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Pillar one's Amount A: A revolution in TP controversy

Mark Martin and Thomas Bettge of KPMG in the US discuss the Amount A tax certainty process and how it turns traditional transfer pricing dispute resolution on its head for in-scope taxpayers.

As far as tax certainty is concerned, the October 8 statement from the OECD/G20 Inclusive Framework on BEPS (IF) does not at first glance seem to contain much. Only two paragraphs are devoted to the topic, and the bulk of these are taken verbatim from the earlier July 1 statement. Yet unpacking these paragraphs reveals a vision for dispute prevention and resolution that will upend how taxpayers within the scope of Amount A handle controversy.

The pillar one blueprint of 2020 contained a detailed proposal on tax certainty. As we detailed in a previous article, that proposal envisioned a two-stage panel process in which a quasi-arbitral determination panel would provide a mandatory and binding backstop to an initial review panel recommendation.

The July statement (also covered in a previous article) did not endorse design details, restricting itself instead to a high-level commitment to mandatory and binding dispute resolution, and it remains unclear what form the Amount A process will take. Details such as timing and panel composition, as well as a more fundamental question of whether the blueprint's two-tier panel system will be retained, have yet to be addressed. Finding the best answers to these open issues is crucial to helping ensure the administrability of Amount A.

What the October statement does tell us can be summarised as follows:

- There will be mandatory binding dispute prevention and resolution mechanisms for Amount A;
- Those mechanisms will cover core Amount A issues (e.g., revenue sourcing, identification of relieving jurisdictions, etc.) and 'related issues', which include transfer pricing (TP) and permanent establishment disputes; and
- There will be a limited opt-out for certain developing countries.

The July statement acknowledged that an opt-out was being considered, and the October statement reflects a compromise: it confirms that an opt-out will be allowed, but places guardrails around it.

First and most significantly, the opt-out applies only with respect to 'related issues': even developing countries will be subject to mandatory and binding dispute resolution for core Amount A issues.

Second, the opt-out is limited to developing countries with minimal bilateral treaty disputes that are eligible for deferral of peer review under BEPS Action 14. Eligibility for the opt-out will be reviewed regularly, and once a jurisdiction becomes ineligible, it loses its eligibility going forward. In other words, once a developing country has enough bilateral dispute resolution experience, it is permanently within the scope of the mandatory Amount A procedures.

More significant for multinational enterprises is the fact that the mandatory process covers related issues as well as Amount A. Although this formulation was included in the July statement, its significance has generally been underappreciated.

Due to the operation of the marketing and distribution safe harbour and the rules to eliminate double tax, it would appear that most cross-border TP adjustments could affect the allocation of Amount A and thus should be regarded as 'related issues'. As a result, practically all TP and permanent establishment issues would be covered by the Amount A process.

For in-scope taxpayers, the ability to obtain certainty for often contentious TP and permanent establishment issues would be an enormous boon, allowing these taxpayers to avoid double taxation and potentially streamline the traditional controversy process.

Of course, making the process workable will require careful design choices and a prevailing spirit of cooperation. For instance, the IRS compliance assurance process (CAP) is a pre-filing dispute prevention programme that may serve as a model for the Amount A process, but the IRS's experience with CAP has been that TP issues are often difficult to address on a pre-filing basis, and the IRS may require that CAP participants instead pursue an advance pricing agreement (APA).

In the US, bilateral APAs take on average 38.5 months to complete, though completion times for renewals are somewhat better at 32.8 months. Developing a dispute resolution process to cover a much broader swathe of transactions, and securing an agreement that is binding across a much larger group of countries, will certainly be challenging.

Significant technical work remains to be done to create a dispute prevention process that is both effective and timely. Still, the October statement outlines a vision for tax certainty that would completely change how in-scope taxpayers deal with cross-border controversy. It is an admirable goal, and one that the IF clearly envisions will benefit in-scope Amount A taxpayers.

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