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Global Tax Alert

OECD holds second Tax Certainty Day

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Executive summary

The Organisation for Economic Cooperation and Development's (OECD) Centre for Tax Policy and Administration (CTPA) held its second annual Tax Certainty Day on 18 November 2020. The virtual discussion focused on the state of the tax certainty agenda and ways to make further improvements to both dispute prevention and dispute resolution programs and processes.

The Tax Certainty Day was attended virtually by approximately 200 participants, including members of the OECD secretariat, officials from national tax authorities, and representatives of private and public sector organizations. During the event, the OECD released the 2019 MAP Statistics[1] and announced the 2019 MAP awards.[2] The OECD also announced a public consultation on the peer reviews under BEPS Action 14 on Effective Dispute Resolution.[3] That consultation is discussed further in an EY Global Tax Alert.[4]

Detailed discussion

The Tax Certainty Day agenda included seven sessions:

- Session 1: Welcome and introduction to the meeting
- Session 2: Introduction and release of 2019 MAP statistics
- Session 3: Mutual Agreement Procedure (MAP) Awards

Building a better working world

- Session 4: The current MAP landscape
- Session 5: The International Compliance Assurance Programme (ICAP)
- Session 6: Other tax certainty tools
- Session 7: Accelerating tax certainty through technology

Opening remarks

Grace Perez Navarro, Deputy Director of the CTPA, opened the program by noting that until recently, tax certainty as a concept used to refer to dispute resolution only. While dispute resolution remains important, she indicated that the tax certainty agenda now also looks at a broader range of innovative ways to address dispute prevention. Achim Pross, Head of the International Cooperation and Administration Division of the CTPA, further noted that the Tax Certainty Day plays a role in informing the OECD Forum on Tax Administration (FTA) annual plenary session, which is scheduled to take place on 7-8 December 2020 as a virtual meeting.

Session 1: Welcome and introduction to the meeting

The welcome and introduction to the meeting were presented by a Canadian Revenue Agency (CRA) official and the chair of the Business at OECD Tax Committee. The CRA official's comments focused on the importance of tax certainty in underpinning global trade and investment as the world enters a recovery phase from the COVID-19 pandemic. The Business at OECD chair noted that the tax certainty agenda is helpful in restoring trust in both business and national tax authorities, with such trust being a particularly strong element of Base Erosion and Profit Shifting (BEPS) Action 14 on effective dispute resolution, and referring to the MAP peer review process as a multi-year process in building trust that taxing authorities are "doing the right thing."

Session 2: Introduction and release of 2019 MAP statistics

Achim Pross and Félicie Bonnet, an OECD advisor, provided an overview of the OECD's 2019 MAP statistics. Pross noted that since introducing the current reporting methodology in 2016, the data continues to improve each year. He indicated that most MAP cases come from between 50 and 60 jurisdictions, while the 10 jurisdictions with the largest inventories of MAP cases represent approximately 70% of all cases globally. He further noted that MAP inventories continue to grow, with an average of seven new MAP cases being submitted each day around the world. Concluding the session, Pross noted two key points to take forward. The first was the issue of speed, with many cases still taking in excess of the 25-month average timeline to complete. The second was the importance of continuing the strong focus on dispute prevention tools, such as joint and simultaneous audits or ICAP, in order to minimize the pipeline of new MAP cases. The 2019 MAP statistics are discussed further in an EY Global Tax Alert.[5]

Session 3: MAP Awards

The MAP awards, which are a new innovation by the OECD's CTPA, were announced by the CRA Commissioner who is the current chair of the FTA. The MAP awards also are discussed in the above EY Global Tax Alert.[6]

Before introducing the next session, Pross highlighted two tax certainty-related matters that were not on the day's formal agenda: comparative risk assessments and joint and simultaneous audits. He indicated that both areas are a continuing focus for the OECD secretariat.

Session 4: The current MAP landscape

Session 4, a panel session, focused on the current MAP landscape, discussing how it has evolved in the last 12 months, and looking at possible future developments. Chairing the session, Sandra Knaepen, Co-Head of the CTPA's Tax Certainty Unit, noted that detailed MAP information is available in the MAP profile section of the OECD website and discussed a number of perceived difficulties with the MAP program. These include the fact that, where domestic remedies are suggested by a Competent Authority, some jurisdictions can deviate from their national court's decisions, while others cannot. She also noted that no information is available on cases that the taxpayer has withdrawn, which impacts overall inventory numbers.

