taxnotes® international

Volume 89, Number 8 ■ February 19, 2018

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Reprinted from *Tax Notes International*, February 19, 2018, p. 695

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In this article, the authors discuss how taxpayers can leverage the emphasis on the mutual agreement procedure and mandatory binding arbitration in action 14 of the base erosion and profit-shifting project to efficiently resolve active or potential MAP cases.

The OECD reached another milestone recently in connection with its base erosion and profit-shifting project when it released the first two batches of peer review reports under BEPS action 14 (dispute resolution).[1] The reports evaluate compliance with what action 14 defines as the minimum standard countries should have in place to resolve international tax disputes using their treaties' mutual agreement procedures.

Overall, the countries evaluated met many elements of the minimum standard; however, the reports include more than 280 recommendations, showing there is room for improvement. Notably, almost every country evaluated has struggled to resolve transfer pricing disputes in two years.[2] As explained below, the emphasis in action 14 on mandatory binding arbitration and timely resolving MAP disputes pressures tax authorities to resolve cases efficiently. Taxpayers with active or potential MAP cases can leverage that pressure by carefully following procedures and working with competent authorities to resolve disputes.

I. Background

The MAP article in tax treaties (article 25 of the OECD model tax convention) provides a mechanism, independent of ordinary domestic legal remedies, through which tax authorities can resolve differences regarding treaty interpretation or application. The MAP process is fundamental to ensuring that taxpayers entitled to treaty benefits are not subject to double taxation.

Action 14 is meant to strengthen the effectiveness and efficiency of the MAP process. In particular, it seeks to minimize the risks of uncertainty and unintended double taxation by

[1]The first batch, released in September, evaluated Belgium, Canada, the Netherlands, Switzerland, the United Kingdom, and the United States. The second batch, released in December, evaluated Austria, France, Germany, Italy, Liechtenstein, Luxembourg, and Sweden.

[2]The OECD recently published aggregated MAP statistics for 48 countries, revealing a 30-month average for resolving transfer pricing cases.

ensuring the consistent and proper implementation of tax treaties. In adopting action 14, members of the inclusive framework — a collection of more than 100 countries and jurisdictions, including all OECD and G-20 members — have agreed to a minimum standard for the resolution of treaty-related disputes. They have further agreed to establish a strong peer-based monitoring mechanism to ensure the minimum standard is implemented quickly and effectively.[3]

The new minimum standard consists of specific measures targeted at four key areas: preventing disputes, increasing access to MAP, resolving MAP cases, and implementing MAP agreements.[4] For example, to comply with the minimum standard, countries must incorporate specific provisions from article 25 of the OECD model into their tax treaties. As another example, countries must publish a MAP profile, which includes a country's domestic rules for accessing and navigating the MAP process, on a shared public platform.[5]

II. Time Limits for Resolving MAP Cases

Action 14 creates two time limits for resolving MAP cases. First, under the minimum standard, members of the inclusive framework must resolve MAP cases in an average time frame of 24 months (the statistical time frame). Progress in meeting that target is reported in accordance with the MAP statistics reporting framework, which reflects a collaborative approach for resolving MAP cases by adopting a common timeline. The framework includes common definitions and rules for identifying the number of MAP cases, as well as the start and completion dates. As shown in Table 1, the countries examined in the initial peer review reports generally struggled to resolve transfer pricing cases in 24 months.

Table 1. Resolution of Transfer Pricing Cases

Country	Transfer Pricing Cases Resolved in 2016	Average Time to Resolve Cases (In months)
United States	145	31.61
Belgium	22	39.67
Canada	141	20.77
Netherlands	14	34.38
Switzerland	54	27.42
United Kingdom	38	25.42
Austria	12	40.70
France	161	29.53
Germany	135	33.09
Italy	9	9.31
Liechtenstein	1	19.04
Luxembourg	1	40.70
Sweden	22	31.21

Second, while mandatory binding arbitration is an optional element of action 14, there has been a significant commitment to implement it as a mechanism to guarantee that treaty-related disputes will be resolved within a specified time frame. According to the June 2017 inclusive framework progress report, more than 25 countries had committed to implement mandatory binding arbitration, either through action 14 or the Multilateral Convention to Implement Tax Treaty Related Measures (the multilateral instrument). While 25 countries might not sound like a lot, they were involved in more than 90 percent of the outstanding MAP cases among OECD members at the end of 2015. Even so, the initial peer review reports reveal that many bilateral tax treaties do not provide for arbitration, as shown in Table 2.

