
Kluwer International Tax Blog

Mutual disagreement procedure?

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Thursday, October 20th, 2016

The OECD has today published details of the [peer review and monitoring process of the Mutual Agreement Procedure \(MAP\) under Action 14 of the BEPS Action Plan](#).

The framework includes the terms of reference for peer review based on the Action 14 final report minimum standards, an assessment methodology for the process and a reporting framework for MAP statistics. It also provides guidance on information and documentation to be submitted with a MAP request.

The other strand of Action 14 proposals is the introduction of mandatory binding arbitration of disputes that remain unresolved two years after a case is presented for MAP. This, more institutional approach, gives taxpayers a legal remedy for slow or unresolved treaty disputes. It will be included in the Action 15 multilateral instrument to be published by the end of the year. The major limitation of this proposal is that only about 20 countries have indicated a willingness to agree to this mechanism.

More international disputes

Although those countries are among those with the largest MAP inventories at present, it is well recognised that many countries will be brought in to the process as tax administrations across the world increasingly focus on cross-border transactions and investment in light of the BEPS process. In launching the BEPS initiative, the OECD noted that “replacement of the current consensus-based framework by unilateral measures, could lead to global tax chaos marked by the massive re-emergence of double taxation.”(OECD, Action Plan on Base Erosion and Profit Shifting (2013)).

This warning was repeated in setting out the Action Plan: “Consequences of [failure to collaborate] could be damaging in terms of increased possibilities for mismatches, additional disputes, increased uncertainty for business, a battle to be the first to grab taxable income through purported anti-avoidance measures, or a race to the bottom with respect to corporate income taxes.”(OECD, Addressing Base Erosion and Profit Shifting (2013)).

Separate work on dispute resolution undertaken by the UN United Nations Committee of Experts on International Cooperation in Tax Matters at their meeting on 11-14 October 2016 is unlikely to result in a wider interest in tax treaty arbitration.

International tax dispute resolution in the tax field suffers from the same difficulty faced in resolving other public international law disputes, that is there is no general obligation on states to settle disputes (other than to do so peacefully) and an absence of international tribunals with

compulsory jurisdiction.

Peer review

Peer review was first invented by the Global Forum on Transparency and Exchange of Information for Tax Purposes to address the risks to tax compliance posed by non-cooperative jurisdictions.

While expressed in the language of collaboration, in effect it relies on naming and shaming to press those jurisdictions to implement transparency and exchange of information agreements. The objective of this peer reviews and data collection is to seek to eliminate taxation not in accordance with treaty provisions and help resolve any tax-treaty related disputes in a timely and efficient manner.

This initiative, whereby one tax administration looks over the shoulder of another, and the transparency of published data, will undoubtedly improve outcomes and promote the dissemination of best practice.

Limitations

Basic limitations of the system remain unresolved however. Unlike the emerging international regime for information exchange, MAP only applies to taxes specified in the particular treaty (within OECD Model Article 2). New BEPS motivated taxes such as the UK Diverted Profits Tax and Indian Equalisation Levy on digital services are designed to operate outside the scope of tax treaties.

The absence of an obligation to resolve MAP cases presented under Article 25(1), and to make corresponding adjustments because Article 9(2) is omitted from a number of tax treaties have been traditional concerns for tax payers. BEPS has added a further identical cause for concern, by abandoning the “place of effective management” test as the tie-breaker in Article 4(3) for all persons other than individuals, in favour of a MAP “endeavour” to determine the issue.

As a result, taxpayers frequently now look to other instruments to resolve international disputes such as addressing tax disputes as investment disputes under business and investment treaties, or by way of arbitration under investment or concession agreements between foreign investors and host governments. International tax disputes as trade disputes may also become more common as show by the recent WTO Dispute Settlement Body decisions on [Airbus](#) and [Boeing](#).

Judicial supervision of MAP

The OECD peer review process aims at improving the operation of MAP generally, which should improve the quality of outcomes. Where MAP has failed or is failing in an individual case, judicial review of the actions of the competent authorities by domestic courts may be available. The Canadian Federal Court gave judgement in such a case earlier this month. In *CGI Holding LLC v Canada* 2016 FC 1086 (CanLII), the Canadian and United States competent authorities were unable to reach a mutual agreement. The taxpayer CGI sought judicial review of the conduct of the Canadian competent authority throughout the MAP Process, arguing a lack of procedural fairness. The court ruled that the MAP process is subject to judicial supervision but as a diplomatic activity is limited in its exercise of supervision by deference to powers of the executive over foreign affairs. It held that the court will only intervene if decision falls outside the range of possible, acceptable outcomes, defensible in respect of the facts and the law. Unfortunately, the decision did not address the central shortcoming of MAP, namely what constitutes an “endeavour” in those

cases where mutual agreement is not reached.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe [here](#).

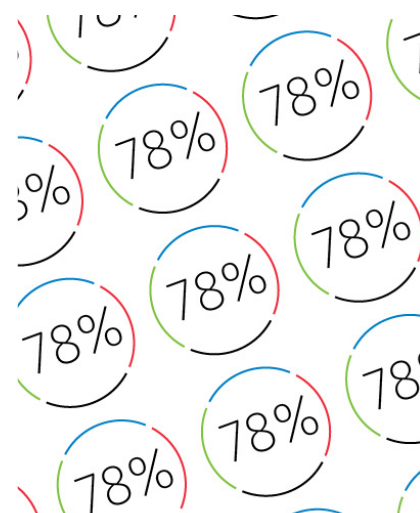
Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

78% of the lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity.

Discover Kluwer International Tax Law.
The intuitive research platform for Tax Professionals.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, October 20th, 2016 at 7:24 pm and is filed under [Arbitration](#), [BEPS](#), [OECD](#), [Tax Treaties](#), [United Nations](#), [WTO](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

