Pointers- Panel discussion on "Resolution of tax disputes in the new International Tax Order"

- Article 25 of the OECD model provides a mechanism independent from the ordinary legal remedies available under domestic law, through which the competent authorities of contracting states can resolve differences or difficulties regarding the interpretation or application of the OECD model on a mutually agreed basis.

Article 25[1] institutes a MAP procedure for resolving disputes arising out of the application of the convention in the broadest sense of the term. It can be invoked in the following circumstances:

(i) Taxation not in accordance with the provisions of the Convention.

(ii) Questions of interpretation or application of the Convention.

(iii) Elimination of double taxation in cases not provided for in the Convention

Hence, MAP is important for effective implementation and interpretation of tax treaties. Consequently, BEPS Action 14 to this extent encourages countries to:

"develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases."

- By adopting the Final Report, OECD member countries and non-OECD countries participating in the OECD/G20 BES initiative agree to changes in their approach towards dispute resolution by developing a minimum standard with regard to the resolution of treaty related disputes. Action Plan 14 provided for specific provisions to be inserted in tax treaties so that there are effective mechanisms for resolving international tax disputes. Part V (articles 16 and 17) and Part VI (articles 18 to 26) of the MLI define various characteristics of MAPs and the possible alternatives available to be taken into account at an international level. To this end, article 16 of the MLI develops the MAP provided for under article 25 of the OECD Model.

Article 16 of the MLI i.e. Mutual Agreement Procedure is the device through which **Action Plan 14** is to be implemented.

[1] Article 25, "Mutual Agreement Procedure", of OECD Model Convention on Income and on Capital, 21 November 2017.

- Under Article 16(1) a "new MAP" process has been laid out, which acts as a single and integrated dispute resolution process, basically divided into three stages. In the first stage, the contracting state receiving the complaint endeavors to resolve the matter unilaterally since the complainant has the option to approach competent authority of either jurisdiction[2]. In the second stage, as usual, if the complaint was properly presented to the contracting state and it was not able to resolve the matter on its own, all states involved should pursue a joint process in order to find a solution to the controversy. It can be considered a mutual agreement *stricto sensu*, in the sense of a consensual settlement between the states involved in the dispute[3]. Finally, in the third stage, if the contracting states fail to reach consensus on the dispute in a timely manner and if specific conditions are fulfilled, an arbitration procedure should take place.[4]

- Article 16(4) is the compatibility clause.[5] Article 16(5) is Reservation clause allows a country to modify its treaty to present a case competent authority of either of the countries. **India has expressed its reservation under this clause; hence a person will necessarily have to approach its country of residence. Hence India has maintained status quo in its MAP process eligibility. This also means that India will comply with the minimum standard of Action 14 by allowing MAP access in the resident state and implementing bilateral notification or consultation process before rejecting such an application for MAP.**

- **Minimum standard under Action point 14**: The minimum standard is composed of specific measures that countries will take to ensure that treaty-related disputes are resolved in a timely, effective and efficient manner. The elements of the minimum standard have the following objectives:

  (i) Full implementation in good faith of treaty obligations related to the MAP and timely resolution of MAP cases;

[2] Timeline: Three years from the first notification of action of one or both of the contracting jurisdictions result or will result for the person in taxation not in accordance with CTA
[3] Article 16(2) of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ('MLI').
[4] Article 19(1) of MLI.
[5] Allowing members of the ad-hoc group to retain existing provisions on dispute resolution to the extent they are consistent with provisions of paras 1, 2, and 3 of Article 16.

To ensure full implementation in good faith of treaty obligations (related to MAP), countries should apply paragraphs 1 through 3 of Article 25 of the Model Tax Convention on Income and on Capital (Model Tax Convention). These paragraphs allow a taxpayer to resort to MAP in cases where the actions of a taxing authority will result in a violation of the provisions of a tax treaty. The same access should be provided in transfer pricing cases and should implement the resulting mutual agreements**. A taxing authority has no obligation to endeavour** to resolve the case or to submit an issue to arbitration. It is up to the taxing authority to determine whether the taxpayer's objection is justified, in which case, the taxing authority may act unilaterally (if possible) or may proceed to the bilateral stage.

(ii) The implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and

There are certain existing lacunae in the application of MAP procedure – lack of transparency, taxpayer not being part of proceedings etc.

(iii) Access of eligible taxpayers to MAP.

