Allens
101 Collins Street
Melbourne VIC 3000 Australia

GPO Box 1776
Melbourne VIC 3001 Australia

T +61 3 9614 1011
F +61 3 9614 4661
www.allens.com.au

ABN 47 702 595 758

Allens > < Linklaters

27 December 2020

International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal
75016 Paris
France

By email: taxpublicconsultation@oecd.org

Dear Sir / Madam

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

Allens acknowledges and appreciates the opportunity provided by the OECD to provide a submission in response to the Public Consultation Document on BEPS Action 14 (the ***Consultation Document***, dated 18 November 2020). We strongly support the efforts of the OECD and G20 in making dispute resolution mechanisms more effective. In particular, we are committed to working with the OECD to build upon the existing mutual agreement procedure (***MAP***) and MAP arbitration frameworks to improve their desirability and effectiveness.

Allens is an independent, Australian-headquartered law firm that is part of an integrated alliance with global law firm Linklaters. We strongly support the eight proposals to strengthen the Action 14 Minimum Standard and the two proposals to strengthen the MAP Statistics Reporting Framework. In line with our experience in advising clients in relation to reviews, audits, settlement negotiations, litigation, MAP and MAP arbitration, our comments are restricted to Proposal 8 (regarding MAP and MAP arbitration) and are ordered to correspond with the questions for public consultation of Proposal 8.

Allens is an independent partnership operating in alliance with Linklaters LLP.

1 Overview

MAP arbitration was first introduced into the Australian treaty network in 2009, commencing with New Zealand (entry into force in 2010). Subsequently, MAP arbitration provisions were negotiated with Switzerland in 2013 (entry into force in 2014) and Germany in 2015 (entry into force in 2016). With Australia signing the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (***MLI***) in 2017 (and given the force of law in Australia in 2018), MAP arbitration now exists with a wide range of additional jurisdictions, including Belgium, Canada, Denmark, Finland, France, Ireland, Japan, Malta, the Netherlands, Singapore and the United Kingdom. The number of jurisdictions with which Australia has MAP arbitration provisions continues to grow.

Allens strongly supports the expansion of MAP arbitration not only as an incentive to encourage the resolution of MAP cases, but also to increase the desirability of MAP as a viable alternative to domestic litigation. Although MAP has a reasonable track record of success in Australia, not all cases are resolved, and anecdotal evidence would suggest that cases are not presented out of a concern that resolution will not be achieved.

Proposal 8 is:

> 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 have responded to two of the three questions for public consultation relating to Proposal 8:

(a) **Question 20**: 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? Our response is at **section 2** below.

(b) **Question 21**: 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? No response.

(c) **Question 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? Our response is at **section 3** below.

2 Question 20

> 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?

Australia has had a long and relatively successful MAP programme, particularly in relation to permanent establishment (***PE***) profit attribution and transfer pricing disputes involving established treaty partners. Average cycle time has remained under two years since 2015, with the majority of cases fully or partially eliminating double taxation (whether by way of bilateral negotiation or unilateral relief). Historically, however, there were a small number of double taxation disputes that were unable to be resolved in a timely manner through MAP or, in some cases, able to be resolved adequately at all.

We have considered publicly available MAP data to determine the success (or otherwise) of the introduction of MAP arbitration provisions into a wider range of tax treaties. As the MAP data does

not distinguish between treaty partners with MAP arbitration provisions and treaty partners without MAP arbitration provisions, it is only possible to make inferences from such data and provide anecdotal evidence. Our observations are set out below:

(a) Since 2016, there has been a marked increase in cases progressing to MAP. This is supported by publicly available MAP data. As the MLI was introduced in 2017, we consider it more likely that the catalyst for the increased MAP caseload was the OECD/G20 publishing the BEPS Actions 8–10 Final Reports, *Aligning Transfer Pricing Outcomes with Value Creation*, in 2015, rather than the wider adoption of MAP arbitration provisions.

