IMPROVING DISPUTE RESOLUTION: THE WORLD OF B.E.P.S.

Authors
Stanley C. Ruchelman
Rusudan Shervashidze

Tags
B.E.P.S.
Comments
M.A.P.
Mutual Agreement Procedure

The Discussion Draft on Action plan 14 (the "Draft") received an overwhelming response. On January 19, 2015, the O.E.C.D. published over 400 pages of comments on how to make dispute resolution mechanisms more effective.

Many believe that as a result of the B.E.P.S. program, the number of treaty-related tax disputes will increase. To accommodate this surge in tax cases, it is crucial to develop an effective dispute resolution mechanism that will enhance cross-border trade.

The Draft reflects a lack of consensus regarding the Mutual Agreement Procedure ("M.A.P."). Most of the comments support creating a M.A.P. that facilitates final and binding decisions within a set timeframe. It is seen as a step towards improving the efficiency and effectiveness of the B.E.P.S. project as a whole. Creating an efficient M.A.P. will demonstrate the O.E.C.D.'s commitment to creating a mechanism that will provide progress.

Making the M.A.P. mandatory may not be enough, as other issues come into play. Here is a sampling of comments that appear in the 400 pages that were released:

- The fact that the initiative in solving the dispute remains with the Contracting States leaves the taxpayer with a limited role.[1] As a result, the opportunity of having a smoothly functioning M.A.P. with taxpayer input bows to need protecting a States' right to tax.
- The Draft pointed out that a taxpayer should not have an active role in the M.A.P. This is rooted in the belief that the involvement of the taxpayer will result in a lengthier process, which is more costly to the Contracting States. This observation may not be correct in all cases; the involvement of a taxpayer may motivate the Competent Authorities to promptly reach a good-faith agreement at an accelerated pace.[2]
- Competent Authorities initiate M.A.P. with a belief in the validity of their position. Believing in the justification of their position will make it hard for a Competent Authority to concede. As a result, the Competent Authorities may have difficulty in preserving an atmosphere necessary to reach a solution through reconciliation.[3]
- Arbitration panels should interact with the taxpayers. This interaction, which will shed light and better explain the background of the case to the panel, should facilitate the M.A.P.[4]

---

1 Comments from A.O.T.C.A.-C.F.E.

2 Comments from B.D.O.

3 Comments from E.E.P.S. Monitoring Group.

4 Comments from Brose.

- Competent Authorities should develop a collaborative mindset and relationship with taxpayers and their advisors in order to seek the "right answer" using an objective approach rather than a self-interested approach. This may require significant cultural changes in the administrative practices of tax authorities in order to facilitate dispute resolution.[5]

- It is important to ensure that the administrative process promotes the prevention and resolution of treaty-related disputes. The Competent Authority should be independent of other parts of the revenue authority if it is to be fully effective. Nonetheless, taxpayers will see Competent Authorities as part of revenue authorities, no matter what, and that will result is disrespect for the outcome of the M.A.P.[6]

- In practice, the initiation of the M.A.P. to challenge a tax assessment in one country may trigger a tax audit in the other country. This practice can be seen as an obstacle for effective use of the M.A.P. to resolve double tax issues. The risk of facing tax examinations in both countries promotes the use of self-help by the taxpayer. Also seen as a problem is the use of ongoing and continuous requests for additional information from the taxpayer. This is frequently viewed as a *sub rosa* attempt by Competent Authorities to discourage use of M.A.P., which fosters distrust of the process.

- The obligation for the Contracting States to resolve cases in a "principled, fair and objective" manner should be expressly stated in the M.A.P. provisions of income tax treaties in order to prevent self-interest of a Competent Authority from being a roadblock to relief. The language should be "shall resolve" or "are obligated to seek to resolve." In addition, many comments suggest clarification of the meaning of "principled, fair and objective."

- Several comments suggested use of mediation in some cases. Mediation can be seen as an excellent way of resolving treaty disputes domestically or bilaterally that are relationship-based.

