarily due to nascent stage of the regulation, inadequate training of transfer pricing officials, a tax collection target approach, and the Indian convention of not giving the benefit of doubt to the taxpayer, accompanied with wide discretionary powers vested with tax and transfer pricing officers.

Such discretion coupled with lack of administrative guidance, resulted in India earning the label of being a highly litigation prone jurisdiction. This coupled with notable high-pitched assessments on issues such as marketing intangibles, location savings, issuance of shares etc. compounded the problem. Some of the issues are before various Appellate forums including the Supreme Court.

Though, there was opportunity for the Administration to intervene with administrative guidance or for the law makers with suitable amendments, very little was done.

Furthermore, as a recommended measure, a recommendatory training module for tax officials under both MAP and APA can help improve the efficiency and improve timelines for conclusion of both MAP and APA process.

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

Countries should commit to adopt the best practices included in the Manual on Effective Mutual Agreement procedures (MEMAP) as part of the overall commitment to a streamlined and effective MAP process.

We have listed below a summary of criteria which could be considered, to ensure MAP is granted in eligible cases. These have been discussed in detail as well.

- Adoption of Charter recognizing taxpayer rights
- Introducing online filing
- Publishing guidance on applicability of principal purpose test
- Suspension of tax collection during MAP proceedings
- Increasing involvement of taxpayer
- Condonation of delay

OECD may consider introducing a *de minimis* standard for countries to statutorily or customarily adopt a set of specific taxpayer rights to strengthen the taxpayer's trust in international dispute resolution process. OECD may consider adopting country best practices followed in this respect.

As an example, India has adopted a 'Taxpayer Charter' which enlists certain taxpayer rights. The Charter was introduced by way of a statutory provision under the Income Tax Act, 1961. The Charter is aligned with the Government's vision towards building confidence of the taxpayer in the present tax administration.

The taxpayer rights under the Charter include:

- Provide fair, courteous, and reasonable treatment to the taxpayer.
- Treat the taxpayer as honest
- Provide mechanism for appeal and review
- Provide complete and accurate information in respect of compliance obligations
- Provide timely decisions within a prescribed time limit
- Collect the correct amount of tax
- Maintain confidentiality of the information disclosed by the taxpayer
- Provide a fair and just system to the taxpayer
- Publish service standards and report periodically
- Reduce cost of compliance.

The above-mentioned taxpayer rights are based upon the well-established principles of *equity and fairness, certainty and simplicity, efficiency, and effectiveness.* The taxpayer charter seeks to achieve greater mutual trust and cooperation between the taxpayer and the tax administration. The Charter is an overall commitment of the Government of India to provide better service delivery standards to its taxpayers.

Countries may consider adopting a similar charter (statutory or customary) on taxpayer rights. They become even more vital during MAP procedures which are conducted between two competent authorities. The introduction of a charter shall help repose faith of the taxpayer and help eliminate any lack of trust from taxpayers regarding their rights, which is likely to weaken their confidence in the entire MAP procedure.

Indicative reference ranges for transfer pricing disputes and prevailing jurisprudence for commonly encountered tax issues could be made available via a central repository funded by all members.

Guidance on Principal Purpose test and Article 9(3) of UN Model Trade Convention could be developed, to restrict denial of treaty benefits under these provisions. (Under the Inclusive Framework, several countries are developing economies following the UN Model convention for entering into tax treaties.)

Suspension of tax collection could be encouraged by way of bilateral MOUs between treaty partners, given the complexity of each country's tax laws.

It is practically observed that there is limited involvement of the taxpayer under the MAP process in India, post initiation of MAP proceedings. This creates uncertainty in the minds of the taxpayer in respect of the outcome to be achieved under MAP. In order to increase greater transparency and repose confidence of the taxpayer, it is recommended that a formal process of hearing arguments of the taxpayers or the taxpayer's authorized representative, with competent authorities of both jurisdictions should be encouraged under the MAP process.

Further, it is also recommended that before rejecting a MAP application on account of being time barred, as an appropriate measure, a hearing may be granted to the taxpayer to put forward its case for condonation of delay.

With respect to criteria to introduce standardized documentation requirements for MAP requests, similar to bilateral APAs, MAP filing process can be made online with standardized documentation requirement suggested. The information should focus on the specific problem to be resolved. An online filing where both parties are simultaneously notified can eliminate potential time lags.

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

Suspension of tax collection should be encouraged by way of bilateral MOUs between treaty partners, given the complexity of each country's tax laws.

As an example, India allows suspension of tax collection under a Memorandum of Understanding signed with a treaty partner. The suspension of collection is based on furnishing a bank guarantee of amount of disputed demand including interest charges imposed.

India has entered into a MOU with a limited number of treaty partners. These include United States, UK, Denmark, Sweden and South Korea. In the absence of a MOU, the domestic law shall take precedence in respect of terms for suspension of tax collection.

Under current Indian domestic law, taxpayer may be asked to pay 20% net demand up to the stage of first appellate authority.

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

We recommend that countries should be encouraged to drop all consequential proceedings if the matter is resolved under MAP. This measure shall help absolve the taxpayer from any undue financial hardships.

