Keidanren
Policy & Action

Comments on Public Consultation Document on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

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Introduction

We are grateful for the opportunity to share our comments on the BEPS Action 14 2020 review.

Keidanren fully supports the initiative taken by the OECD to make dispute resolution mechanisms more effective. Challenges concerning the mutual agreement procedure (MAP) such as securing access, reducing time to reach conclusions and implementing agreements in good faith still need to be addressed. We are also facing a new issue, tax certainty, as part of Pillar 1 of tax challenges arising from digitalization. Rules and their application should be continuously reviewed, improved and monitored so that MAP may be used to resolve double taxation in a timely and appropriate manner.

Use of multilateral advanced pricing arrangements (APAs) should be increased. Consideration should also be given to mediation by third parties. Arbitration should be adopted by as many countries as possible. Japanese companies have been advocating for this since the beginning of the BEPS project.

Prevention of disputes in the first place is also essential as the costs and compliance burdens associated with MAP is significant. There have been too many cases where adjustments have been made based on different views of the appropriate profitability level of and function performed / risk assumed by foreign related parties. Tax authorities should refrain from arbitrary taxation that is not in line with the OECD Transfer Pricing Guidelines and other international standards for the purpose of securing tax revenue. Training and education for auditors should also be strengthened.

1. Proposals to strengthen the Minimum Standard

Proposal 1: Increase the use of bilateral APAs

Introducing the obligation to establish a bilateral APA program as a minimum standard would contribute to increased predictability for taxpayers. We support this proposal.

Just doing so however is not sufficient in our view. Some countries with APA programs conduct a "preliminary review" prior to the actual filing of an APA application, sometimes refusing to accept an application form unless its content is acceptable from the tax authority's perspective. This practice should be abolished. There is also scope to improve the efficiency of APA processes, for example in cases where taxpayers are required to submit data that are similar to information already provided in previous APAs. There is potential for countries to overly prioritize national interest in APA negotiations. Operation of APA programs therefore should be monitored.

Taxpayers should be provided with more opportunities to participate in bilateral and multilateral APA processes so that they can sufficiently explain their positions to the relevant tax authorities.

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

We support this proposal. Cases observed in some countries seem to indicate limited knowledge or experience of international tax issues on the part of auditors and examiners. Expanding access to training is therefore welcomed.

- Taxes are repeatedly imposed by tax authorities based on an assertion that profitability of an entity in question is too low, even where the taxpayer prevailed in an assessment or lawsuit in a previous year.
- Additional tax is imposed without reasonable grounds in periods covered by an already concluded APA.
- Transfer pricing methods such as the cost-plus method are not appropriately applied by tax authorities.

These positions are unreasonable and appear to stem not only from a lack of international tax experience but other factors such as quotas set for collecting tax revenue. This practice should be changed. A minimum standard should be considered to establish a section within the tax authority to ensure examinations are conducted objectively and that any adjustments are reasonable.

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

We support this proposal.

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

We support this proposal. Moreover, countries should be encouraged to introduce a domestic rule for suspension of tax collection if such a rule is not already in place.

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

We support this proposal. In some countries interest charges / penalties are not reduced even if the amount of tax associated with the primary adjustment is reduced through MAP.

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

We support this proposal. Even where the amount of tax associated with a primary adjustment has been reduced following MAP, it is sometimes difficult to implement the agreement due to time limits under domestic laws.

Separate from the issue of domestic law time limits, we have observed principles in some countries to avoid refunding taxes once collected. International efforts should be made to correct this practice.

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

We support this proposal. Allowing multi-year resolution through MAP of recurring issues would reduce compliance burdens for taxpayers where they can foresee to some extent the possibility of MAP agreement.

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 strongly support MAP arbitration; a mandatory dispute resolution mechanism that would increase the likelihood of speedy and proper MAP agreement. We encourage more countries, in particular Asian nations with which Japanese companies have strong links, to introduce MAP arbitration. Where double taxation is expected to remain unresolved according to a draft partial agreement provided in a MAP process, it should be clarified that a taxpayer can reject the agreement and request MAP arbitration.

Arbitration by an international body should be considered in the future.

Other proposals

(1) Corresponding Adjustment

While providing for corresponding adjustments in tax treaties (ordinarily paragraph 2 of Article 9) is currently classified as a best practice, countries should consider making this a minimum standard to eliminate double taxation. However, situations should be avoided where making corresponding adjustments under a minimum standard leads to tax authorities taking a tougher line in MAP negotiation or limiting access to MAP.

(2) Secondary Adjustment

Secondary adjustments which are made where money is not transferred as a result of a corresponding adjustment are based on domestic rules. This means practices differ between countries and presents concerns for taxpayers. Secondary adjustments take the form of withholding tax on deemed dividends or interest on loans. Even if double taxation on primary adjustments is eliminated through MAP, these withholding taxes cause separate financial burdens, which taxpayers cannot overlook. International rules should be established by the OECD on secondary adjustments to which there should be some limitation based on tax treaty provisions.

2. Proposals to strengthen the MAP Statistics Reporting Framework

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

We support the proposal to require jurisdictions to report data on the three items. "Identification of the jurisdiction(s) that made the adjustment" in particular would discourage some countries from imposing unreasonable tax through a monitoring process.

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

We support the proposal to publish statistics on APA. Some countries put too much emphasis on national interest with the result that no APAs are concluded. A monitoring process based on MAP statistics would have a deterrent effect. it is desirable to break down closed cases of APA into three categories: (i) concluded cases, (ii) disagreed cases and (iii) withdrawn cases.

As unilateral APAs may not fit into an international monitoring program, it would be appropriate to separate unilateral APA statistics from bilateral ones for all items (instead of newly received APA requests only). Alternatively, statistics on bilateral APAs only may be appropriate.