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Improving Dispute Resolution: the BEPS orphan?

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Friday, October 2nd, 2015

Everyone concerned with international taxation awaits the publication of the final package of BEPS measures by the OECD on Monday 5 October 2015. While the BEPS programme addresses disparities between national tax systems and features of international tax rules that have allowed some multinational companies to enjoy very low effective corporate tax rates, it is acknowledged that the reforms will also give rise to increased double taxation. New rules are themselves will bring disputes about interpretation of application and the uneven implementation of reforms to national tax systems by states acting unilaterally will generate more disputes both between taxpayers and tax administrators as well as between tax administrations.

Even before the BEPS initiative started, the number of international tax disputes has been increasing dramatically. The [OECD has observed](#) a 94.1 % increase in MAP cases notified to it between 2006 and 2013. Many more cases involving cross-border issues are also coming before national courts.

Multilateral treaty

Unlike the firm commitment to include provisions in the proposed multilateral treaty that have been developed to address tax administration concerns relating to hybrids (Action 2), treaty abuse (Action 6) and permanent establishments (Action 7), rule changes to make international dispute resolution more effective are undeveloped ([Action 14](#)). At a seminar during the IFA Congress in Basel, Mike Williams, chair of the ad hoc group responsible for development of the multilateral instrument made it clear that the terms of the BEPS proposals would not be up for re-discussion, although discussion was still necessary in relation to dispute resolution. Early indications are that, while multilateral provisions intended to prevent abuse enjoy wide political support, with more than 80 countries participating in the ad hoc group, only around a quarter of participating countries appear interested in implementing even the existing arbitration mechanisms in article 25 of the OECD model.

Key principles

The four key principles in Action 14 are self-evidently in need of attention:

1. Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith.
2. Ensuring that administrative processes promote the prevention and resolution of treaty related disputes.
3. Ensuring that taxpayers can access the mutual agreement procedure when eligible.
4. Ensuring that cases are resolved once they are in the mutual agreement procedure.

Unfortunately, much of this is essentially a restatement of the objective of earlier work undertaken by the OECD over more than a decade (See eg, [OECD progress report on its work on improving the resolution of cross-border tax disputes 27 July 2004](#)).

The proposed discussion draft on Action 14 to make dispute resolution mechanisms more effective, published on 18 December 2014, contains no new rules. Unlike the other BEPS actions, where the OECD has acknowledged that only changes to the language of treaties can effect the intended reforms, Action 14 continues to rely primarily on amendments to the Commentary, for example, to ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith.

Creative proposals

Among the most creative and positive proposals to address this is the formation of the Group led by Hans Mooij, former Competent Authority for the Netherlands and independent international tax counsel. The Tribute Group has proposed the establishment of a permanent international body specialising in the resolution of tax disputes. This body would be supported and administered by the Permanent Court of Arbitration of the Peace Palace at The Hague.

The group has also been active in drafting innovative model provisions that go beyond the modest role of arbitration in article 25 of the OECD model. Current mechanisms only provide for arbitration where competent authorities are unable to agree. Proposals include a supplementary dispute resolution mechanism, a form of mediation, which is already adopted domestically by a number of countries.

Ideas about the establishment of an international tax court have, historically, been confined to tax theoreticians. So too have been ideas about multilateral tax treaties, whose time now appears to have come.

Delivery of the BEPS objectives to reallocate taxing jurisdiction among states will undoubtedly be a major achievement for the officials charged with this responsibility and governments who have supported it. However, tax can only be collected from business undertaken and there is a risk that uncertainty and double taxation will discourage cross-border activity, causing companies to look inwards and creating new economic distortions. A genuine rule-based approach to international dispute resolution is essential to avoid this.

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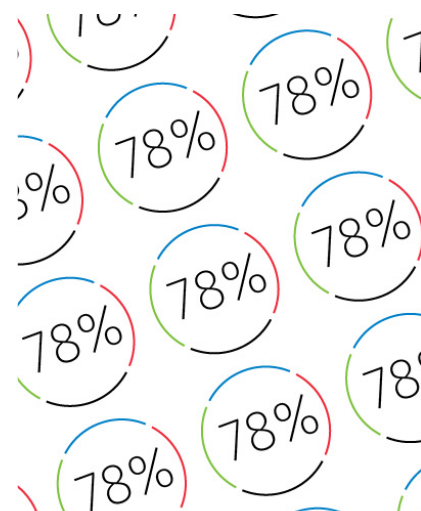
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