

OECD releases Israel peer review report on implementation of Action 14 minimum standard

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Executive summary

On 30 August 2018, the Organisation for Economic Co-operation and Development (OECD) released the fourth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms.¹ Israel was among the assessed jurisdictions in the fourth batch.²

Overall the report concludes that Israel meets most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Israel's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Detailed discussion

Background

In October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14 on *Making Dispute Resolution Mechanisms More Effective*.³ The Terms of Reference translated the Action 14 minimum standard into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a member of the Inclusive Framework (IF) on BEPS implements the

minimum standard based on its legal framework for Mutual Agreement Procedure (MAP) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the member of the IF on BEPS takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.⁴ In summary, Stage 1 consist of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP Forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP Forum and later to the OECD Committee on Fiscal Affairs' to adopt the report for publication.

Minimum standard peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

The report includes a number of recommendations relating to the minimum standard. In general, the performance of Israel with regard to MAP has proven to be satisfactory in their respective reports. Overall, Israel meets most of the elements of the Action 14 minimum standard.

Preventing disputes

Israel meets the relevant element of the Action 14 minimum standard concerning the prevention of disputes. Out of Israel's 56 tax treaties, 51 enable competent authorities to endeavor to resolve any difficulties or doubts regarding the interpretation or application of the treaty provisions for

cases of a general nature.⁵ One of the five remaining treaties does not contain any provision based on Article 25(3), first sentence of the OECD Model Tax Convention (OECD 2015). For three treaties, a provision based on Article 25(3), first sentence, is contained, but the word "interpretation" is missing. For the remaining treaty the term "may" is used instead of "shall." For this reason, these five treaties are considered as not containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD 2015). It is expected that the five remaining treaties will be modified to include this provision as well, either through the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) or through bilateral negotiations.

In addition, Israel is authorized to enter into bilateral Advance Pricing Agreements (APAs), and is in theory able to extend bilateral APAs to previous fiscal years, within its domestic statute of limitations on assessment.

Availability and access to MAP

Israel meets the requirements regarding the availability and access to MAP under the Action 14 minimum standard.

- ▶ All but one of Israel's tax treaties allow the taxpayer to submit a MAP request. Israel's six tax treaties deviate, to some extent, from Article 25(1) first sentence, of the OECD Model Tax Convention (OECD 2015) as it read prior to the adoption of the Action 14 final report (OECD, 2015b)⁶ and do not satisfy the required standard of access to MAP. In total, seven treaties are considered not to have the full equivalence of Article 25(1) first sentence of the OECD Model Tax Convention (OECD 2015) as it read prior to the adoption of the Action 14 final report (OECD, 2015b).⁷
- ▶ Israel has published clear and comprehensive MAP guidance, which is easily accessible on the website of the Israeli Tax Administration. This guidance specifies the manner and form in which the taxpayer should submit his MAP request, but neither includes the contact details of Israel's competent authority nor addresses the relationship between MAP and audit settlements.
- ▶ Israel's policy is to provide access to MAP in all eligible cases, including cases involving transfer pricing, anti-abuse provisions or cases where the taxpayers and tax authorities have already reached an audit settlement.
- ▶ Israel does not limit access to MAP in eligible cases when the taxpayer has complied with the relevant information and documentation requirements.

- ▶ Most of Israel's tax treaties contain a provision allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties. The seven treaties that do not contain this provision are expected to be modified either through the MLI or through bilateral negotiations so as to include this provision.⁸
- ▶ Most of Israel's tax treaties allow taxpayers to submit a MAP request within a period of no less than three years. It is expected that the remaining 13 tax treaties that do not contain this provision will be modified either through the MLI or through bilateral negotiations so as to include this provision. Currently, in the absence of a filing period for MAP requests in the tax treaty, access to MAP will be denied if the MAP request is submitted after expiration of the domestic statute of limitations.⁹
- ▶ Israel's tax treaties do not contain a provision allowing taxpayers to submit a MAP request to the competent authority of either treaty partner, and will not be modified in this respect by the MLI. In order to protect taxpayers' rights, Israel has in place a bilateral consultation or notification process allowing the other Contracting State to provide its views in cases where the Israeli competent authority considers the objection raised by taxpayers in a MAP request as not being justified. Israel intends to document this process in the near future.