- The presence of a mandatory binding arbitration clause in a double tax treaty may prevent cases from being settled by the tax authorities under M.A.P. Taxpayers may believe that binding arbitration provides more complete, cost-effective, and timely relief than never-ending M.A.P. discussions between the Competent Authorities. This causes some to believe that the threat of arbitration is more effective than mandatory resort to arbitration because it will encourage timely decisions affording relief under the M.A.P.

- Access to M.A.P. should only be denied when both Contracting States agree that *prima facie* evaluation shows that the taxpayer's objection is not justified.[7]

- The existing M.A.P. process is usually lengthy. In many instances, taxpayers are required to pay the tax in both countries as a condition of initiating M.A.P. Some persons commented that an alternative provision should be adopted allowing a taxpayer to pay into escrow a single amount that is equal to the

"In a normal year, this legislation would then go through several Parliamentary stages before being signed into law. This year, though, the General Election on May 7 will intervene."

[5] Comments from B.D.O.

[6] Comments from I.B.A. Taxes Committee.

[7] Comments from BusinessEurope.

higher of the two deficiencies. The Competent Authorities would not have access to the cash until relief is agreed. Refunds of any excess escrow payment would be made to the taxpayer.[8]

- Some commentators suggested use of a mediator or a Professional Facilitator ("P.F.") to facilitate the granting of relief on a timely and principled basis. The P.F. could be a neutral person appointed jointly to manage the M.A.P. process and serve as a chairman/secretary at meetings. The P.F. would not be involved in assessing the case itself, but would be involved in procedural matters designed to speed-up up the M.A.P. process.[9] Alternatively, the P.F. could fulfil an important role in assisting in managing M.A.P. proceedings, establishing and preserving a collaborative working relationship between competent authorities, assessing legal and technical merits of a dispute, making factual determinations, and identifying viable pathways to resolution.[10]

- The process must be streamlined and sped up. This can be achieved by simplifying the process when small businesses are involved or the amount of the dispute is not significant. Guidelines for the simplified procedure would be helpful.[11]

- Making dispute resolution a simpler and cheaper process will allow developing countries to use M.A.P. as a tool in dispute resolution.[12]

- Secrecy undermines the goal of the B.E.P.S. initiative. Transparency will help M.N.C.'s and other taxpayers in planning their activities within the rules and avoid double taxation and the need for M.A.P. assistance.[13]

- Under established international law, local remedies must be exhausted before International Dispute Resolution can be accessed. The Draft suggests bypassing this established procedure and giving priority to M.A.P. However, going through the domestic channels will develop cases where all the issues are clear and will identify the international issues.[14]

- Paragraph 32 should be revised to clearly state that a taxpayer can choose either a domestic remedy or M.A.P. and if the taxpayer choses one, it does not result in the forfeiture of the other option.

- Some commentators suggested that choosing M.A.P. will result in undue delay for some taxpayers. The better solution would be for participating countries to commit to making counter-adjustments when a domestic law remedy applies.[15]

- Others commented that governments do not always act in good faith. For example, many governments enact domestic legislation that expressly or

---

8 Comments from A.O.T.C.A.-C.F.E.

9 Comments from Arnaud Booij.

10 Comments from TRIBUTE.

11 Comments from B.D.O.

12 Comments from Christian Aid.

13 Comments from B.E.P.S. Monitoring group.

14 B.E.P.S. Monitoring group, pg. 36

15 Comments from BusinessEurope.

implicitly overrides tax treaties. Less openly, M.A.P. can be abused readily by a government seeking to delay or avoid resolution in order to prevent payment of a tax refund. Consequently, objective standards are required of governments that can be enforced by taxpayers and counter parties in the M.A.P. through recourse to domestic or international courts.

The M.A.P. process is always subject to serious practical limitations unless backed-up by an accessible arbitration system.[16]

While the overall comments approve the direction the O.E.C.D. has taken, the consensus is that the rules neither go far enough nor are they specific enough. Action 14 remains a "softball" for recalcitrant governments not acting in a principled way.

[16] Comments from I.B.A. Taxes Committee.