Answer-to-Question-_1_

PART A

Introduction

Aligning taxation with substance and ensuring transparency while promoting certainty and predictability has been for a long time in the agenda of the OECD.

The OECD made its first move with the 1998 Report on Harmful Tax Practices.

The impact of that report was huge, and a starting position of what would later become the BEPS Project.

Some examples are that the Report pushed countries to sign at least 12 DTA or Information Exchange Agreements, setting the way for what would later be the automatic exchange of information.

Additionally, the banking secret and many harmful tax regimes stopped.

The EU has also been active in this area and made the EU Code of Conduct for Business Taxation that is considered soft law (1997).

However, more than 15 years had passed since the publication of the 1998 Report and there where still concerns about the artificial profit shifting being done by MNEs and the lack of transparency.

Before the BEPS project was implemented, countries continued with their race to the bottom in order to be tax competitive with other jurisdictions.

Some examples are Ireland that for a long time had a 12.5% tax rate. Another closer example is the United Kingdom that had a 19% Corporate Tax Rate, that was only raised in April 2023 to 25% because of the economic impact of the Covid Pandemic. There was even proposed legislation to reduce further to a 17% rate.

In 2015 the Base Erosion and Profit Shifting Report ("BEPS Report") was published by the OECD, with an aim of aligning taxation with substance (digital economy) increasing transparency, and promoting certainty and predictability for taxpayers.

In this essay we will explain the minimum standards and their significance.

Analysis

The BEPS Project has 15 Action Points that are recommended for States to implement.

Considering how difficult it was getting countries to agree, there are only 4 minimum standards.

The minimum standards are the actions that are considered compulsory and that must be implemented by member states.

The BEPS project agreed minimum standards are the following:

Action Point 6.

Action Point 6 proposes to amend treaties including a general anti-avoidance clause or LOB.

This action point identifies treaty shopping as one of the most harmful abuse practices, considering that benefits are granted in situations where they were not intended.

Treaty Shopping considers "*the strategies through which a person who is not resident of a State, attempts to obtain benefits that a tax treaty concluded by that state grants*"

An example would be establishing a letterbox company, that is an strategy that would clearly erode the base of the country that would have the real rights to tax and that therefore separates taxation from substance.

In this sense, AP6 called for a clear statement that mentioned reduced taxation or tax avoidance was not the purpose of the DTA.

Thanks to this, the 2017 OECD MC now has a new preamble that clearly establishes the object and purpose of any DTA: "Avoiding double taxation, without creating opportunities for tax evasion"

Additionally, the AP6 called for a specific anti-abuse rule and the limitation-on-benefits rule that would limit the availability of treaty benefits to entities that meet certain conditions.

This again, was done to align taxation with substance, avoiding

opportunities where enterprises could artificially reduce their tax base by shifting profits to low tax jurisdictions where there was no substance.

Action Point 5.

Action Point 5 seeks to fight harmful tax practices.

The Forum on Harmful Tax Practices worked hard on this actions and focused on "*agreeing a methodology to define substantial activity requirement to assess preferential regimes*"

This was done by first looking into intellectual property regimes and then at other regimes.

Worth noticing that intellectual property is easily shifted from one jurisdiction to another considering its intangible nature.

AP 5 also focused on increasing transparency through spontaneous exchange of certain rulings that could give rise to BEPS, such as:

1. Rulings related to preferential regimes.
2. Cross Border unilateral APAs
3. Rulings giving a downward adjustment to profits
4. PE rulings
5. Conduit rulings and

6 any other type of ruling that could give rise to BEPS concerns.

Action Point 13.

AP 13 proposed the Country-by-Country Reporting ("CbC Reporting").

Large MNE's have to prepare a report considering the international transactions that they take part in.

This AP developed a three-tiered standardised approach to TP documentation: 1) Master File, 2) Local File, and 3) CbC Reporting.

These 3 documents will require taxpayers to have consistent TP documentation and will allow tax administrations to assess the international operations done by MNEs with their subsidiaries.

This AP will make it easier for tax authorities to detect practices where MNEs are artificially shifting substantial amounts of income into low tax jurisdictions.

It is worth noting that this AP will promote transparency and oblige large MNEs to be careful when doing transactions that have reducing taxation as a main objective.

Action Point 14.

This AP is very important since it looks at making dispute resolution mechanisms more effective.

There was a natural concern for taxpayers and tax authorities with the implementation of all the BEPS rules.

This, because no Country would like to affect foreign investment and therefore there was a recognised need for a more effective dispute resolution mechanism considering the enhanced risk of assessment that the BEPS project would bring.

This AP leads allows us to conclude that the BEPS project also promotes certainty and predictability.

Article 25 of the OECD MC provides a mechanism independent of domestic law through which tax authorities may resolve differences or difficulties regarding the implementation of the Convention.