She indicated that the MAP peer review process shows that there are certain things that could work better in MAP if they were to be addressed. Based on the results of the peer review process, the OECD secretariat has made proposals to improve transparency, improve the collection methodology, and review deferrals granted to jurisdictions. Some suggestions have been made on strengthening the MAP minimum standard, including ensuring that penalties better align with MAP outcomes, but nothing has yet been agreed or decided, and such issues continue to be discussed in the MAP forum.

Knaepen asked the panelists to focus on whether the MAP statistics align with what they are experiencing in dealing with MAP. One private sector panelist noted that "MAP works and that's why it's so popular." She noted that the "how long a MAP takes" is often a worry for taxpayers and expressed concern that the MAP inventory will continue to rise, reflecting more and more aggressive enforcement activity around the world. She further indicated that it would be helpful if tax authority examiners focused their efforts on the meaning of their initial adjustment or assessment, and the impact that it has on taxpayers. She described the United States (US) Accelerated Competent Authority Program (ACAP) as a useful program, allowing similar issues across multiple years to be addressed. Finally, she said that some of the new virtual technology techniques may improve MAP, but resource challenges continue to be a central issue.

Another private sector panelist expressed the view that concrete improvements are evident in the MAP program despite an increase in the total number of MAP cases. He noted the need for taxpayers to balance any MAP timeline against a typical 8-10-year timeline for litigation. In terms of improvements to MAP, he suggested that more resources should be assigned to the biggest cases, as well as to the first stages of MAP, where case assessments first occur. He further suggested that taxpayers should be given more opportunities to be involved in their MAP cases, and that a less hierarchical approach from tax authorities may also be useful. Finally, he indicated that other instruments such as ICAP, joint audits and arbitration should also continue to be implemented, with arbitration being a noted success when added to the European Union (EU) dispute resolution model.

A US Internal Revenue Service (IRS) official described the 2020 review of MAP as a key step in improving Action 14, noting that it is important for each tax authority to stand back from its own processes and to instead take the opportunity to look closely at the MAP process, identifying potential improvements to each step.

Concluding the session, Knaepen stated that while there is more trust in MAP now than in prior years, other instruments are still needed to stop cases entering MAP in the first place.

Session 5: ICAP

This session involved a discussion among representatives of tax administrations and multinational enterprise (MNE) groups that have participated in the second ICAP pilot. Mark Johnson, an OECD advisor and co-head of the CTPA's Tax Certainty Unit introduced the session, explaining that ICAP is a voluntary dispute resolution program designed to stem the flow of issues into MAP. He noted that it has been designed and is supported on an ongoing basis by the OECD and uses country-by-country (CbC) reports as well as other taxpayer-provided information to facilitate open, cooperative and multilateral engagement between these taxpayers and typically four to eight tax administrations, with a view to providing early tax certainty and assurance. A taxpayer that successfully completes ICAP will receive an outcome letter confirming low risk status from each of the participating tax administrations, confirming that they anticipate no further compliance interventions on the risks reviewed for a period of two years.

ICAP commenced with a first pilot in January 2018, with 8 participating tax authorities, and was expanded in a second pilot in March 2019, in which 19 tax authorities participated. The OECD advisor indicated that virtual technology platforms have played a critical role in the second phase, and that while ICAP does not provide legal certainty, outcome letters should give taxpayers a "good level of certainty."

A US IRS official welcomed the introduction of ICAP as a way of encouraging voluntary tax compliance, noting that the IRS has participated in both ICAP pilots. She stressed the IRS's interest in engaging in programs that encourage voluntary compliance, expressing the view that ICAP is a good solution even for higher risk businesses that may have complex supply chains or transactions. In her view, ICAP aligns well with IRS goals of preserving audit resources for the most aggressive, non-transparent taxpayers. She also noted that ICAP allows the IRS to develop better relationships with both businesses and other tax authorities.

She applauded the willingness of both the OECD and jurisdictions to make changes to the program between pilots, including scaling back the ICAP documentation package in the second pilot and making modifications to the risk assessment stage, where a two-phase approach became a single phase in ICAP 2. She noted that the future of ICAP depends on continued resource commitment by tax authorities, as well as more tax authorities joining the program, which she said would make it more relevant for business. Finally, she indicated that finding an appropriate IT solution in which participating tax authorities can share and discuss taxpayer involvement in a secure, shared environment is also important.