According to the OECD's October 2016 action 14 peer review documents, the arbitration time frame is calculated differently than the statistical time frame. The start date for arbitration under the MLI is the earlier of the date both competent authorities have notified the taxpayer that they have received all information necessary to undertake substantive consideration of the case,

[3] *See* action 14 report; and OECD, "Inclusive Framework on BEPS" (June 2017), at 4.

[4] *See* OECD, "Making Dispute Resolution More Effective — MAP Peer Review Report, United States (Stage 1)" (2017), at 9-10.

[5] Many countries' MAP profiles are available on the OECD's website.

Table 2. Tax Treaties With Arbitration Procedures

Country	Tax Treaties in Force	Treaties With Arbitration Provisions in Force*
United States	58	4
Belgium	89	2
Canada	93	20
Netherlands	90	42
Switzerland	90	26
United Kingdom	128	21
Austria	89	10
France	118	7
Germany	89	14
Italy	92	18
Liechtenstein	17	11
Luxembourg	79	12
Sweden	84	5

*Belgium, the Netherlands, the United Kingdom, Austria, France, Germany, Italy, Luxembourg, and Sweden are signatories to the EU arbitration convention, which provides an arbitration procedure for settling transfer pricing disputes between EU member states.

or three months after the second competent authority has been notified of the request. If additional information is requested, the start date is the earlier of the date both competent authorities notify the taxpayer that they have received the necessary information, or three months after the last competent authority request for information. Once the start date is established, the case is submitted to arbitration if not resolved in two years, provided that both competent authorities do not agree to a different time period.

The MAP start date for the statistical time frame is the earlier of one week from the date that the second competent authority is notified of the request, or five weeks from the date of the taxpayer's MAP request. However, like with the arbitration timeline start date, the MAP start date for the statistical time frame can be postponed if the taxpayer's MAP request does not include all required information and the competent authority notifies the taxpayer within two months of the request.

The MAP end date for the statistical time frame is the date of an official communication from the competent authority informing the taxpayer of the outcome of its MAP request. Possible outcomes that would trigger the end date include, but are not limited to, a mutual agreement that fully or partially eliminates double tax, unilateral relief, or access to MAP being denied.

III. Action 14 Encourages Efficiency

The time limitations in action 14 should compel competent authorities to administer cases efficiently. First, while the statistical time frame does not create a firm deadline, competent authorities with unfavorable MAP statistics might feel pressured to resolve cases in less time or risk potentially adverse consequences. For example, poor MAP statistics could impede future negotiations, because they create the perception that the competent authority is difficult to work with. Further, poor statistics could lead multinationals to question whether to establish (or maintain) operations in countries with weak or inefficient dispute resolution mechanisms.

Second, the prospect of mandatory binding arbitration should further influence competent authorities to be efficient. For example, the MLI recommends that MAP cases be submitted to arbitration if not resolved in two years, a firm deadline. And if the arbitration proceedings reflect the rules in U.S. arbitration agreements, the stakes for competent authorities will be high because the arbitration board does not make its own determination of the correct result; it simply chooses one of the positions.[6] Thus, the prospect of arbitration should compel competent authorities to take reasonable positions and move the case along or risk having their positions rejected.

[6]U.S. arbitration agreements provide for what is commonly referred to as "baseball-style" arbitration, where both competent authorities present their case, and then the arbitration board selects the winner. The MLI also includes an alternative approach to arbitration that more closely resembles a judicial proceeding — that is, the arbitration panel reaches its own conclusion after allowing the competent authorities to present their positions.

