Grant Thornton

An instinct for growth™

Grant Thornton discussion draft response

BEPS Action 14: Make dispute resolution mechanisms more effective

Grant Thornton International Ltd welcomes the opportunity to comment on the OECD public discussion draft entitled BEPS Action 14: Make dispute resolution mechanisms more effective, issued 18 December 2014. Our general observations and detailed comments are set out below.

General observations

In our experience, taxpayers are in favour of the mutual agreement procedure (MAP) process and would like to see improved access to the existing system, rather than a radical change in MAP or the creation of an alternative process.

Furthermore, where the MAP process has worked well for taxpayers, it has been between knowledgeable, experienced competent authority (CA) teams who had worked with each other a lot and who both wanted to resolve the issue of double taxation through applying a principles based approach.

Conversely, taxpayers have been reticent to engage in the MAP process where barriers were placed in the way of entering the process, where the domestic tax collection continued during MAP and where previous experience suggested that the CAs were unlikely to come to agreement in a timely manner. The options presented in the discussion draft go some way to addressing these concerns.

We note that the introduction of other BEPS measures is likely to place greater pressure on the MAP and dispute resolution processes already in place. It was in recognition of this that the OECD have introduced BEPS action 14, in order to ensure swifter and more transparent dispute resolution. We would be disappointed if other BEPS actions were therefore introduced without sufficient support being given to Action 14.

We welcome the OECD's recognition that there are currently barriers to entering the MAP process and to cases progressing once accepted into MAP. In particular, we welcome options 4, 7, 10, 16 and 17 of the discussion draft. These options relate to supporting the CAs resourcing of MAP, improving the simplicity and transparency of MAP and clarifying the relationship between MAP and domestic laws, particularly regarding tax collection during MAP.

While we were disappointed that there was no consensus on moving towards mandatory binding MAP arbitration, we recognise that the options presented in the discussion draft are a serious attempt to address the obstacles to speedy and effective resolution of treaty-related disputes through MAP.

We note that MAP is one aspect of the dispute resolution process. Making improvements to that wider process may also impact on the success of MAP. For example, helping tax authorities to identify the most appropriate cases to audit, when to pursue and when to close a case, as well as working with taxpayers to resolve cases more quickly, could all relieve the, soon to be further increased, pressure on MAP.

Further improvements

Taxpayers' charter

In the UK, there exists a general 'taxpayers charter', which sets out principles binding on both taxpayers and the fiscal authority. The taxpayer is expected to act honestly and in good faith and in return there is a promise of fair and principled behaviour and respect of taxpayer confidentiality by the fiscal authority.

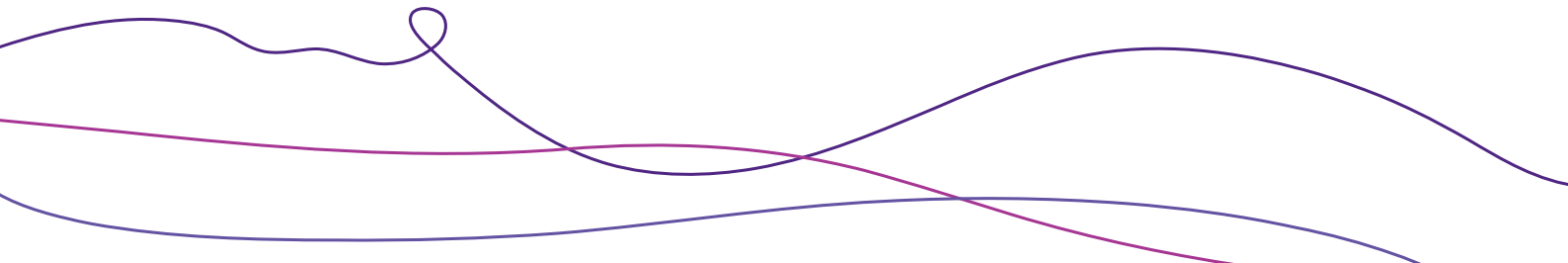
A similar high-level charter relating to MAP procedures could provide protection for CAs by regulating taxpayer intentions about invoking MAP, without dictating in detail how a MAP procedure is to be run. The charter would, however, be a public reassurance for taxpayers that a CA remains open-minded about access to MAP and that the CA will abide by the principles of concluding MAP processes in a timely and unprejudiced matter. The charter could potentially become a first-stage test point for any third party who assesses whether MAP has been sought or granted appropriately.

Grant Thornton International Ltd believes that this proposal could potentially address in part the issues highlighted by options 10, 12, 16, 17, 18 and 28 of the discussion draft. These options address the transparency and simplicity of the MAP process, whether MAP can be applied to cases where anti-abuse legislation has been invoked at a domestic level, the wider relationship between MAP and domestic legislation and the time limits applied to MAP resolution.

Paying an entry fee to MAP

We are aware that all CAs face increased resource pressures, particularly in the area of MAP resolution. Some tax authorities charge an entry fee to participate in an advance pricing agreement and we could see a position where tax authorities similarly seek to charge for entry into the MAP process.

We do not accept the principle that taxpayers should pay in order to enter an arbitration or tax audit process, to which they are legally entitled under the relevant treaty. However, from a purely pragmatic perspective, if an entry fee was imposed in respect of MAP and that fee was nominal and the monies received were used to resource costs incurred by the CAs in running the MAP arbitration, then taxpayers may accept the charge.



Comments on the options presented in the discussion draft

Our specific comments on some of the options are summarised below:

Option 1 – the importance of resolving cases – CAs are more likely to strive for the resolution of a case if they have strong working relationships fostered by better co-ordination, transparency and trust between them (see option 21) and through adequate resourcing (see option 4 below).

