

# **Dialogue with Business Community**

22 March 2017

**Osamu KAWANISHI**

Director for Tax Treaties and International Affairs,  
Ministry of Finance, Japan

## Article 25 of the OECD Model Convention (1)

### Article 25 of the OECD Model Convention

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in **taxation not in accordance with the provisions of this Convention**, he may, **irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national**. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

## Article 25 of the OECD Model Convention (2)

2. The competent authority **shall endeavour**, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, **to resolve the case by mutual agreement with the competent authority of the other Contracting State**, with a view to the avoidance of taxation which is not in accordance with the Convention. **Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.**

3. The competent authorities of the Contracting States **shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention**. They may also consult together for the elimination of double taxation in cases not provided for the Convention.

## Article 25 of the OECD Model Convention (3)

### 5. Where

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

**b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,**

**any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. [These ....]**

## Action 14 of the OECD/G20 BEPS Project

- *Starting point - Action Plan on Base Erosion and Profit Shifting (2013)*
  - ✓ **The actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business.** Work to improve the effectiveness of the mutual agreement procedure (MAP) will be an important complement to the work on BEPS issues. The interpretation and application of novel rules resulting from the work described above could introduce elements of uncertainty that should be minimised as much as possible. **Work will therefore be undertaken in order to examine and address obstacles that prevent countries from solving treaty-related disputes under the MAP. Consideration will also be given to supplementing the existing MAP provisions in tax treaties with a mandatory and binding arbitration provision.**

## Action 14 of the OECD/G20 BEPS Project

- Starting point - Action Plan on Base Erosion and Profit Shifting (2013)

### **Action 14**

***Make dispute resolution mechanisms more efficient***

***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.***

## Action 14 of the OECD/G20 BEPS Project

### ➤ Minimum standards in the Action 14 Report

- ✓ Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- ✓ Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes; and
- ✓ Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure.

## Action 14 of the OECD/G20 BEPS Project

### ➤ Minimum standards in the Action 14 Report

**1.1 Countries should include paragraphs 1 through 3 of Article 25 in their tax treaties**, as interpreted in the Commentary and subject to the variations in these paragraphs provided for under elements 3.1 and 3.3 of the minimum standard; they should provide access to MAP in transfer pricing cases and should implement the resulting mutual agreements (e.g. by making appropriate adjustments to the tax assessed).

**1.3 Countries should commit to a timely resolution of MAP cases: Countries commit to seek to resolve MAP cases within an average timeframe of 24 months.** Countries' progress toward meeting that target will be periodically reviewed on the basis of the statistics prepared in accordance with the agreed reporting framework referred to in element 1.5.

## Action 14 of the OECD/G20 BEPS Project

### ➤ Minimum standards in the Action 14 Report

**3.1 Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected.** In order to achieve this, countries should either:

- amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the competent authorities of **either** Contracting States, or
- where a treaty does not permit a MAP request to be made to either Contracting State, **implement a bilateral notification or consultation process** for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).

## Action 14 of the OECD/G20 BEPS Project

### ➤ Minimum standards in the Action 14 Report

**3.3 Countries should include in their tax treaties the second sentence of paragraph 2 of Article 25 (“Any agreement reached shall be implemented notwithstanding any time limit in the domestic law of the Contracting States”).** Countries that cannot include the second sentence of paragraph 2 of Article 25 in their tax treaties should be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

- 39. [ . . . . ] It is also understood that a country that prefers to include the second sentence of paragraph 2 of Article 25 would not be obliged to accept such alternative provisions.

## Action 14 of the OECD/G20 BEPS Project

### ➤ Minimum standards in the Action 14 Report

[In Article 7]

- A Contracting State **shall make no adjustment** to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting State **after [bilaterally agreed period]** from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or willful default.

[In Article 9]

- 3. A Contracting State **shall not include in the profits of an enterprise, and tax accordingly, profits** that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, **after [bilaterally agreed period]** from the end of the taxable year in which the profits would have accrued to the enterprise. The provision of this paragraph shall not apply in the case of fraud, gross negligence or willful default.

## Action 14 of the OECD/G20 BEPS Project

### ➤ Best practices

- ✓ The minimum standards is complemented by a set of best practices.

### ➤ Next steps

- ✓ Monitoring and follow-up work
  - The Forum on Tax Administration (FTA), including all OECD and G20 countries along with other interested countries and jurisdictions on an equal footing, will continue its efforts to improve MAP through its recently established **FTA MAP Forum**.
  - This will require the development of an assessment methodology to ensure the new standard for timely resolution of disputes is expeditiously met.
  - **An effective monitoring mechanisms will be established to focus on the improvement of dispute resolutions.**

## Action 14 of the OECD/G20 BEPS Project

### ➤ Next steps

- ✓ Implementation of the Multilateral Instrument (concluded last November)
  - Action 15 BEPS Report “Developing a **Multilateral Instrument** to Modify Bilateral Tax Treaties” concluded that a multilateral instrument, providing an innovative approach to enable countries to swiftly modify their bilateral tax treaties to implement measures developed in the course of the work on BEPS, is desirable and feasible.
  - Action 14 Report also stated that a mandatory binding mutual agreement procedure arbitration provision would be developed as a part of the negotiation of the multilateral instrument envisaged by Action 15. **Part VI of the Multilateral Instrument includes the provisions for the mandatory binding arbitration of MAP cases. Part VI applies only between Parties that expressly choose to apply Part VI with respect to their Covered Tax Agreements.**