(b) The Australian competent authority's caseload and cycle times are stabilising, with MAP generally successful in resolving double taxation disputes involving PE profit attribution and transfer pricing. Given the relatively recent introduction of the MLI, it is too early to determine the impact of the MAP arbitration provisions on the desirability of MAP. However, our experience indicates that the mere existence of MAP arbitration provisions with a treaty partner increases the attractiveness of MAP to taxpayers vis-à-vis domestic litigation particularly in complex or contentious tax disputes. As MAP arbitration is becoming a realistic possibility in a growing number of cases, MAP is increasingly considered to be an effective alternative to domestic litigation procedures. We consider it likely that the number of complex and contentious cases presented to MAP will grow.

(c) A small number of pre-MLI disputes, and post-MLI disputes exceeding two years, remain unresolved. Without further granularity of data, it is not possible to determine the extent to which such disputes are potentially subject to MAP arbitration (and whether, for example, MAPs involving treaty partners with which Australia has MAP arbitration provisions are more successful than MAPs involving treaty partners with which Australia does not).

In light of the above, and in the absence of data showing comparative outcomes between those jurisdictions with MAP arbitration provisions and those without such provisions, our observations are limited to our experience. Our experience is that the existence of MAP arbitration provisions with a treaty partner increases the attractiveness of MAP. The existence of MAP arbitration provisions has led to an expectation in the Australian market that MAP arbitration will increase the likelihood of timely resolution, and an expectation that the perceived drawbacks of MAP (eg, prolonged uncertainty, risk of non-resolution) are materially lower where MAP arbitration is available.

3 Question 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?

Based on our experience, we make three suggestions to strengthen the Action 14 Minimum Standard:

(a) Elevating Best Practice 7 (regarding the general principle that the choice of remedies should remain with the taxpayer) to elements of the Action 14 Minimum Standard;

(b) Placing an upper limit on the extent to which the competent authorities may extend the timeframe before which a taxpayer may submit a case to MAP arbitration; and

(c) Clarifying that a PE profit attribution or transfer pricing dispute must be resolved by agreeing an attribution or allocation of profits between the jurisdictions represented by the competent authorities.

These suggestions are considered in turn.

3.1 Elevating Best Practice 7

The OECD/G20's BEPS Action 14 Final Report, *Making Dispute Resolution Mechanisms More Effective* (2015), contains a number of best practices which are not part of the Action 14 Minimum Standard. We are fully supportive of all best practices.

To strengthen the Action 14 Minimum Standard, we strongly support the elevation of Best Practice 7 to elements of the Minimum Standard (our **emphasis**):

> Countries should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the **general principle that the choice of remedies should remain with the taxpayer**.

This is broadly aligned with paragraph 44 of the OECD Commentary on Article 25 of the OECD Model Tax Convention (***MTC***) (our **emphasis**):

> Depending upon domestic procedures, **the choice of redress is normally that of the taxpayer** and in most cases it is the domestic recourse provisions such as appeals or court proceedings that are held in abeyance in favour of the less formal and bilateral nature of mutual agreement procedure.

We are concerned that, without elevating Best Practice 7 to elements of the Minimum Standard, taxpayers can in effect be prevented from having double taxation resolved via MAP. This issue arises because of the tension that exists between a taxpayer's instigation of domestic litigation procedures and the ability of the taxpayer to access the resolution of double taxation via MAP. In particular:

(a) Where a taxpayer is faced with an action of a tax administration under domestic law (such as the issue of a tax assessment against the taxpayer) which results in the taxation of profits that have already been subject to tax in another jurisdiction, the taxpayer will generally have no choice but to instigate domestic litigation procedures to protect its position under the domestic tax laws. However, as domestic litigation considers the application of domestic legislation to a particular set of circumstances, it will result in a domestic law outcome without regard to whether that outcome results in, exacerbates or resolves double taxation. As such, domestic procedures are an unsatisfactory pathway for resolution of double taxation.