Option 4 – provide adequate resources to CAs – an effective way to resolve disputes is vital if taxpayers are to embrace and accept the BEPS programme. This means, despite embracing ways to reduce the costs of MAP (see comments on option 32 below), the need for resources for resolving disputes is likely to be higher in the future. We therefore welcome this option, particularly as we believe that MAP applications will rise as a result of other BEPS actions.

Option 7 – ensure that audit settlements do not block access to MAP – it is important that taxpayers have full access to MAP and we therefore strongly support the move to discontinue the practice of preventing taxpayers seeking MAP at the conclusion of an audit.

Option 10 – improve transparency and access to MAP – given that BEPS may result in a larger number of taxpayers seeking redress through MAP than previously had been the case, many of whom may not have used the process before, all improvements to the transparency of and access to MAP are welcome. We strongly welcome this option.

Option 11 – guidance on minimum contents of a MAP request – while we agree that further guidance would be helpful to taxpayers, as noted in our comments on option 30 below, greater involvement of taxpayers in the process may allow quicker, more focused answers to questions of fact that will overcome the need to request large amounts of information at the start of the process.

Option 12 – clarify the availability of MAP access where an anti-abuse provision is applied – we fully support option 12. We note that some territories, such as the UK with its proposed Diverted Profits Tax (DPT), are already contemplating the adoption of domestic anti-abuse rules in anticipation of the outcome of the BEPS project. The relevant tax authorities may argue that such measures do not fall within the ambit of double tax treaties.

We are concerned that such measures could lead to multiple tax charges on the same profits without the possibility of effective double taxation relief. For example, this might occur if one state argued that the activities of an enterprise in their jurisdiction are tantamount to a Permanent Establishment (PE) and impose tax on that basis under domestic anti-abuse rules whereas the state of residence of the enterprise does not consider the PE threshold in the relevant treaty or treaties is met.

The first-mentioned state might also argue that they are not obliged to allow a deduction for the expenses of the foreign enterprise where the expenses are paid to another group entity which in their view does not have sufficient commercial substance. We believe it is important that MAP can be used here to avoid double taxation and to allow an appropriate deduction for expenses in the relevant territories.

Paragraph 59 of the public discussion draft invites commentators 'to provide other examples of multilateral situations that raise issues for the mutual agreement procedure'. We consider the situations referred to above as suitable examples of where two or more jurisdictions may assert taxing rights over the same profits and a multilateral solution is necessary.

Option 16 – the relationship between MAP and domestic law remedies – we strongly believe that there should be greater flexibility allowed to taxpayers to enable them to pursue MAP, even if all domestic options have not been fully exhausted.

Option 17 – collection of taxes – we consider it vital that tax and interest collection is suspended while MAP is pending or in progress so that cash-flow issues do not prevent taxpayers from accessing the MAP process.

We also consider that domestic anti-abuse rules which require tax to be paid upfront based on an estimate issued in a notice by the tax authority need to be included within the scope of this measure, particularly given that such notices may in some cases significantly overestimate the tax that might ultimately transpire to be due. In this situation, where the MAP is invoked, no tax should be payable under the relevant domestic anti-abuse rules until the case is satisfactorily resolved.

Option 18 – issues relating to time limits and access to MAP – as per our comments in respect of option 10 above, it is important to clarify the meaning of terms such as 'first notification' so as not to disadvantage first-time MAP users.

Option 21 – improve CA co-operation, transparency and working relationships – measures to improve and strengthen the working relationships between CAs are likely to lead to cases being more speedily resolved.

Option 26 – deferral of MAP – we could not identify circumstances in which the deferral of MAP would be appropriate. Further examples of the situations in which deferral would be relevant is required in order to better understand this option.

Option 29 – default form of decision making – while we can see pros and cons of both forms of default decision-making, we have a preference for the so-called 'baseball-arbitration' as it requires tax authorities to focus on what is likely to be realistically acceptable to the arbitrator and the other tax authority.

Option 30 – evidence – we consider that taxpayers should be more involved in the MAP process to enable the quicker resolution of factual queries as well as to be more regularly informed on the progress of their MAP claim. Ideally, we would like to see taxpayers, their advisers and the CAs working together more collaboratively to reach an acceptable conclusion in a timely manner for all stakeholders.

Option 31 – treatment of multiple, contingent and integrated issues – BEPS is likely to increase these types of MAP claims. Guidance to arbitrators to help them navigate these types of issues is vital to prevent MAP from becoming too slow to be effective.

Option 32 – costs and administration of MAP – given that the number and complexity of MAP claims are likely to increase as a result of BEPS, there should be a recognition that the costs of administering the process will necessarily increase too. We consider that CAs should provide sufficient resources to enable the process to operate effectively (see comments on option 4). CAs should also adopt modern technologies (for example increased use of e-mail, video conference etc) wherever possible, to minimise costs yet maintain a high level of interaction between CAs.

Option 34 – guidance on consideration of interest and penalties – we consider that interest and penalties (as well the tax itself – see comments on option 17) should be suspended while the MAP process is pending or in progress. This option is also important in cases where interest may be levied on tax underpaid in one country but where no interest is paid in the other country where tax has been overpaid.

Conclusions

Grant Thornton International Ltd welcomes the OECD's recognition of the current need to address the issue of access to and proper application of MAP and hopes that the comments set out above assist the OECD in this. If you would like to discuss any of these points in more detail then please contact your usual Grant Thornton contact, alternatively please contact or Elizabeth Hughes, Director, Grant Thornton UK LLP at elizabeth.hughes@uk.gt.com or Annis Lampard, Senior Manager, Grant Thornton UK LLP at annis.lampard@uk.gt.com.

grantthornton.global