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A Case for MAP Arbitration in India

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India has entered into more than 100 double tax avoidance agreements with foreign nations. Almost all these tax treaties contain an article on Mutual Agreement Procedure (MAP) setting out how India and its treaty partners would resolve, at the instance of the taxpayer, disputes that lead to "taxation not in accordance with the treaty." International tax dispute resolution by way of MAP is not a new concept and is featured in many tax treaties, with some variation with respect to the timeline for submitting MAP requests etc. The attempt however has always been to resolve tax treaty disputes as "effectively" as possible. The OECD's Report on Base Erosion and Profit Shifting (BEPS) Action 14, on making dispute resolution mechanisms more effective, seeks to further this objective by proposing a mandatory, binding arbitration to settle MAP cases. The proposal to introduce mandatory, binding arbitration as a means to effectively settle MAP cases has largely met with dissent, with numerous countries, including India, expressing reservations on introducing such a clause in their tax treaties.

India's Sovereignty Concern

At the Group of Twenty meeting held in Cairns, Australia on September 20-21, 2014, Nirmala Sitaraman, India's Minister of Finance for State, expressed reservations on introducing a mandatory, binding MAP arbitration in India's tax treaties. The Minister then said: "One of the major concerns from the point of view of developing countries is regarding the approach adopted for making dispute resolution mechanisms more effective which includes introduction of mandatory and binding arbitration in the mutual agreement procedure of the tax treaties. This not only impinges on the sovereign rights of developing countries in taxation, but will also limit the ability of the developing countries to apply their domestic laws for taxing non-residents and foreign companies." India's stance on MAP arbitration was unambiguous after the OECD published its final report on BEPS Action 14, in October 2015, in which India did not feature as one of the 20 countries that committed to MAP arbitration. Readers may also recall that, in the wake of Vodafone (and Cairn and Nokia) taking India to ICSID to settle tax disputes, the Government also recently revised its bilateral investment treaties to exclude taxation matters "in view of the fact that taxation is an integral function of the State's sovereignty and hence such matters need not be escalated under treaty dispute settlement mechanism."

But is the Concern Well-Placed?

Whether or not "tax disputes" are "investment disputes" and whether or not both tax and investment disputes can or should go for international arbitration (ICSID or otherwise) will

essentially rest on how a country understands and applies the concepts of state immunity (limited or absolute) and waiver of state immunity. However, a close look at the BEPS Convention reveals that India's sovereignty concern so far as MAP arbitration is concerned is misplaced for the following reasons. First, MAP arbitration as proposed by the OECD, although mandatory and binding, is not automatic. The arbitration process is only kicked off in the event countries fail to reach a MAP settlement in two years from the date of commencement of MAP. Few will disagree that an "endeavor" to settle tax treaty disputes must not only be made but must also be seen to be made. The absence of deadline (or an explanation of what constitutes "endeavor") in tax treaties to reach MAP settlement cannot be a ground for unexplained delay, given that treaty countries not only have an obligation to prevent double taxation but also to prevent it speedily.

India's sovereignty concern is also taken care of by the fact that the arbitrator may only select as its decision either of the proposed resolutions submitted by contracting states (along with position papers) without providing any rationale or explanation in support of its decision. Besides, countries can mutually agree on rules relating to appointment of arbitrators and the type of arbitration process, which means that they will have full control and participation in the arbitration process. For instance, countries have a right to choose one of the arbitrators and the Chair of the arbitration panel cannot be a national or resident of either of the contracting states. It will be puerile then to say that the arbitration panel constituted to conduct the state-to-state arbitration process represent any sovereign nation and exercise sovereign authority of its own.

In any event, countries may terminate arbitration proceedings in cases where the dispute is resolved by way of MAP anytime before the arbitration decision is handed down. Countries may also consider not implementing the arbitration panel's decision if they can agree on a different resolution of disputes within three months from the date of the decision.

A Bleak MAP

India does not have any MAP guidance in place nor does it publish annual statistics on MAP program, which makes the MAP program both vague and opaque (India's response sheet on its MAP program published by the OECD lacks substance too). To get some idea about India's MAP progress, I studied the Annual Reports published by the Finance Ministry on its website for the last ten years ("review period"). A quick perusal of these reports reveals that India has MAP inventories with the following 11 nations as at December 2015: Australia, Canada, China, France, Japan, the Netherlands, Russia, Sweden, Switzerland, the United Kingdom, and the United States.

According to the available data, "a number of cases" were resolved with the United Kingdom, the United States, and Japan during the review period, but no information exists on how many cases were resolved by when and qua which country. As at December 2012, only 13 and 24 cases are recorded to have been resolved with Japan and the United Kingdom, respectively. Only two MAP cases are recorded to have been resolved with China in the last two years; while only five cases are recorded to have been resolved with Canada in 2015. The data reveals that no MAP meetings were held with France and Russia since December 2006 and 2007, respectively. Although few meetings were held between the years 2010 and 2014 with Sweden, Switzerland, and the Netherlands, the reports do not disclose the number of MAP cases resolved with these countries till date, if at all cases were resolved.

It is pertinent to note here that in the last three years, more than 259 MAP cases are recorded to have been resolved with the United States but whether the numbers indicate an "effective" MAP

framework is something to consider. On how India and the United States resolved that many MAP cases in such a short span of time, followed by the United States opening up its bilateral advance pricing agreement program to India, merits another blog.

Besides, of the cases that have been resolved, there is no information in public domain to show as to when the cases were initiated or the time taken to resolve the cases. There is also no information on what disputes the above MAP cases (initiated, resolved and pending) relate to and also how many of these were foreign-initiated. It is also in not public domain if the Indian Competent Authority faced a deadlock with any foreign nation in resolving MAP cases. The data (or the lack of it) paints a bleak picture of India's MAP program, which needs to be brought in line with international best practices and publishing detailed guidance on the MAP program as well as annual MAP statistics will be a step in the right direction.

Way Forward

MAP arbitration acts as a lubricant, and not as a resistant, to international tax dispute settlement. As some would rightly argue (citing the US as an example), to have mandatory, binding arbitration in tax treaties is to not go for arbitration at all. Having a MAP arbitration clause in tax treaties would deter countries from prolonging dispute settlement and constrain them to best use the two-year window in order to reach a settlement under the MAP framework. This in turn will enable India to foster greater investor certainty, which has suffered a great deal amidst unending transfer pricing disputes. Ten out of 11 countries (with the exception of China) with whom India has MAP inventories have committed to binding arbitration under BEPS Action 14 and India should follow suit. It does not get said enough that some of the BEPS items (especially the changes to transfer pricing rules) will inevitably result into greater tax uncertainty, leading to more and more tax disputes. In such a scenario, a commitment to "effectively" resolve disputes through MAP within two years, and by way of arbitration thereafter if need be, will go a long way in building investor trust and confidence in the international tax treaty framework.

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