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Outline Subject 1 on DISPUTE RESOLUTION

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During at least the last 10 years companies and Tax Administrations have been facing an increase in the number of adjustments regarding transfer pricing or application of Treaties. These kind of assessments generate an incorrect application of Double Taxation Agreements (MAP) or/and double taxation; the only solution companies have in order to solve this problem is the Mutual Agreement Procedure and/or the Arbitration Convention in Europe.

Consequently, there has been a dramatic increase in the number of MAP and, due to different reasons, an agreement has not always been reached in due time or the procedures have been too long... Lack of experience on the Tax Administrations side and on companies' side has been the main reasons for this situation.

In order to find a solution for this, OECD included additional Commentaries on Article 25, has published the MEMAP (Manual on Mutual Agreement Procedures) and has incorporated the possibility of going to arbitration to the OECD Model. On the other hand, the EU has approved two Codes of Conduct regarding the Arbitration Convention.

Even after these reviews, the MAP does not solve all the cases on due time or not all cases have had access to MAP.

In the new international scenario, there is a trend towards a higher level of juridical insecurity. The BEPS OECD project is pointing out some mismatches in the international tax system and some changes in Double Taxation agreements and internal legislation are being proposed. In general terms, the solution the OECD is pointing out would imply that all tax systems are drafted similarly; even if this was true and every country would wait until a final solution in the BEPS project is reached, this project incorporates concepts that may affect the juridical security: new antiabuse regulation in the Treaty and in the internal legislation, definition of hybrid instruments and hybrid treatment of income, taxation and definition of intangibles....

The real scenario companies are facing is the following:

- Countries are not waiting for a common solution to BEPS issues and they are regulating unilaterally: even if legislations follow the same principles, the drafting and interpretation may differ from each other and this could easily generate new international double taxation that did not exist before;
- The new concepts incorporated are going to generate disputes among countries: we are walking towards economic interpretation of business which may create different views depending on the perspective or interest of the country analyzing the issue (antiabuse regulation, hybrid mismatches, definition of intangibles...)

As it may be easily concluded, the number of cases where Tax Administration may not agree in the application of Treaties or benefits from the internal legislation is going to increase, and the content of these new controversies might be different from the past. These new cases of double taxation will need to find some resolution instrument; otherwise the investment abroad could be badly damaged.

The purpose of this work is to analyze the instruments companies may have to solve these cases, given the scenario they may be facing in the coming years. MAP has been a tool that some countries did not “use” that much, and other countries applied it but with many problems in its implementation.

From a formal perspective, it is important to learn from every country the number of cases initiated every year, number of Treaties with arbitration included, possible statistics... This information will help us understanding the degree of experience every country may have, the complexity of cases, the resources devoted to it...

On the other hand, it is also important to hear about the content, transfer pricing, DTA, experience of Tax Administration in these areas... In this sense, we could learn about best practices, areas where countries need to improve internally...

Finally, we would like to explore what are the real options to achieve a better solution for this kind of controversies, either continue developing MAP or looking for new alternatives.

1. Double Tax Treaties:

- How many does your country have in force?
- How many have a Mutual Agreement Article?
- How many have an arbitration clause?

2. Mutual Agreement Procedure experience:

- Does your Government publish the statistics of MAP?
- How many MAP do they have initiated per year (last four years)?
- What aspects are discussed?
 - Interpretation of treaties (royalties, interest, services, dividends, pensions),
 - conflicts of residence,
 - transfer pricing cases

- Application of antiabuse rules: beneficial owner, antiabuse rules (internal legislation or Treaty rules)
 - Do the Competent Authorities normally reach an agreement? Any unsolved case in last four years?
 - Any experience in arbitration?
3. Does your country have any Internal Guidelines regarding MAP?
- If the answer is yes:
 - Do the guidelines limit or interpret in any way MAP Article?
 - Do they limit the possibility to enter into a MAP in any way?
 - Do they ask for any additional requirements for its initiation?
4. Courts vs MAP
- The Treaty establishes that both procedures can be initiated at the same time, how does it work in your country? Do any of the procedures get suspended until the other one has reached a conclusion (agreement or Decision)?
 - What happens if there is a Court Decision previous to the MAP agreement?
5. Tax Administration Experience in International issues:
- Could you please describe the experience of your Tax Administration in this area? Do they have any internal guidelines regarding this kind of adjustment, applying OECD principles...? Do they consider/mention/propose the possibility to go to MAP as an option in the tax Assessment in order to eliminate double taxation?
 - Does your Tax Administration interact with other Tax Administrations during the audit procedure?
 - Multilateral controls,
 - joint audits,
 - exchange of information.
6. APA program: Does your country have an APA program?
- In case you answered yes: what are the main characteristics?
 - Does it have a roll-back effect?
 - What kind of cases would the APA program cover? Only transfer pricing? Or it would also include interpretation issues+valuation (for example, definition of PE+attribution of profits to PE, definition of royalties+valuation...)
7. Apart from Joint audits, multilateral controls with a common agreement, MAP and APA, do you think there would be any other way in order to solve this kind of disputes that would help eliminating double taxation?