An official with Danish Tax Agency described Denmark's experience in leading one of the risk assessments in the second ICAP pilot as "fruitful." He indicated that a key driver for Denmark to join the program was to have a better understanding of how transfer pricing risk assessments may work under a more standardized approach, though he noted that transfer pricing fact patterns are different for every company. He also noted that they took away lessons from ICAP that can be applied to other BEPS-related topics.

Senior tax department personnel from two multinational companies noted that ICAP aligns to their corporate social responsibility strategies, but the lack of legal certainty delivered by the program continues to be an issue. They indicated that the ability to have real-time discussions with multiple tax authorities was an improvement on having more fragmented discussions several years later, where personnel changes can impact efficiency and accuracy of conversation. They further noted that some of the more experienced tax authorities in the program had been helpful in ensuring that less experienced tax administrations did not "move into audit mode." There was no discussion on whether there would be a third ICAP pilot.

Session 6: Tax certainty tools

Pross presented a brief update on ongoing tax certainty projects and tools, with a focus on improving Advance Pricing Agreements (APAs), the potential introduction of standardized benchmarking data in certain transfer pricing processes, and the potential creation of multilateral MAP and APA programs.

Introducing the session, Knaepen explained that the 2019 FTA plenary had resulted in the creation of multijurisdictional focus groups in which tax authorities had discussed each topic during 2020.

Jessica de Vries, an OECD advisor, described the CTPA's ongoing work on transfer pricing benchmarking and improving APAs, noting that the introduction of such concepts could reduce the time needed to agree on an APA and improve efficiency. She indicated that the next steps are to recommend criteria for filters and types of transaction where benchmarking may be useful, to test standard criteria against agreed scenarios, and to agree on leading practices for standardized benchmarking. She noted that the OECD's APA work is focused on improving the agreement of bilateral APAs, referencing a survey of tax authorities and businesses that indicates that APAs deliver earlier tax certainty and what is viewed as an overall fair position between taxpayers and revenue authorities. Finally, she identified some areas for improvement, including creating higher levels of transparency, involving taxpayers in more meetings, and increasing communication between jurisdictions. She further noted that time limits for pre-filing and final agreement processes could also be introduced in the future, while work would also focus on creating formats for data requests that are easier for taxpayers to complete. Finally, she indicated that a focus group will continue to study these issues, and further guidance or a handbook may be published in due course.

Sriram Govind, also an OECD advisor, provided an update on the work on multilateral MAPs and APAs, indicating that work in this area tends to have a greater policy focus, because multilateral APAs are not yet fully developed as a global concept. In this regard, the results of tax authorities and businesses show that while there is little experience in this area to date, many jurisdictions are already supporting multilateral APAs.

Three areas of work are being pursued, all of which are common to both multilateral MAPs and APAs. The first area is definitions and examples, where many scenarios are being considered for multilateral treatment, including permanent establishment, residency, and the use of hybrid instruments.

Second is the legal basis for initiation of a multilateral MAP or APA, with the advisor noting that in many jurisdictions, taxpayers need to initiate APAs and MAPs separately and that there is a need for clearer guidance on timing issues. The third area of focus is procedural issues, including whether the OECD should design a specific process for such instruments. Next steps may include publishing a handbook and specific recommendations.

An official with the United Kingdom (UK) tax authority noted that although the UK does not use standardized benchmarks, benchmarks can yield efficiency gains and also offer higher levels of tax certainty. He indicated that having a critical mass of MAP cases to support such use is important. Finally, he said that whether the UK could gain significant benefit in that regard remains under debate.

A US IRS official noted that hundreds of similar cases come into the IRS each year, providing strong impetus toward finding a consistent approach to benchmarking. The suitability of a tested party to utilize a standardized range, though, he said, is where issues may arise, as there will also be certain levels of subjectivity in such cases.

The UK official further commented on the work on both APA improvements and the potential use of multilateral APAs, noting that any handbook would be useful in the (M)APA process, not only for experienced tax authorities, but also as a "soft landing" for tax administrations that may now be introducing APAs for the first time. Also commenting on the (M)APA body of work, the US IRS official noted that short duration APAs of only one year may be sub-optimal, and that longer duration APAs may better reward the time investment of all stakeholders. He also noted that improving APAs will require better coordination and collaboration among tax authorities in future, as well as higher levels of involvement of taxpayers. He noted that the advisor community will play a very important role in future, especially in cases where there may be different advisors in different countries. Finally, he announced that the US and Mexico had very recently reached agreement to renew their 2016 Competent Authority agreement regarding Maquiladoras, details of which are covered in an EY Global Tax Alert.[7]