The competent authorities of both Contracting States should be made aware of the MAP requests that are submitted pursuant to paragraph 1 of Article 25 and have the opportunity to provide their views on whether the MAP request should be accepted or rejected, and on whether the taxpayer's objection is considered to be justified. In order to achieve this, countries should take one of two alternative approaches: (i) amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made from the competent authority of either Contracting State; or (ii) where a treaty does not permit a MAP request to be made from either Contracting State, implement a bilateral notification or consultation process for cases where the competent authority to which the case is presented does not consider the taxpayer's objection to be justified

In cases where a request for MAP may be made, it is important to note that taxpayers have the option to file a request for MAP assistance with one or both competent authorities at the same time. On the other hand, Contracting States may consider that taxpayers should, in the first instance, be required to present their case to the

competent authority of the State of which they are resident. If this approach is adopted, the report provides that Contracting States should take appropriate measures to ensure broad access to the MAP and that the decision as to whether a case should proceed to the second stage is appropriately considered by both competent authorities.

- The report has also identified the following best practices which countries can adopt[6]:

  (i) Include paragraph 27 of Article 9 in their tax treaties.
  (ii) Develop 'global awareness' of audit/examination functions involved in international matters through FTA's 'Global Awareness Training Module'.
  (iii) Implement bilateral Advance Pricing Agreement ('APA') programme to provide an increased level of certainty in both jurisdictions and proactively prevent Transfer Pricing disputes.
  (iv) Take appropriate measures to provide for the suspension of tax collections during the pendency of MAP.
  (v) Implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes.
  (vi) Publish guidance on the relationship between the MAP and domestic law administrative and judicial remedies to provide relevant information to taxpayers.

- Action point 14 recommended that jurisdictions should provide access to the mutual agreement procedure in transfer pricing cases and should implement the resulting mutual agreements appropriate adjustments to the tax assessed. Article 17 of MLI implements this best practice as stated in OECD Model Convention's Article 9(2). Transfer pricing adjustments carried out in the context of transactions between associated enterprises may give rise to economic double taxation, insofar as an enterprise in a contracting state whose profits are revised upwards will be liable to tax on an amount of profit which has already been taxed in the hands of its associated enterprise in the other contracting state. Article 9(2) of the OECD Model Convention provides that the other contracting state shall make an appropriate adjustment to relieve such double taxation. Thus, as per Article 17 **a country will be required to make a**

[6] Section B: Best Practice, Action 14 Report on "Making Dispute Resolution Mechanisms More Effective" (2015).
[7] With a view to prevent economic double taxation, paragraph 2 of Article 9 of the OECD Model Convention enables a treaty partner to make corresponding adjustment to the income of its resident taxpayer on account of transfer pricing adjustments (made by the other treaty partner) to the income of such taxpayer.

downward adjustment to the profits of a resident entity, as a result of an upward adjustment by the other country to the profits of an associated entity which is a resident of that other.

- Paragraph 2 of Article 17 is the compatibility clause which provides that paragraph 1 shall apply in place of or in the absence of a provision requiring that a contracting jurisdiction make an adjustment where the other contracting jurisdiction makes an adjustment that reflects the arm's length profits of an enterprise. While Article 17 is a best practice, Action Plan 14 required that, as a minimum standard, countries should provide access to the mutual agreement procedure in transfer pricing cases and implement the resulting mutual agreements regardless of whether the relevant bilateral tax treaty contains a provision modelled after Article 9(2) of the OECD Model Tax Convention. Accordingly, a reservation against Article 17 may be made only on the basis that in the absence of the provisions described in Article 17(2) in Covered Tax Agreements, either (i) the party making the reservation will make adjustment referred to in Article 1 or, (ii) its competent authority will endeavour to resolve a transfer pricing case under the mutual agreement procedure provision of its tax treaty. Where a contracting jurisdiction makes such a reservation, and the other does not, Article 17 will not apply to the covered tax agreement and there is no expectation created that the contracting jurisdiction that has made the reservation will make a corresponding adjustment. A party may make a reservation for the provisions of Article 17 to not apply to its treaties that contain a provision modelled on Article 9(2) of the OECD Model Convention.

