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Dansk Industri
Confederation of Danish Industry

OECD
Centre for Tax Policy and Administration

International Co-operation and Tax
Administration Division

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Input on the 2020 Review of BEPS Action 14

Question 1: Experiences with dispute resolution

The OECD has requested input on general experiences with the dispute resolution mechanisms and suggestions for improvement. In keeping with the public consultation document, we include our relevant comments with reference to the specific question raised by the OECD.

As we will elaborate on below in respect of question 7, we find it necessary that for tax administrations to initiate negotiations, the taxpayer should only be required to present the minimum information, and not all facts and circumstances which the tax administration may subsequently request.

Where the competent authorities in two jurisdictions are negotiating multiple cases involving several taxpayers simultaneously, this can lead to a deadlock on solving double taxation for a single taxpayer.

It is unfortunate that an individual taxpayer's case risks becoming a bargaining chip in a larger negotiation and thus can fall victim of the tax administrations failing to come to an agreement on other cases. In these situations, the taxpayer is left in the very unsatisfactory position that the resolution of their request for the mutual agreement procedure is dependent on resolution of other cases.

From a rule of law perspective, tax administrations should treat cases independently and individually.

Consequently, taxpayers suggest reiterating to the tax administrations that each case should be negotiated on its merits and the outcome of a mutual agreement procedure should not be dependent on the results of other cases being negotiated between the tax administrations.

Question 3: Expand access to training for tax administrations

The OECD has requested input on whether taxpayers have experienced adjustments reflecting a lack of experience by the relevant tax authorities.

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It seems there is a general challenge for tax administrations to deal with and understand complex business structures that are not principal structures. This leads to struggles with effectively understanding and applying appropriate transfer pricing principles to MNE groups that do not have a principal structure, which in turn causes misleading results not reflecting where value is created, and risks are assumed.

This issue is compounded by OECD guidance having a substantial emphasis on principal structures and giving less consideration to other structures.

Taxpayers therefore stress the need to educate tax administrations on how to apply the arm's length principle to structures different from principal structures and that the methodologies developed for principal structures cannot be applied universally to structures that commercially are completely different from a principal setup. This could in part be addressed by providing revised OECD guidance (including examples) providing clear guidance on and what principles should be applied instead, including educational efforts together with trade or industry bodies.

Question 7: Minimum information in requests for the mutual agreement procedure

The process of concluding a mutual agreement procedure can be lengthy, sometimes due to continuous requests for additional information from the tax administrations.

It goes without saying that a case should be sufficiently informed for the tax administrations to reach a correct result in any mutual agreement procedure.

However, when a tax administration issues a reassessment that gives rise to any double taxation, that tax administration should already have obtained the relevant information from the taxpayer. The information received by one tax administration could easily be shared with the other tax administration, including which elements of the materials that have led to the first tax administration issuing a tax reassessment.

In practice, taxpayers experience that the onus falls on the taxpayer to provide all the information again, leading to significant resources spent on the part of the taxpayer. Secondly, taxpayers have experienced that tax administrations in such scenarios often ask detailed questions about the reassessment made by the other tax administration, which the taxpayer sometimes struggle to provide answers to.

Compounding this issue is the fact that tax administrations in the experience of taxpayers do not typically start to process or negotiate the particular case until such time that they feel that all relevant information and facts have been provided by the taxpayer.

This leads to the mutual agreement procedure not being concluded within the envisaged 2-3 years, but often takes several years more to conclude as a consequence of it - first being delayed by the process of obtaining additional information and secondly by the negotiation period.

Taxpayers accordingly feel a need to reiterate to tax administrations, and providing strong OECD guidance to that effect, that the taxpayer indeed must only submit the required minimum materials for the case to be considered presented and for the tax administrations to initiate negotiations with the other tax administration and settle the case within 2 years as set out in the 2017 OECD Model Tax Convention.

The two-year period provided for in the 2017 OECD Model Tax Convention should in the view of taxpayers be sufficient time for the tax authorities to have additional questions answered and complete negotiations.

Taxpayers also note that while having no yet experience in mutual agreement procedures under the MLI, the same issue could easily become of relevance in that context. As such, stronger guidance and principles on this issue would also seem relevant in the context of how to apply the MLI.

Question 17-19: Multi-year resolution

Tax authorities may initiate a tax audit before MAP regarding the preceding years is completed resulting in the taxpayer having MAP proceedings and an ongoing audit at the same time. This situation requires use of very substantial administrative resources by the taxpayer.

As a consequence of the principle about separation of competent authorities and regular tax authorities it will not be possible to process together the MAP and subsequent audit going on at the same time and about the same issues. In relation to countries with a very formalistic approach (Germany has been mentioned as an example) it will not be possible to submit a request for an APA with retrospective effect (roll-back) because of time limits and as a result of the competent authority is not allowed to interfere with a tax audit.

In cases where the tax audit leads to a negative result for the taxpayer and to double taxation, the competent authorities will have to use resources on the same issue again a number of years later. And the taxpayer needs to spend huge resources on solving the double taxation problem again, just for the subsequent years covered by the tax audit.

It should be considered whether in cases where a request for MAP or Arbitration is accepted for consideration by the local competent authorities, then the taxpayer could have an option for either:

a) To include the subsequent years in the MAP process – i.e. de facto an APA for subsequent years - which may be excluded from a regular APA due to deadlines, or
b) Be granted a suspension of the commenced tax audit until a MAP for the previous years is settled, after which the tax authorities are required to take into account the agreement reached between the local competent authorities.

Question 22: Other suggestions for improving the mutual agreement procedure

The OECD has requested input on other suggestions that could help improve the mutual agreement procedure and dispute resolution in general.