Finally, in addition to the action 14 time limits, other aspects of the BEPS action plan will likely lead to an increase in cross-border tax disputes and thus an increase in MAP requests.[7] For example, actions 8-10 revise the OECD transfer pricing guidelines to allow tax authorities to disregard or recharacterize intercompany transactions they deem not commercially rational; require related parties to control any risk they assume; and emphasize development, enhancement, maintenance, protection, and exploitation (so-called DEMPE functions) in pricing related-party transactions involving intangibles. Likewise, action 7 — now implemented in some treaties through the MLI — lowers the threshold for recognizing a permanent establishment. And action 13 creates several new reporting requirements that without additional context could mislead tax authorities into initiating disputes that otherwise would not have occurred. In sum, as a result of the BEPS action plan, competent authorities will likely have to resolve more MAP disputes in less time.

IV. Best Practices Under Action 14

Taxpayers should use the action 14 time limits to their advantage. When dealing with tax authorities taking unreasonable positions, taxpayers should follow the procedures to ensure access to MAP, start the clock, and keep the process moving. Taxpayers should also help competent authorities resolve cases before the clock runs out. By doing so, taxpayers can create an environment for reaching an efficient and favorable outcome.

A. Getting Into MAP

Under U.S. rules, efforts to secure access to MAP should begin early in the audit process: Taxpayers can be denied access for any conduct that significantly impedes the ability of the IRS exam function to adequately audit the issues in the competent authority request.[8] For example, a taxpayer that fails to present material information during the audit, and then attempts to present the same information to the competent authorities, can be denied access to or be removed from MAP. Taxpayers can also be denied access to MAP for refusing to extend the limitations period for assessment of tax. In short, taxpayers should cooperate and present all material information to IRS exam or risk being precluded from MAP.

Taxpayers should also be cautious in entering agreements with the IRS or other tax authorities. For example, if a taxpayer agrees to a foreign-initiated adjustment or enters into a unilateral advance pricing agreement involving important legal or factual questions, she can be denied access to MAP if the agreement impedes full and fair consideration of the competent authority issue. Further, although this would not preclude access to MAP entirely, if a taxpayer enters into a closing agreement with IRS exam, the U.S. competent authority will only seek a correlative adjustment, thereby limiting options to obtain relief from double taxation. Thus, taxpayers can and should informally consult with the competent authority before settling any transfer pricing issues.

Taxpayers should also watch for transfer pricing matters being examined under domestic legislation that, if sustained, could give rise to double taxation. Because of the increased pressure from the action 14 time limits, tax authorities might be encouraged to propose adjustments based on domestic laws to preclude access to MAP. For example, a tax authority could deny deductions for payments to a foreign related party based on inadequate documentation or a general antiavoidance rule. Thus, taxpayers should be prepared to take control of the narrative by framing relevant issues in transfer pricing terms before auditors get too far along in developing positions based on domestic rules.

Once an issue that could give rise to double taxation has been identified, taxpayers should take care to comply with treaty requirements and other published guidance to avoid being precluded from MAP. Specifically, the MAP article in many tax treaties requires that the competent authorities be notified within a specified period for the taxpayer to obtain access to MAP, or to benefit from the special provision in most MAP articles that allows MAP resolutions to

[7] *See* Jason Osborn and Elena Khripounova, "Advance Pricing Agreements in the Post-BEPS Era," *Tax Notes*, Mar. 7, 2016, p. 1179; and Osborn, Brian Kittle, and Kenneth Klein, "Are the Final BEPS Reports on Actions 8-10 Effective Now?" *Tax Notes Int'l*, Aug. 22, 2016, p. 709.

[8] Rev. Proc. 2015-40, 2015-35 IRB 236.

be implemented despite domestic procedural limitations, such as statutes of limitations. The time periods for providing the requisite notifications vary by treaty and often differ from domestic limitations statutes. For example, the Canada-U.S. tax treaty generally requires that the competent authorities be notified within six years from the end of the tax year the adjustment relates to, while the U.K.-U.S. tax treaty requires notification within three years from the date the adjustment is proposed.