AP14 is aimed at making the MAP process stronger and requires countries to commit to minimum standards on the resolution of international disputes, such as:

a) to ensure countries implement art 25 in good faith.

b) to ensure domestic administrative provisions don't block access to the MAP procedure and

c) To allow taxpayers to access MAP if the requirements of the article are met.

It is worth noting that only the first 3 paragraphs of Article 25 of the OECD MC will be implemented through the MLI as a minimum standard.

This, because para 4 of article 25 established arbitration for unresolved MAPS, but countries couldn't agree on the

implementation of arbitration.

Through the MAP process countries must endeavour (try very hard to agree) but they don't have an obligation to actually agree, so this affects the certainty and predictability for taxpayers.

The EU and its support to aligning taxation with substance and transparency.

The EU has continued issuing reports on the actions taken by the Commission on fiscal State Aid, that are very relevant when considering the tax rulings that where being offered in countries like Ireland to taxpayers such as apple.

Additionally, the EU implemented the automatic exchange of tax rulings (from BEPS AP5) by a DAC 3, successfully managing that al MS implemented exchange of information from 2017.

Conclusion

The OECD and the BEPS project, particularly the minimum standards that are the ones that had to be implemented by all members, have been instrumental in the development of transparency, certainty and predictability.

This considering that AP 5 seeks to align taxation with substance, and enhances transparency through the automatic exchange of information.

Prove of the success is Article 26 of the OECD MC.

Also AP6 seeks to align taxation with substance by introducing a PPT or LOB clause that will stop benefits being granted in situations where they are not intended.

Article 20 of the OECD MC is concerned with the implementation of this PPT or LOB clause.

AP 13 calls for CbC reporting that will by itself promote transparency. AP14 seeks to protect taxpayers by making dispute resolution mechanisms more effective, promoting increased certainty and predictability.

We conclude that the minimum standards are a great start for aligning taxation with substance, promoting transparency and certainty, but there is still way to go and we will see how the implementation of Pillar 2 works.

This area continues developing, an example is that it was recently agreed that big MNEs would now make their CbC Reports public.

The OECD is responsible for the latest agreed position by G20 in 2021, Pillar 1 and Pillar 2 which will also seek to align taxation with substance.

Pillar 1 will allocate taxation to market jurisdictions, aligning taxation with substance.

Pillar 2, introduces a Global Minimum Effective Rate, that allows a country to "top-up" the tax to the minimum level, which was recently agreed to be a 15%.

PART A

Answer-to-Question-3

Treaty override, can it be justified?

Introduction

The process of the domestic recognition of a tax treaty is different in every country.

There are two main approaches that countries take:

1. Monistic Approach: that is when treaties automatically become part of the domestic law, an example of this is Spain.

2. Dualistic approach: This approach happens when treaties need to be implemented, "transformed" into domestic law. This approach is taken in countries such as Canada, Australia and the United Kingdom.

Treaty Override is when legislation is introduced after signing a DTA, that "overrides" the treaty terms.

In other words, it happens when legislation that is contrary to the treaty principles is introduced after the rectification of said treaty.

Analysis

The Vienna Convention on the Law of Treaties ("VCLT") came into force in 1980.

The VCLT is very important for the interpretation of tax treaties and is regarded as customary international law.

Article 26 of the VCLT, also known as the *Pacta Sunt Servanda* article, establishes that **agreements should stand in good faith.**

Considering Art 26 and the Pacta Sunt Servanda Principle it would be logical that the treaty prevails over domestic law, because there is no sense in entering a Treaty that countries are not willing to comply with.

Also, treaties must be reciprocate so States must consider that the violation of a DTA would probably have further consequences.

Furthermore, article 27 of the VCLT establishes that *"a CS may not invoke the provisions of its internal law as justification for its failure to perform a treaty"*

Article 27 of the VCLT directly disregards treaty override, by expressly mentioning that a Country can't invoke its domestic legislation to ignore the provisions in a DTA.

Article 31 of the VCLT establishes the general rules of interpretation of treaties. It mentions that a treaty **shall be interpreted in good faith** and in accordance with the ordinary meaning given to the terms in their context and in the light of its **object** and **purpose**.

It is worth noting that in relation with the above and thanks to AP6 of the BEPS Project, the 2017 OECD MC now has a new preamble that clearly establishes the object and purpose of any DTA: *"Avoiding double taxation, without creating opportunities for tax evasion"*

Paragraph 70 of the OECD Commentary to article 1 mentions that as a general rule, ***"where the application of provisions of domestic law and of those of tax treaties produces conflicting results, the provisions of tax treaties are intended to prevail"***

It is worth mentioning that the OECD MC and the Commentary are considered as published preparatory works.