A representative of a multinational company broadly supported all developments in this area. Noting the ongoing work of the OECD CTPA and jurisdictions on Pillars One and Two of the work on *Addressing the Tax Challenges of the Digital Economy*, he observed that business specifically appreciates how much both dispute prevention and dispute resolution have been incorporated into the pillar work. However, securing an APA can be onerous, and business would welcome improvements. He further indicated that more discussion on the nature of tax risk at the outset of APA discussions would also be beneficial. In addition, he said that more widespread and consistent use of digital technologies would help with both speed and efficiency of APAs and expressed support for the work on standardized benchmarks. He expressed the view that significant tax certainty could be delivered through multilateral MAPs and APAs, he said. He concluded with the observation that greater publicity and transparency (such as the new US-Mexico agreement) are useful in increasing taxpayer confidence and the suggestion that the business community would like to further explore whether a non-transfer pricing, APA-type instrument could be developed by jurisdictions and the OECD, addressing a far broader range of tax issues.

Session 7: Accelerating tax certainty through technology

Pross opened the session by describing how data and information is communicated securely by tax officials, followed by tax administration representatives from several jurisdictions sharing their experiences with the benefits and challenges of hosting multilateral dialogues.

Johnson noted that tax authority activity is becoming more multilateral in nature, which means that secure conversations and sharing of data need to be utilized in order to bring more efficiency to all processes.

Philip Kerfs, Head of the CTPA's International Co-operation Unit, noted that the Common Transmission System (the platform developed to support the exchange of tax information among jurisdictions) may provide the basis for many ongoing needs, but it does not meet all identified requirements. A CRA official noted that competent authorities have reported broadly positive experiences using virtual communication platforms during the COVID-19 pandemic, with such platforms likely to play a key role in future.

A UK tax administration official noted that the ICAP pilots could not have been run without secure data rooms in place, though some challenges have been experienced. He suggested that greater efficiency is likely to occur in the future, with the COVID-19 pandemic providing impetus for change at HM Revenue & Customs.

Closing remarks

In closing remarks, the MAP award winners were congratulated and the willingness of Business at OECD to continue to support the OECD and FTA, particularly when piloting new programs, was noted.

The Business at OECD representative noted that MAP is now beginning to return stronger results, while the process of rebuilding trust may not always be apparent to the wider public. Pascal Saint-Amans, Director of the OECD CTPA, concluded the day by saying that any progress on tax certainty will be the result of effective cooperation, noting that he believes that the tax community is at the beginning of the process of gaining higher levels of tax certainty. He described tax certainty as a key policy objective, while overall delivery "is in the hands of tax administrations."

Implications

Tax certainty continues to be extraordinarily important to the business community.

It is expected that the role of MAP will increase for the foreseeable future as a result of a convergence of trends that include the ongoing focus of tax authorities on cross-border transactions, the weakness of national finances as a result of the COVID-19 pandemic, and the increasing multilateralism of many tax processes, programs and revenue authority activity. Businesses should therefore follow developments relating to tax certainty, including monitoring the output of the upcoming 7-8 December 2020 FTA meeting, where details of new or expanded programs may be announced.

Endnotes

1. http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.
2. http://www.oecd.org/tax/dispute/mutual-agreement-procedure-2019-awards.htm.
3. http://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf.
4. See EY Global Tax Alert, *OECD releases Consultation Document on 2020 review of BEPS Action 14*, dated 23 November 2020.
5. See EY Global Tax Alert, *OECD releases 2019 mutual agreement procedure statistics and 2019 mutual agreement procedure awards*, dated 24 November 2020.
6. Ibid.
7. See EY Global Tax Alert, *US and Mexico renew competent authority agreement on unilateral APAs for maquiladoras*, dated 20 November 2020.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Belastingadviseurs LLP, Rotterdam

- Ronald van den Brekel ronald.van.den.brekel@nl.ey.com
- Marlies de Ruiter marlies.de.ruiter@nl.ey.com

Ernst & Young Solutions LLP, Singapore

- Luis Coronado luis.coronado@sg.ey.com

Ernst & Young LLP (United Kingdom), London

- Joel Cooper joel.cooper@uk.ey.com

Ernst & Young LLP (United States), Global Tax Desk Network, New York

- Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- Tracee Fultz tracee.fultz@ey.com

Ernst & Young LLP (United States), Washington, DC

- Barbara M. Angus barbara.angus@ey.com
- Rob Thomas rob.l.thomas1@ey.com

EYG no. 008127-20Gbl

1508-1600216 NY
ED None