(b) Where a case is 'pending' before court or administrative tribunal, a competent authority has the right to suspend MAP.[1]

(c) Where a decision has been 'rendered' by a court or administrative tribunal, a taxpayer is prevented from submitting a case to MAP arbitration. If a decision has been rendered after a taxpayer has submitted a case to MAP arbitration but before the arbitration panel has delivered its decision, the arbitration process shall terminate.[2]

The result of (b) or (c) would be that the taxpayer is in effect blocked from having double taxation resolved via MAP. The taxpayer is left with the domestic litigation procedures only which, as noted, are an unsatisfactory pathway for resolution of double taxation.

This concern was observed in the case of *Glencore Energy Ltd v HMRC* [2019] UKFTT 438, in which the Tax Chamber of the First-tier Tribunal in the United Kingdom was required to consider the application by a taxpayer to stay domestic proceedings pending the outcome of MAP. Although the taxpayer succeeded in obtaining a stay of proceedings in that particular case, raising Best Practice 7 to elements of the Action 14 Minimum Standard would prevent such cases from needing to be brought, empower taxpayers to take control of how they resolve a tax dispute and, in conjunction with our suggested changes to Articles 7, 9 and 25 of the MTC (see **section 3.3** below), provide an

[1] MLI, Article 19(2).
[2] MLI, Article 19(12).

avenue that is guaranteed to eliminate double taxation in PE profit attribution and transfer pricing disputes.

3.2 Limiting ability to defer MAP arbitration

Where competent authorities are unable to reach mutual agreement to resolve a double taxation dispute involving a particular taxpayer, Article 19(1) of the MLI entitles the taxpayer to submit any unresolved issues to MAP arbitration within a period of two years beginning on the start date referred to in Articles 19(8) or 19(9). Article 19(11) permits jurisdictions to replace the two-year period with a three-year period. Further, Article 19(1)(b) permits the competent authorities to negotiate a different time period with respect to each case.

Before a case is submitted by a taxpayer to MAP, double taxation must have occurred or be likely to occur. In most circumstances, this will mean several years of review and audit even before a case is eligible for MAP. During this time, there is likely to be a loss of institutional knowledge in both the taxpayer and the tax administration, with a loss of further institutional knowledge likely inevitable as the dispute progresses to MAP.

Particularly in light of Chapter 9 of the OECD Report on Pillar One Blueprint, which is focused on securing tax certainty for multinational taxpayers and tax administrations alike, we suggest strengthening the mandatory binding arbitration framework by placing an upper limit on the extent to which the two-year time period (or three-year time period under Article 19(11)) can be extended. Although any extension requires the agreement of both competent authorities and there is no suggestion that competent authorities would seek to misuse this right, placing an upper limit would focus the attention and effort of the competent authorities on resolution and provide taxpayers with greater certainty on timing. As a result, we suggest limiting the ability to extend the timeframe to a maximum of one year.

We suggest the following additional Article to any new multilateral convention (in red):

> Article X: Amendments to Part VI of the Multilateral Convention
>
> 1. A party that has chosen to apply Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting may choose to apply this Article with respect to its Covered Tax Agreements and shall notify the Depositary accordingly. This Article shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification.
>
> 2. Subparagraph b) of paragraph 1 of Article 19 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting shall be amended as follows:
>
> > b) *[Where] the competent authorities are unable to reach an agreement to resolve that case pursuant to a provision of a Covered Tax Agreement (as it may be modified by paragraph 2 of Article 16 (Mutual Agreement Procedure)) that provides that the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, within a period of two years beginning on the start date referred to in paragraph 8 or 9 (Initial Period), as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting Jurisdictions have agreed to a different time period no greater than one year subsequent to the Initial Period with respect to that case and have notified the person who presented the case of such agreement), [any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part, according to any rules or procedures agreed upon by the competent authorities of the Contracting Jurisdictions pursuant to the provisions of paragraph 10.]*

