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BEPS Actions 14: Making dispute resolution mechanism more effective – 2020 review

Dear OECD-members and secretarial support,

Studio Tributario Tognolo thanks the opportunity to provide comments and share the experience gained throughout the years working alongside taxpayers and public administrations. We have sought to provide constructive input for the Inclusive Framework to make decisions as to the 2020 review, the strengthening of the Action 14 minimum standards and the statistical reporting framework.

We are convinced that effective and timely international dispute resolution will become even more important in the future and therefore we welcome the initiatives to improve the mutual agreement procedure to resolve double taxation issues. Many MNEs are facing multiple disputes involving countries where the level of experience in MAP process is limited and sometimes represent an issue. However, as the OECD MAP statistics show, there has been a significant growth in MAP cases and we expect this trend to continue. In this sense, we recognize the importance of improving the minimum standard in order to prevent and reduce dispute cases.

In this respect, we would like to report our observations and comments based on the field experience made with the Italian tax authorities as well as with foreign tax authorities in international tax disputes.

Proposals to strengthen the Minimum Standard

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

Further work to improve provisions permitting access to MAP would be helpful. To prepare auditors and examiners through specific technical training programs would certainly increase the level of reliability on final tax adjustments and provide a good incentive to use in a more efficient way the Dispute Resolution mechanisms, such as MAP.

We have experienced cases with evident inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAP.

Additionally, we have experienced cases, mainly outside Italy, where auditors deliberately and inappropriately have made pressure to local taxpayers to preclude or discourage these latter from using MAP relief by the means of threatening with stricter audits or the application of penalties. In this sense, training could be helpful to stress that such behavior is a violation of the minimum standard, alongside the introduction of a penalization to auditors precluding and/or discouraging taxpayers access to MAP.

Technical training becomes even more important to developing jurisdictions present in the Inclusive Framework. As they usually have less MAP cases, the lack of experience with both procedural and technical issues could have a negative impact on the timeline but also on the final outcome. Additional training directed to those jurisdictions could be incorporated into the Tax Inspectors Without Borders program, for example.

In addition, it would be helpful to sponsor a pre-MAP analysis of the assessment made by auditors at the level of the local competent tax authorities in order to eliminate or adjust any clearly unfair result.

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

We agree that a minimum standard list of information would be useful, and we suggest that it should be drawn from lists that already exist and are used by competent tax authorities. A consistent legal framework would ensure taxpayers the certainty of being able to initiate a MAP at any location. If needed, additional information could be provided if and when required by the Competent Authority after reviewing the initial set.

We have not experienced cases for which the access has been denied.

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

To guarantee tax collection by the end of a MAP process is a very delicate matter regulated by domestic procedural rules that usually include all cases; this means that there is not a specific rule regulating only MAP procedures.

During the past ten years, the Italian tax authorities have adopted different approaches: they started to collect all the amounts in advance and, more recently, they are accepting to stop the collection but in presence of a guarantee.

Provided that a MAP is a procedure activated to eliminate or minimize a double taxation phenomenon, it means that the amount of additional income taxes assessed in one Country has been partially or totally paid in the other Country. Anytime the two Countries involved have signed the Convention on Mutual Administrative Assistance in Tax Matters[1] it is not necessary to ask for more guarantee as one of the Countries has already received the amount. The mentioned multilateral instrument provides for all possible forms of administrative co-operation between the parties in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. In such a case, we think that the request of a guarantee can be eventually made to a taxpayer by the tax authorities but limited to the amount of income taxes exceeding those already collected in the other Country (i.e. substantially resulting from the spread of the applicable income tax rates).

[1] OECD/Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing, Paris, https://doi.org/10.1787/9789264115606-en.

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

We do not have experience with cases where interest and penalties were not aligned with the outcome of the MAP process but we agree that in general it is an important issue to be discussed.

In addition, we would like to highlight that the main problem we faced is directly connected to the length of the MAP negotiation and the subsequent local adoption of the accepted outcome. Negotiations and the actual application of the final outcome could take years in some jurisdictions and still vary a lot between countries in the Inclusive Framework. In this sense, we do agree that the application of interest charges should be aligned with the standard timeline defined for a MAP process; thus limiting the burden to the taxpayer of additional interest charges to a reasonable timeframe, for example up to 24 for the MAP process and up to 3 months for the local adoption.

Finally, we also would like to point out the importance of balancing the interest issue. A taxpayer must pay interest charges to its tax authorities for additional income taxes but, at the same time, the other tax authorities, that collected excessive income taxes, should also pay interests to the local taxpayer.

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

Misalignment between jurisdictions is not a simple matter, especially when imposing rules regarding time limits. We do have experience with some cases where a dispute resolution could not be implemented because of domestic time limits. In some occasions, tax authorities proved to be quite flexible and reasonable, analyzing the actual facts and making exceptions to meet a pragmatic solution. We think that more than elaborating a minimum standard or legal framework, it should be a best practice to offer the possibility of an open case-by-case analysis to better evaluate the facts involved.

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

Following the observations made on the previous proposal, as long as the relevant facts and circumstances to the MAP issue remain consistent for multiple years, it would be only reasonable for the outcome to be applied equally for the periods subsequent to the ones covered by the MAP.

We highlight that the agreement's roll forward depends on an appropriate analysis of the specific case and should be detailed and technically justified for each of the years involved.

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

We fully support the inclusion of mandatory binding arbitration after a reasonable time limit. It could represent a good incentive for more MAP disputes to be closed with an agreement.

However, it is more important for tax authorities to technically motivate their decisions on MAP cases as well as to define eventual critical assumptions. With more technical information and details available, it would be easier for the taxpayer and the auditors to fully understand the approach and, for example, apply it along more tax periods still not yet defined for tax assessment.

Also, a well-structured analysis improves the chances of taxpayers accepting the final outcome and not starting further disputes.

Proposals to strengthen the MAP Statistics Reporting Framework

We find the MAP Statics Reporting not only useful but very important when it comes to planning and assessing potential transfer pricing disputes. Therefore, we believe that the trends shown in such documents should show MAP and APA cases separately.

Regarding the effectiveness of dispute resolution mechanisms available, we point that the time frame reported for BAPAs should start from the date of the first application submitted by the taxpayer and not from the official admissibility date made by the administration. This would give more transparency to how long it actually takes for the competent tax authorities to reach an agreement and it would certainly be helpful to the taxpayer.

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We hope that you find our brief observations might be helpful. Should there be any questions, we remain at your disposal.

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