- India has reserved the right for the entirety of Article 17 not to apply to its Covered Tax Agreements that already contain a provision described in paragraph 2 of Article 17 of the MLI. It has notified its treaties with inter alia, Netherlands, Ireland, Japan, Luxembourg USA, UK and Singapore as containing such a provision. Accordingly, the provisions of Article 17 will not apply to the treaties with these countries. It should be noted however that the Netherlands, Singapore, Japan, Luxembourg and the UK have both not made any reservations and have also notified the treaty with India, indicating their intention to have paragraph 1 of article 17 replace article 9(2), article 9(2), article 9(2), article 9(2) and article 10(2) of the India-Netherlands Tax Treaty, the India-Singapore Tax Treaty, the India-Japan Tax Treaty, the India-Luxembourg Tax Treaty and India-UK Tax Treaty, respectively. However, India has not notified its treaties with Mauritius, France and Sweden. France has not made a reservation under Article 17 but

has also not notified India. Therefore, paragraph 1 of Article 17 will supersede the provisions of the India-France Tax Treaty only to the extent that those provisions are incompatible with paragraph 1.[8]

- Historically, in the pre-BEPS era, India, with Brazil, had consistently expressed apprehensions for entertaining Bilateral APA or MAP requests involving transfer pricing that result in double economic taxation in the absence of Article 9(2) in the relevant treaty. Post-BEPS, India has responded by stating that the MAP for Transfer Pricing disputes and the bilateral APA process would be available to taxpayers even where Article 9(2) or the equivalent is not present in the DTAA with the taxpayer's jurisdiction[9]. This coupled with India-U.S. announcing bilateral APA programme[10] has given impetus to APA programme with several treaty partners, and in particular, France, Germany, Singapore and Belgium, due to the absence of Article 9(2) in the respective tax treaties. Though the newer tax treaties entered by India include Paragraph 2 of Article 9, it still needs to amend several significant DTAAs for due concurrence.

- Arbitration clause (Article 18-26) has been envisaged as a supplement to the MAP in order to achieve the effective and timely resolution of tax treaties. Thus, Arbitration is not an **independent mechanism** rather a **supplementary mechanism.** It is also not an appeal aimed at reviewing MAP. Given India's position on arbitration it is incumbent to review the MAP process to improve upon the existing process read with compatibility clause, it could turn out to be 'double whammy' for taxpayers.

- The arbitration process is considered by the OECD as "an extension of the mutual agreement procedure that serves to enhance the effectiveness of that procedure by ensuring that where the competent authorities cannot reach an agreement on one or more issues that prevent the resolution of a case, a resolution of the case will still be possible by submitting those issues to arbitration". As BEPS project dedicates its Action 14 to making its dispute resolution process more effective by proposing the adoption of "minimum standards" that will lead to effective dispute resolution within a proper time frame, it should also be complemented by "best practices", such as a "monitoring process" and a discussion and evaluation forum.

[8] India's MLI positions: Impact on availing treaty benefits", Nishith Desai Associates, July 2017.
[9] Ministry of Finance, Press Release dated 27.11.2017, http://pib.nic.in/newsite/PrintRelease.aspx?relid=173885 (Accessed on 12 June 2019).
[10] US confirms plan to begin bilateral APA negotiations with India, MNE Tax, https://mnetax.com/us-confirms-it-will-accept-indian-bilateral-apa-applications-13278 (Accessed on 12 June 2019).

However, Action 14 of the BEPS Project ultimately did not include arbitration – neither in the minimum standard nor in the best practices – because of the lack of consensus on the topic. **Arbitration remain purely optional. Major concerns are pertaining to sovereignty, huge costs, lack of resources.**

Binding nature of Arbitration: MLI mirrors the approach of OECD – leaves on the taxpayers to implement the arbitration decision, states allowed to opt out of binding nature of arbitration.

India's Stage 1 Peer Review Report on BEPS Action 14. (The report was approved by OECD Inclusive Framework on 8 May 2019 and published by OECD on 24 October 2019)[11]

The Minimum standard peer review report is divided into four parts, namely: (i) Preventing disputes; (ii) Availability and access to MAP; (iii) Resolution of MAP cases; and (iv) Implementation of MAP agreements. Each part addresses a different component of the minimum standard.

India's responses/policy level considerations as per peer review process in relation to these areas:

(i) Preventing disputes

India meets the Action 14 minimum standard concerning the prevention of disputes. India has in place a bilateral APA program which also enables taxpayers to request rollbacks of bilateral APAs and such rollbacks are granted in practice. On the most concerning area for taxpayers, i.e., the practical application of the rollback of bilateral APAs, one of the peers has noted that India is willing to try and deal with all years where double taxation occurred in either the MAP or the APA process.