Article 32 of the VCLT establishes the supplementary means of interpretation, including preparatory works.

This would mean that the Commentary is to be considered when interpreting the true meaning of a DTA.

Schneider Electric (2002)is a case that concerned the French Controlled Foreign Companies rules and how they interacted with article 7 of the DTA between France and Switzerland. In this case it was concluded that the DTA took precedence over the domestic CFC rules.

Treaty override as an anti-abuse provision.

There are situations where treaty override maybe be regarded as an anti-abuse provision.

Paragraph 75 of the OECD Commentary to art 1 establishes that *"the application of tax treaty provisions may be denied under judicial doctrines or principles applicable to the interpretation of the treaty. In such case,* ***there will be NO CONFLICT with the treaty provisions if the treaty benefits are denied as a result of the application of domestic specific anti-abuse rules.****"*

It is important to mention that AP 6 prevents treaty abuse and allows anti avoidance domestic provisions to override treaty.

In paragraph 61, better known as the "guiding principle" it is mentioned that domestic anti-abuse rules are compatible with the treaty"

Conclusion

Treaty override should only be justified in the case of tax avoidance.

There should not be benefits available when the main idea of entering a transaction is to get a more favourable tax treatment.

This, would be contrary to the objects and purpose of the relevant provisions of the Treaty, as mentioned in para 61 of the commentary.

Furthermore, Article 29 of the DTA would confirm this.

PART B

Answer-to-Question-7

Date: 6 June 2023

To: The Azurian Tax Administration ("ATA")

From: Tax Advisors

Advise regarding the taxing rights ATA would have in the case it entered into DTAs regarding the income of non-resident performers.

We agree that the first priority for Azuria is to negotiate and implement DTAs.

According to article 17 of the OECD MC for 2017, entertainers who are residents of a CS may be taxed in the other CS in this case Azuria, in which their personal activities as such are performed, such as their performance on the prominent travelling music festival.

This would mean that the famous international non-resident musicians performing in Azuria would be taxed for their performances in Azuria.

Article 17 is an exception to article 7 of the DTA and considers

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the special circumstance that sports persons and entertainers face.

According to Para 1. of the Commentary to article 17 *"this provision makes it possible to avoid the difficulties which often arise in taxing entertainers and sport persons performing abroad".* Difficulties that Azuria is clearly facing.

According to Para 3 of the commentary of the article in question, and entertainer would clearly include a stage performer, which is relevant because it would cover the non-resident musicians performing in Azuria.

Additionally, Para 8 of the Commentary establishes that when an entertainer is employed by a person or company, the state where the performance takes place, in this case Azuria, may tax an appropriate proportion of any remuneration paid to the individual.

It is important to mention that this applies regardless of how pays the musicians.

In this case, according to article 17 of the OECD MC and the Commentary, for the fees for the involvement at the festival paid by the Azurian festival to the performers, i***t is clear that Azuria would have rights to tax over the non-resident musicians performing in the musical festival.***

Payment for the television performance made immediately after performing.

Para 9.1 of the Commentary to article 17 establishes that *"Merely reporting or commenting on an entertainment event in which the reporter does not himself participate is not an activity of an entertainer and as such would not be covered by article 17".*

However, considering that this is a payment for a **television performance**, and assuming the musicians are performing an accruing income thanks to their c**lose relation as entertainers**, **Azuria would have rights to tax under article 17.**

Article 26 exchange of information provisions

ATA may use the exchange of information provision in article 26 of the OECD MC to gather further information on non-resident performers who owe taxes as a result of their performance in past musical festivals in Azuria, this assuming Azuria has entered into the DTA.

It is very notable that the scope of information of this article is not limited by article 1 or article 2 of the DTA, meaning it IS NOT ONLY limited to residents of the 2 contracting states.

Also, art 26 applies to taxes of every kind, having a very wide scope.

Article 26 provides that the relevant authorities of the CS shall exchange information that is foreseeable relevant for carrying out the provisions of the Convention.

This article is very useful for ATA since it is very wide. However, the term foreseeable relevant offers protection to taxpayers and tends to strike the balance.

This would mean that ATA would have to request information that is relevant and that has a link to the application of the tax provisions regarding the non-resident performers who owe taxes.

It will also be useful for ATA that Para 9 of the Commentary indicates that the provisions allow for exchange of information to be done a) on request, b) automatically or c) spontaneously.

Art 26 does have some limits established in Para 3, such as a) no information will be supplied if it carries out administrative measures at variance with the laws and administrative practices of the other state, b) no information which is not obtained under the normal course of the other state shall be supplied, and c) no information which would disclose any trade, business, industrial commercial or professional secret or trade process would be exchanged.