As an example, under the Indian domestic tax law, penalties are initiated through independent proceedings. Further, the application of a transfer pricing penalty in certain cases such as documentation penalty is independent of the transfer pricing adjustment imposed by the revenue department. The Competent Authorities of India do not have the mandate to consider such consequential issues under MAP.

However, in majority of disputes, penalties are consequential and hence linked to the quantum of adjustment made to the income. A recent guidance[4] from the revenue authorities, has clarified that penalties linked to the quantum of income shall be aligned in proportion to the outcome of the MAP process.

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

Indian tax rules provide clear timelines for the taxpayer and the tax authorities in India to implement a MAP that has been resolved by the Competent Authorities (CAs) of both treaty partners. The taxpayer has been provided a time period of 30 days (from the date of receipt of a communication from the CAs of India) to convey its acceptance of the MAP resolution and to submit evidence of withdrawal of domestic appeals. Conveying of acceptance of the MAP resolution within this time period is mandatory and failure to do so may render the MAP resolution unimplementable. Similarly, the Assessing Officer has been provided a time period of one month (from the end of the month in which he receives the letter of the CA of India having jurisdiction over the case providing details of the resolution) for giving effect to the MAP resolution. These timelines are expected to quicken the MAP implementation process and make it more efficient and effective.

It is recommended that specific timelines for MAP implementation should be adopted by other countries as well. Further, implementation statistics should also be reported by countries. This shall help ensure monitoring and assessment of the MAP implementation process based upon the practical experience of Countries.

It is recommended that the legal framework should be as consistent as possible in order to avoid any ambiguity on account of varied approaches adopted across various countries.

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

1. ***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.***
2. ***Are there any other options – 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 via bilateral APA)?***
3. ***Do you have any other comments on this proposal?***

A recent guidance[5] from the revenue authorities in India, has clarified that competent authorities may resolve recurring MAP issues on the same principles as prior years. However, this is effective

[4] F.No. 500/09/2016-APA-I Government of India, MAP Guidance/2020

[5] F.No. 500/09/2016-APA-I Government of India, MAP Guidance/2020

only once an audit order has been firmed up by the revenue authorities. Thus, it cannot apply for years where returns have been filed and audit is yet to be completed.

Countries should be encouraged to allow access to MAP post the issuance of a draft assessment order where the law so provides, or on first communication of intent by revenue authorities to make an adjustment to the filed income. Early access to MAP shall help resolve the disputes in an efficient manner, thereby reducing the need to rely upon the domestic channels of appeal for the interim period.

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

1. ***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?***
2. ***Separately, do you have views or other suggestions regarding alternative approaches to dispute resolution that could provide taxpayers full and timely resolution of cases that remain unresolved in the MAP? Question for public consultation***
3. ***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.***

With respect to implementation of MAP arbitration, countries not accepting binding arbitration should be encouraged to re-examine their positions. As an example, India's tax treaties do not include a binding arbitration clause. India has consistently maintained that binding arbitration is against any jurisdiction's sovereignty pertaining to tax matters and against the constitutional mandate as well. However, an alternate view is that the objection basis sovereignty may not be well-founded since Article 51(d) of the Constitution of India itself provides for India to endeavor to 'encourage settlement of international disputes by arbitration'. Even in respect of tax matters, there are precedents of India having accepted international tribunals for dispute resolution (like the one under WTO and Bilateral Investment Promotion Agreements). Further, India has also subscribed to international dispute resolution by way of international courts and tribunals like International Court of Justice and International Tribunal for the Law of the Sea. In view of the same, India may want to re-examine its position on mandatory arbitration.

As an alternative measure, countries may consider possibility of exploring a non-binding mediation process for settling treaty related disputes. Flexible non-binding processes such as mediation would help facilitate an agreement between the Competent Authorities, and thereby help improve the arrival at a conclusion under the MAP process.

Non-binding dispute resolution mechanisms shall also serve as precursor to arbitration, till the time period wherein developing countries develop sufficient experience and confidence in binding mechanisms of arbitration.

Furthermore, other forms of effective alternate dispute resolution processes such as conciliation, early neutral evaluation (ENE) and non-binding expert opinions may be adopted as the final step in the MAP process in order to ensure that the dispute resolution process is reached within a specified timeframe.

ENE can prove to be a speedy option for the early intervention procedures. It increases likelihood of parties forming a realistic appraisal of their MAP cases and breaking deadlock situations including economic and reputational issues.

It is believed that a successful outcome is consensual rather than imposed, that may prove to be useful to the continuing relationship between countries. Overall, the sovereignty remains well-protected since the parties to the ADR process retain control on the decision[6].

C: Additional elements to strengthen the MAP Statistics Reporting Framework

Proposals to strengthen the MAP Statistics Reporting Framework

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

Implementation statistics of cases closed could be added. This could help a taxpayer in arriving at the actual time required for the process.

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

1. ***Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.***

APA statistics should be published. This would help in giving an overall picture.

Thank you for the opportunity to provide these comments.

[6] *UN Secretariat Paper on Alternative Dispute Resolution in Taxation dt. 8th October 2015*