Resolution of MAP cases

Out of Israel's 56 tax treaties, 52 contain a provision requiring its competent authority to endeavor to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty. The remaining four treaties are expected to be modified either through the MLI or through bilateral negotiations so as to include this provision.¹⁰

The average time needed to close MAP cases during the period of 1 January 2016 through 31 December 2017 was 33.93 months, which is higher than the pursued 24-month average timeframe. The median time taken to close MAP cases was 22.19 months. In particular, attribution/allocation cases took longer to close than other cases, with an average of 38.48 months as opposed to 30.80 months for other cases.

In addition, Israel's competent authority operates fully independently from the audit function of the tax authorities and adopts a co-operative approach to resolve MAP cases. Its organization is adequate and no inappropriate performance indicators are used to assess staff in charge of MAP function.

Implementation of MAP agreements

Israel meets the Action 14 minimum standard as regards the implementation of MAP agreements. Since 1 January 2016, Israel has reached seven MAP agreements, six of which requested implementation by Israel. All of the six agreements, once accepted by taxpayers, have been implemented in a timely manner.

The majority of Israel's tax treaties contain a provision whereby any agreement reached through MAP shall be implemented notwithstanding any time limits in the domestic law. However, Israel has a domestic statute of limitations for implementation of MAP agreements, for which there is a risk that such agreements cannot be implemented where the applicable tax treaty does not contain this provision. Such treaties are expected to be modified either through the MLI or through bilateral negotiations so as to include this provision.

Next steps

Israel is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where Israel's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, Israel shall submit an update report to the Forum on Tax Administration's MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the Stage 1 peer review report.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Israel's peer review report represents the continued recognition and importance of the need to achieve tax certainty for cross-border transactions for MNEs. While increased scrutiny is expected to significantly increase the risk of double taxation, the fact that tax authorities may be

subject to review by their peers should be seen by MNEs as a positive step to best ensure access to an effective and timely mutual agreement process.

Furthermore, the peer review for Israel provides insights to taxpayers on the availability and efficacy of MAP. With additional countries continuing to be reviewed, the OECD has made it known that taxpayer input continues to be welcomed on an ongoing basis.

With stakeholder feedback in mind, businesses are encouraged to share their views with the OECD on the peer review for Israel and any other jurisdictions, and to perhaps comment on whether the next iteration of the OECD's assessment of tax administration's MAP performance warrants greater feedback from taxpayers as the primary source. Feedback from the international tax community is the logical next step after peer review, which may help to further validate the current favorable result.

Endnotes

1. See EY Global Tax Alert, [OECD releases fourth batch of peer review reports on Action 14](#), dated 4 September 2018.
2. https://www.oecd-ilibrary.org/taxation/making-dispute-resolution-more-effective-map-peer-review-report-israel-stage-1_9789264304284-en.
3. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
4. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
5. Israel's tax treaties that are deemed not to contain the first sentence of Article 25(3) of the OECD Model Tax Convention (OECD 2015) in a satisfactory manner are its treaties with Belgium, Sweden, South Africa, United Kingdom and the United States.
6. Which allows taxpayers to submit a MAP request to the competent authority of the state in which they are resident when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state.
7. Israel's tax treaties that are deemed not to contain the first sentence of Article 25(1) of the OECD Model Tax Convention (OECD 2015a) in a satisfactory manner are its treaties with Belgium, Brazil, Italy, Netherlands, Romania, Sweden and the United Kingdom.
8. Israel's tax treaties that are deemed not to contain the second sentence of Article 25(3) of the OECD Model Tax Convention (OECD 2015a) in a satisfactory manner are its treaties with Belgium, Brazil, Italy, Portugal, Sweden, United Kingdom and the United States.
9. Israel's tax treaties that are deemed not to contain the second sentence of Article 25(2) of the OECD Model Tax Convention (OECD 2015a) in a satisfactory manner are its treaties with Belgium, Brazil, Ethiopia, Italy, Mexico, Netherlands, Norway, Philippines, South Africa, Sweden, Switzerland, Thailand and the United Kingdom.
10. Israel's tax treaties that are deemed not to contain the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD 2015a) in a satisfactory manner are its treaties with Belgium, Sweden, United Kingdom and the United States.

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