India has reported that where a tax treaty does not contain a provision that is based on or is the full equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (MTC), there are no constraints to endeavor to reach an agreement on the

[11] OECD/G20 Base Erosion and Profit Shifting Project, "Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 1), Inclusive framework on BEPS: Action 14.

general interpretation of a tax treaty. Further, the MLI, upon entry into force, will modify all such tax treaties to include the equivalent of Article 25(3), first sentence, of the OECD MTC.

(ii) Availability and access to MAP

India meets some requirements regarding the availability and access to MAP under the Action 14 minimum standard. It provides access to MAP in TP cases and cases concerning the application where treaty anti-abuse provisions are applied.

Access to MAP and domestic remedies: India has clarified that it grants MAP access simultaneously with domestic remedies. However, in cases where domestic remedies have been finalized, India will grant access to MAPs but will not be able to derogate from decisions of its domestic courts and thus will only seek correlative relief at the level of the treaty partner.

MAP access to TP cases: India provides access to MAP in TP cases. Further India has withdrawn its reservation to Article 25 of the OECD MTC, thereby providing MAP access even in absence of Article 9(2) of the OECD MTC which was notified by CBDT in 2016.

No MAP access in the absence of double taxation: Though most of the tax treaties are aligned with Article 25 of the OECD MTC to provide for MAP access where there is a risk of taxation not in accordance with the tax treaty and not limited to cases of double taxation, India's view is that MAP access will be granted only where there is double taxation practically, even if it is established that there was taxation in contravention of the tax treaty. **In India's view, the issue raised by the peer review group on the availability of MAP go beyond the terms of a tax treaty is not acceptable, as these are applied in furtherance of the treaty's preamble (setting out the treaty's purpose) being double taxation and cannot go beyond that. If the treaty's purpose would not be of relevance, India questioned as to why then under BEPS Action 6 it was necessary to create a minimum standard to amend treaties' preambles. India's position seems contrary to MLI since plain review of Article 16(1) envisages an entitlement of MAP in situations where 'tax treaty may result**

or have resulted; further it states that irrespective of remedies under domestic law, parties can approach either of the contracting states.

MAP access for fiscally transparent entities/single member partnerships: India's current position is that it does not provide MAP access for fiscally transparent entities. India's view is that MAP access to such taxpayers will require amendments to the tax treaty. India also mentioned that it is aware of the fact that the peer review has a similar issue with other treaty partners for which it has entered into a protocol with one of its treaty partners to allow treaty benefits to pass through-structures (In India-UK Treaty via Protocol dated 27th December 2013). Further, India treats this aspect as beyond the purview of the peer review of the Action 14 minimum standard.

MAP access to cases involving advance tax rulings: Where a taxpayer obtains a tax ruling from an independent judicial authority (example, Authority for Advance Rulings), India's CA (Competent Authority) will not grant access to MAP. Since, such rulings can only be challenged in courts and are in the nature of judicial proceedings, MAP access cannot be granted. This disincentivizes treaty partners from availing MAP access in situations where AAR has issued a ruling.

MAP access concerning the domestic anti-abuse provision: India provides MAP access for cases concerning application of the domestic anti-abuse provision, but the discussion in MAP will only focus on the elimination of double taxation arising from such application to issues that do give rise to double taxation, and not to the question of whether the application of a domestic law anti-abuse provision conflicts with the provisions of tax treaty.

MAP access in cases of audit settlements: Where the disputes are settled by the Income Tax Settlement Commission, MAP access will be denied. However, no MAP requests involving the above situation were received by the CAs during the Review Period.

Submission of MAP requests to the CA of either treaty partner or introduction of a bilateral consultation or notification process: None of the India's tax treaties allow for submission of MAP requests to the CA of either treaty partner. Also, due to India's reservation, the MLI will not modify the tax treaties to include the required provision. However, India intends to introduce a bilateral notification process to be applied in

situations where its CA considers the objection raised by a taxpayer in its MAP request as not justified.

Inclusion of Article 25(3), second sentence: Where current tax treaties do not include Article 25(3), second sentence which provides for CAs to consult together for the elimination of double taxation in cases not provided for in the Convention, the MLI will modify such tax treaties. If the MLI does not modify a treaty due to specific reservation by the treaty partner, India will include in its plan for renegotiation of the respective bilateral tax treaties.