Functional separation between competent authorities and audit personnel

As a more general point, business find it crucial to underline the need for functional separation and independence between the competent authority undertaking mutual agreement procedure proceedings and the audit personnel that has issued a reassessment decision.

By its very nature, the mutual agreement procedure presumes and requires that both competent authorities are willing to and have a sufficient mandate to negotiate a particular case. That negotiation will ultimately have to result in one or both of the competent authorities deviating from the position prior to the mutual agreement procedure being initiated.

If the tax administration that has issued a reassessment has no scope or real mandate to negotiate a position that deviates from the reassessment, the only way to eliminate any double taxation is if the other competent authority can fully accept the outcome of the reassessment.

It is the experience of taxpayers, that this is not desirable nor often the case, which result in deadlocks and lingering double taxation for the taxpayer.

The appropriate way to ensure that the competent authority can freely negotiate a reasonable outcome is to ensure that the competent authority is effectively independent from the authority or personnel that has issued the reassessment, and therefore also not bound – formally or informally – by that reassessment.

Failure to provide clear separation and independence between those two offices of government creates a risk of the competent authority being compromised in its mandate to freely and openly negotiate with the other competent authority.

Taxpayers therefore suggest that the OECD provides firm guidance on best principles for independence between competent authorities of a state and the authorities or personnel responsible for tax audits or transfer pricing audits in that same state.

Application of binding arbitration in the MLI irrespective of choices made by the state

Taxpayers find that in order to achieve the maximum certainty for taxpayers to have any double taxation issues resolved, the current reservations in the MLI should be rescinded, such that taxpayers are guaranteed access to the binding arbitration provided for in the MLI irrespective of which choices the relevant states have made under the MLI.

Access to binding arbitration under the existing MLI regime presupposes that the states in question have made compatible choices under the MLI. This is by no means guaranteed, which significantly reduces the value of the MLI.

Taxpayers therefore urge that efforts are undertaken to ascertain whether it is feasible to alter the MLI in a manner that guarantees the taxpayer a right to binding arbitration irrespective of the choices made by the relevant states under the MLI.

That would greatly improve the effectiveness of the international tax system and would guarantee taxpayers an avenue to eliminate double taxation to the benefit of all parties involved.

Mediation institute for mutual agreement procedure and advance pricing agreement processes

A satisfactory conclusion of a mutual agreement procedure or advance pricing agreement hinges on both competent authorities coming to common consensus on how the relevant transactions should be taxed and valued in both states.

In the experience of taxpayers, fundamental differences of opinion can arise between the two competent states, leading to the mutual agreement procedure or negotiations in an advance pricing agreement being submitted for arbitration or terminated.

It should be in the interest of all parties to come to an amicable solution that achieves the desired outcome, i.e. a fair allocation of taxable profits and elimination of double taxation.

Many states have now started to implement mediation processes in situations where there is fundamental disagreement between the taxpayer and the tax authorities with a view to arriving at a satisfactory result.

In the view of taxpayers it could be helpful to introduce similar mechanisms in both the mutual agreement procedure and advance pricing agreement processes where the competent authorities are struggling to find common ground.

That could help prevent situations where mutual agreement procedures or advance pricing agreement proceedings are unnecessarily terminated or where the parties find themselves in a lengthy and unpredictable arbitration process.

To that effect, taxpayers suggest introducing a recommendation for tax administrations to accept that the taxpayer is entitled to appoint and bring in a mediator at its own cost to help facilitate dialogue and help mediate towards an amicable solution. In the view of taxpayers, that should benefit both tax administrations and taxpayers in eliminating double taxation in a constructive manner.

Improve the advance pricing agreement process to avoid the need for retroactive mutual agreement procedure

While not directly in scope of Action 14, taxpayers suggest that the OECD gives due consideration to the effectiveness of the advance pricing agreement process and ways to improve that.

As already alluded to above, taxpayers suggest implementing an option to allow for mediation in advance pricing agreement processes.

However, taxpayers also believe that there are strong arguments to also include mechanisms to ensure that tax administrations are required to arrive at a solution to eliminate double taxation in the advance pricing agreement process, and not only in connection with a mutual agreement procedure to eliminate double taxation post fact.

A bilateral advance pricing agreement is intended to provide clarity and certainty on acceptable terms in intra-group transactions. To that effect, the advance pricing agreement should serve as a means to ensure that the taxpayer is not subsequently subject to a unilateral audit resulting in a reassessment, while also ensuring a great level of transparency towards the tax administrations in both jurisdictions.

However, in the absence of an obligation on the tax administrations to initiate and come to a conclusion on an advance pricing agreement, the taxpayer runs the risk of requesting an advance pricing agreement, which does not result in an agreement between the tax administrations, but subsequently results in an audit being initiated by one or both of the relevant tax administrations.

In the event such audit results in a reassessment, the taxpayer will then most likely have to request a mutual agreement procedure in order to eliminate any double taxation. Such mutual agreement procedure will involve the same competent authorities which previously failed to come to an agreement.

In this scenario, the effect of failing to come to an agreement during the advance pricing agreement process is thus that all relevant parties will have to commit additional resources towards a case that will be subjected to the mutual agreement procedure later on and, where the double tax treaty permits, binding arbitration if the tax administrations cannot agree during the course of such proceedings.

An obligation for the tax administrations to initiate and agree during the course of advance pricing agreement negotiations would greatly improve the advanced pricing agreement as a means to ensure elimination of double taxation and would serve to reduce excessive and needless resource spend on the part of both taxpayers and tax administrations.

In the opinion of taxpayers, this could be implemented in a revised MLI to ensure maximum effect on existing double tax treaties. Alternatively, it could be included in the next iteration of the OECD Model Tax Convention similarly to the mechanism suggested for the mutual agreement procedure to eliminate double taxation.

Yours sincerely,

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