3. Paragraph 11 of Article 19 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting shall be amended as follows:

> 11. *For purposes of applying this Article to its Covered Tax Agreements, a Party may reserve the right to replace the two-year Initial Period ~~period set forth in subparagraph b) of paragraph 1~~ with a three-year Initial Period ~~period~~.*

3.3 Profit attribution and allocation

Many cases that are submitted to MAP involve disputes pertaining to profit attribution to PEs (under the Business Profits Article of the relevant DTA) or transfer pricing (under the Associated Enterprises Article of the relevant DTA). Article 7(3) of the MTC describes the making of an adjustment to the amount of *tax charged* on profits attributed to a PE. Similarly, Article 9(2) of the MTC describes the making of an adjustment to the amount of *tax charged* on the profits of an enterprise.

One of the primary purposes of PE profit attribution and transfer pricing rules is to ensure an arm's length allocation of profits between jurisdictions. Although reasonable minds may differ as to how an arm's length range may be determined, we strongly believe in the principle that profits should only be taxed once. The wording contained in Articles 7(3) and 9(2) of the MTC leaves open a risk that, when a PE profit attribution or transfer pricing case is submitted to MAP, a resolution is reached that merely adjusts the allocation of taxes rather than the allocation of profits. In other words, a competent authority might perceive that the wording in Articles 7(3) and 9(2) supports a resolution of double taxation through MAP by way of a full or partial tax credit for taxes paid in a jurisdiction, rather than a principled allocation of profits in accordance with the arm's length standard. Although such a resolution may mitigate the consequences of double taxation, it does not properly eliminate double taxation in accordance with the spirit of the DTA network.

We recommend clarifying this position in the form of amendments to Articles 7, 9 and 25 of the MTC and amendments to the corresponding OECD Commentaries. Suggested amendments are outlined below (in red):

> 1. Amendment to Article 7(3)
>
> 3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other. In the event a case has been presented to the competent authority of a Contracting State in accordance with paragraph 1 of Article 25, the competent authorities shall endeavour to eliminate double taxation by agreeing an attribution of profits to any permanent establishment that may exist and imposing taxation accordingly. In the event any unresolved issues arising from the case have been submitted to arbitration in accordance with paragraph 5 of Article 25, the case shall be decided by allocating profits amongst the Contracting States and allowing the Contracting States to impose taxation accordingly.
>
> 2. Amendment to Article 9(2)
>
> 2. Where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such an adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other. In the event a case has been presented to the competent authority of a Contracting State in accordance with paragraph 1 of Article 25, the competent authorities shall endeavour to eliminate double taxation by agreeing the

conditions which would have been made between independent enterprises and the profits which would, but for those conditions, have accrued to the associated enterprises and imposing taxation accordingly. In the event any unresolved issues arising from the case have been submitted to arbitration in accordance with paragraph 5 of Article 25, the case shall be decided by determining the conditions which would have been made between independent enterprises and the profits which would, but for those conditions, have accrued to the associated enterprises, and allowing the Contracting States to impose taxation accordingly.

3. New Article 25(6)

6. Any case presented to a competent authority under paragraph 1 of Article 25 pertaining to Article 7 (**Business Profits**) or Article 9 (**Associated Enterprises**) that is resolved in a manner that is not consistent with paragraph 3 of Article 7 or paragraph 2 of Article 9 accordingly shall be deemed not to have resolved taxation in accordance with the provisions of this Convention. For the avoidance of doubt, a person may submit a case to arbitration in accordance with paragraph 5 of Article 25 in the event the competent authorities resolve the case in a manner that is not consistent with paragraph 3 of Article 7 or paragraph 2 of Article 9.

Concluding remarks

We once again thank the OECD for the opportunity to comment on the Consultation Document. If the OECD wishes to discuss any aspect of this submission please contact Martin Fry (+61 3 9613 8610) or Thomas Ickeringill (+61 3 9613 8712).

Yours faithfully

Martin Fry
Partner
Allens
Martin.Fry@allens.com.au
T +61 3 9613 8610