(iii) Resolution and implementation of MAP cases

India meets most of the other requirements under the Action 14 minimum standard in relation to the resolution of MAP cases. India's CA operates independently from the audit function of the tax authorities and the performance indicators used are appropriate to perform the MAP function.

MAP cases with India were not closed within 24 months. The average time to close was 35.66 months, 34.31 months for attribution/allocation cases and 68.70 months for other cases. For attribution/allocation cases, the peer review noted that India's CA sometimes became entrenched due to a preference to apply domestic TP rules over OECD TP guidelines (example preference over arithmetic/percentile range over an interquartile range and single year data over multiple year data for benchmarking analysis, however the recent experience reflects use of multiple year data).

India's MAP inventory increased since 1 January 2016. This increase can be broken down into an increase by 9% for attribution/allocation cases and an increase of 16% for other cases. This state of play indicates that the CA is not adequately resourced to ensure that post-2015 cases are resolved within the average of 24 months.

India mentioned that it does not deny MAP access in cases concerning the question of whether a permanent establishment exists. However, the burden of proof on establishing such existence differs based on the facts of the case and the peer review cannot put specific conditions on India to resolve cases in a certain manner.

- **Arbitration clause**: In line with the position to the OECD MTC 2017 update, India does not support inclusion of arbitration in tax treaties as India believes that such processes are against a jurisdiction's sovereignty in tax matters.

With respect to implementation, India meets the Action 14 minimum standard and no issues have surfaced regarding the implementation throughout the peer review process. India reported that the actual implementation of MAP agreements is monitored at the level of the local tax offices. Where the local tax office is requested to implement a MAP agreement, it is also asked to report back to India's CA to confirm implementation. By doing so, India's CA can keep track on whether all MAP agreements have been implemented. India further reported that all MAP agreements that were reached on or after 1 January 2016, once accepted by taxpayers, have been (or will be) implemented. Almost all peers that provided input reported not being aware of any impediments to the implementation of MAP agreements in India on a timely basis.

Peer inputs and OECD Recommendations to India

Several peers appreciated the willingness of India to resolve cases. Other peers, however, also mentioned difficulties in resolving cases with India, particularly the long time it takes to receive position papers, the interplay with domestic remedies and the fact that reaching an agreement on a principled basis is sometimes challenging.

Recommendations:

- **Publish comprehensive MAP guidance**: Currently, India does not have MAP guidance and domestic legislative rules are not comprehensive. Further, the effects of the statutory dispute settlement process on MAP are not addressed in the MAP guidance, since such guidance is not yet available. In this regard, India should without further delay introduce clear and comprehensive MAP guidance. Such guidance should be, publicly available and easily accessible. Further, India should, when it introduces MAP guidance, follow its stated intention to clarify the effects on MAP when the case has been resolved through its statutory dispute settlement process.
- **Provide MAP access to cases involving domestic anti-abuse as well as no double taxation:** India should change its policy to effectively allow access to MAP for issues concerning the question of whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty, and be willing to discuss such issues when being accepted into the MAP process, including where there is no double taxation but there is taxation that is not in accordance with the provisions of a tax treaty. India should seek to resolve all MAP cases that are accepted into the MAP process. In

this regard, India should not refuse discussions in MAP with the other CA concerned on the grounds that there is no double taxation.

- **Increase resources for handling of MAP/bilateral APA cases**: The peers opined that with India's preference to make site visits on all cases, the timeline for resolution might be extended. Hence, the peers stressed that such visits should be undertaken on a case by case basis. The peers also recommended that India should hire additional personnel to ensure that MAP cases are resolved in a timely, effective and efficient manner, which should inter alia enable India to issue position papers in timely manner and communicate more frequently and hold face to face meeting with CAs.
- **Consider adherence to OECD TP guidelines**: The peers noted that the negotiations with India's CA can sometimes become entrenched due to India's preference to apply domestic TP rules over the OECD TP guidelines, example, preference over arithmetic/percentile range over an interquartile range and single year data over multiple year data for benchmarking analysis. In this regard, for attribution/allocation cases, India should provide more details explaining the acceptance or rejection of comparables and show greater willingness to adhere to OECD TP guidelines over domestic tax law to consider OECD endorsed methods in addition to cost-plus.

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The Document has been prepared by Mukesh Butani, Founder of BMR Legal Advocates and Riya Gupta, associate at the Firm.