The Developments post the work on the Harmful Tax Practises Report led to a further addition of Para 5 to article 26 to the OECD MC in 2005, since States cannot use the banking secrecy laws to decline a request of information.

This would mean that Azuria could even request information that is held by banks and that the residence state of the non-resident musicians would have to provide said information.

It is important to mention that in the past, the CJEU has found

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in the **Luxembourg State Case (2020)** that it does not matter if the information is requested in categories (such as contracts, invoices and payments) rather than being specifically identified, as long as the categories are related to documents that are related to the taxpayers for the time period concerned.

This would mean, that the ATA could request information in categories, making it easier to get the documentation needed to start an assessment to the non-resident performers who owe taxes if they found convenient.

Conclusion

If Azuria implements DTA, under article 17 it will have rights to tax the performance of the non-resident musicians occurred in their jurisdiction.

Considering the increasing internationalisation of economic relations, article 26 will allow Azuria to exchange information that will make it easier to gather information on non-residents who owe taxes.

PART A

Answer-to-Question-4

Memorandum discussing mechanisms for dispute prevention and for dispute resolution

Introduction

A double tax treaty, which could follow either the OECD or the UN Model, often has an article that allows contracting states ("CS")to resolve disputes arising.

The MAP, established in article 25 of the OECD Model is used in various circumstances, such as:

1. Transfer Pricing (article 9 of the OECD Convention)

2. Tie-breaker for dual residence of companies (Art 4 of the OECD Convention)

3. For profits of a PE (article 7 f the OECD Convention)

With the introduction of the BEPS Project in 2015, AP 14,that is a minimum standard, aimed at making dispute mechanisms stronger.

In this essay we will discuss how the **MAP can be a process for dispute prevention and for dispute resolution depending the case**

and we will mention its effectiveness in managing the risk of double taxation.

Analysis

The MAP process

The Mutual Agreement Procedure ("MAP") is regulated in article 25 of the OECD MC.

Para 1. establishes that when a person considers that the actions of one or both of the CS will result for him in taxation not in accordance with the provisions of the Convention, he may present his case to the competent authority.

It is important to mention that since the first paragraph it is clear that the MAP is not only a remedy for the misapplication of the convention, but that also can be reached when taxpayers **consider that the actions of one of the CS will result in double taxation.**

This means, that the **taxpayer doesn't need a determination, he can reach out to MAP as soon as he considers that the actions of the CS may result in double taxation.**

This makes the MAP a dispute prevention mechanism because it can be requested even before the dispute arises.

Competent authorities shall endeavour to resolve the case by the MAP.

Here is where we face our first shortcoming, since the resolution of the MAP is not mandatory, meaning that CS don't have an actual obligation to resolve.

This considering that endeavour to resolve only means to try very hard, but not to actually resolve.

In the **GlaxoSmithKline Case**, that was a transfer pricing dispute between the United States and the UK, the taxpayer (Glaxo) ended up settling outside of Court for $3 billion USD even though the 2 countries where involved in a MAP procedure. In this case the tax authorities didn't resolve the MAP and the taxpayer had to resolve on its own.

The OECD has considered this, and as such, for the 2017 OECD MC Treaty one of the changes was the ability of the taxpayer to present the case to any of the tax authorities.

Also, in 2008, an arbitration clause was introduced in recognition of the problems occurring with Article 25.

However, in the Action Point 14 of the BEPS Project, only the first 3 paragraphs of Article 25 where considered minimum standards, meaning that the arbitration clause could not be agreed, and is an option for Contracting States.

The arbitration clause is very good because it makes the dispute resolution effective.

The arbitration can be requested by the taxpayer (in writing) if the MAP is not resolved in 2 years.

Arbitration has some very positive sides such as the fact that it is impartial, that the competent authorities are obliged to agree and that it will resolve the dispute in a timely manner.

However, it is worth mentioning that the taxpayer can't reach out to request arbitration if the dispute is already resolved under domestic law.

Conclusion

The MAP is both a mechanism for preventing and for solving disputes.

We consider that this is a more effective use of the tax administration resources in managing the risk of double taxation, however, there is a shortcoming in the fact that arbitration is not part of the minimum standard.

Mandatory binding arbitration as a minimum standard would have probably been a better move forward.

This considering that in cases such as article 4, when using MAP as a tie-breaker for double tax residency of enterprises, if no agreement is reached the taxpayer is left with double taxation.

This defeats the purpose of the Convention itself, but luckily, it can be solved through arbitration if the Contracting States apply it in their treaties.

However, until today, only some States have arbitration in their

treaties, such as Austria, Belgium, Canada, France, Japan, New Zealand, UK, USA, among others.

The EU has a Dispute Resolution Directive since 2017, which is similar to article 25. This directive covers all issues regarding double tax disputes and means that if a tax dispute arises in Europe it will be effectively resolved.