Taxpayers should also be aware of any local notification requirements. Rev. Proc. 2015-40, 2015-35 IRB 236, for example, includes an additional requirement to annually update the competent authority of any prior treaty notifications until the MAP request has been filed. For other countries, identifying the proper procedural requirements should become easier with the implementation of action 14 because the minimum standard requires countries to publish their MAP requirements on a public forum.

Finally, if the treaty permits filing the competent authority request in either country, taxpayers should consider simultaneously filing MAP requests in both jurisdictions.[9] That approach adds an additional layer of protection in case one competent authority disputes access to MAP.

B. Starting the Clock

The timing pressure created by action 14 could cause competent authorities to delay the start date of the MAP request. As indicated, the start date for both action 14 statistics and mandatory arbitration does not occur until the tax authorities receive the necessary information to substantively consider the case. Thus, if either competent authority determines that the initial MAP request lacks the necessary information, it can postpone the start date for both arbitration and action 14 statistical purposes. In fact, the competent authorities could theoretically continue to postpone the start date after receiving follow-up submissions if they determine the taxpayer still hasn't provided sufficient information.

Because of the potential for delay, taxpayers should prepare a strong MAP submission from the outset. In doing so, they should consult MAP profiles for published guidance and err on the side of overinclusion when interpreting ambiguities. Moreover, taxpayers should anticipate potential follow-up questions before filing a MAP request, and in some cases might want to consider providing responses to anticipated questions in the initial submission, even if not required upfront. And although not always required, taxpayers should request a prefiling conference with the competent authorities to confirm what should be included in the submission.

To speed up the review process, taxpayers should consider providing electronic documents bookmarked and linked to other source documents. When providing Excel spreadsheets, all formulas should remain intact. Failing to provide information in an easily accessible format may hinder the review process and create the potential for further delay. Finally, after filing the submission, taxpayers should follow up with the competent authorities and request written confirmation that the MAP request has been accepted.

C. Keeping the Clock Moving

The prospect of mandatory binding arbitration could also lead competent authorities to stop the clock after the MAP request has been accepted. As indicated, under the MLI, competent authorities can agree to a different timeline for beginning mandatory binding arbitration. U.S. arbitration agreements similarly allow competent authorities to delay the start of arbitration. For example, the Canada-U.S. arbitration agreement allows the competent authorities to postpone arbitration when the taxpayer has been slow to respond to requests for information. Hence, milking the clock by slowly responding to competent authority requests is an ineffective approach for getting to arbitration.

D. Resolving Issues Before the Clock Runs Out

Some cases will prove complex and require more than two years to resolve. As a result,

[9] While many income tax treaties specify the jurisdiction to file the competent authority request, the new OECD model tax convention recommends allowing competent authority requests to be filed in either jurisdiction.

competent authorities have incentives to resolve easier cases more quickly to bring their averages down. Thus, taxpayers should frame their issues straightforwardly through clear advocacy — that is, a taxpayer that believes it has an easy case appropriate for expedited resolution should be sure to explain its reasoning. In doing so, taxpayers should be proactive in suggesting to competent authorities potential unilateral solutions (withdrawal or correlative relief) for resolving their case. Taxpayers should also take advantage of opportunities to provide joint presentations to both competent authorities. Having both sides at the same place is an invaluable opportunity to frame the issues, offer potential solutions, and identify common ground.

E. Keeping Caseloads Down

The potential for an increased caseload also encourages competent authorities to prevent the same issues from recurring. Action 14 suggests that countries implement appropriate procedures for resolving multiple tax years when the relevant facts and circumstances remain the same. U.S. taxpayers can use the accelerated competent authority procedure to resolve additional tax years not under audit as long as tax returns have been filed for those years. To resolve similar issues for future tax years if tax returns have not been filed, taxpayers should consider proposing an advance pricing agreement. Finally, when the competent authorities reach an agreement, taxpayers should attempt to document the resolution in the most challenge-proof instrument available in each jurisdiction, such as a closing agreement with the IRS.

V. Conclusion

While taxpayers may encounter more international tax disputes as countries continue to implement the BEPS action plan, action 14 provides some reprieve by increasing access to MAP. As a result, a taxpayer's ability to efficiently resolve disputes through MAP has become even more critical. ■