

Streamlining the Tax Treaty Mutual Agreement Procedure (MAP) and Tax Arbitration in Cross-Border Tax Disputes Between BRICS Member States (A Russian Perspective)

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I. Tax Treaty Disputes: The Current Landscape in B

1. Dynamic development of the *judicial doctrines connected with the taxation situations* for 2007-2018 in BRICS countries:
 - application of the thin capitalization rules, transfer pricing rules and the beneficial owner concept;
 - recognition of the permanent establishment of a foreign entity;
 - cross-border taxation regimes of certain categories of passive incomes;
 - aspects of the application of international tax treaties;
2. Case law do not always correspond to the essence of a legal issue considered in the light of the OECD /UN Models and the relevant commentaries to the Models;
3. Provisions of the BEPS Action Plan have been consistently implemented in the domestic tax legislation (TP rules; CFC rules; beneficial owner; GAAR; etc.) in the legislation of other BRICS countries;
4. Increased use of other *non-double tax treaties* (Treaty on EAEU; individual tax treaties, etc.);
5. Lack of tax arbitration clauses, but *application of other remedies* - such as tax arbitration, Energy Charter instruments, etc.

II. Dispute Resolution under a Mutual Agreement Procedure: State of the Art or Fundamentally Broken

1. MAP is not implemented in the Russian legal system;
2. There are *special measures or instruments to avoid or settle an international dispute*:
 - Trilateral Advance pricing agreements (APAs) with regard to transfer pricing cases;
 - the right of the Russian tax resident to recognize himself as a "person" in CFC cases;
 - the right of the foreign organization to lodge an application to the tax authorities to be regarded as a Russian tax resident or to cease to be the Russian tax resident;
 - tax services (electronic "VAT office");
 - tax monitoring, etc.;
3. Federal Tax Service allows *amicable agreements with taxpayers in dispute* (see, e.g. Ruling of the Presidium of the Higher Arbitration Tribunal of 2011, No. 16370/11, etc.).

III. The Experience with Arbitration in International Disputes

1. Almost all Russian DTTs comprise MAP;
2. Tax arbitration clause is contained only in the DTT with the and is allowed in DTTs with Switzerland, Belgium and Japan (2 clause is included in a DTT with a third party;
3. *Alternative dispute resolution mechanisms* in order to resolve related cross-border disputes:
 - European Court of Human Rights;
 - Investment Arbitration and Commercial Arbitration Courts tried by the International Commercial Court (at the RF Chamber; Stockholm Commercial Court);
4. Russia has no experience with arbitration in international tax d

IV. The New Framework for Arbitration in Tax Matters

1. Russia was one of the first countries which joined the instrument and expressed its desire to cover 66 tax treaties;
2. The provisions of the Multilateral Instrument will not cover the treaties with Sweden and Japan (2017) as separate negotiations are ongoing with these countries in respect of concluding new treaties with them, but they will follow the norms of the Multilateral instrument;
3. Russia has not expressed a desire to apply the arbitration procedure provided in the framework of the Multilateral instrument;
4. It is expected that the new Russian bilateral treaties will also include the respective arbitration provisions.

V. The Players in Arbitration: Arbitrators, Co-Authorities, Taxpayers and Their Advisers

1. In Russia there is no special institution of independent third parties contributing to the resolution of international tax disputes between taxpayers and tax authorities and in tax disputes between states;
2. The Business-Ombudsman or the Ombudsman for Human Rights may hypothetically participate in its resolution;
3. Other experts are called to help resolve disputes in various branches of legislation, including tax relations (consultative councils within states and organs; legal expert in the Constitutional Court of the RF; etc).

VI. The Tax Mediation

1. In Russian legislation **Mediation** is defined as:
"a method of dispute resolution with the help of a mediator based on the consent of the parties to the achievement of a mutually acceptable solution for the parties";
2. In Russian legislation (and in legislation of other BRICS countries) there is no formal definition of "tax mediation";
3. Arbitration courts recommend the transfer of disputes for resolution either in arbitration or in mediation and even provide venues for these procedures (by way of example, the dispute was settled in 0.007% of cases considered by courts in arbitration jurisdiction and in 0.003% of cases considered by arbitration courts);
4. Tax disputes in Russia before they are tried by *the court shall pass through a pre-trial stage* ;
5. The Russian Chamber of Tax Consultants *as a prospect for the tax mediation in Russia.*

VII. Procedural Issues of Tax Mediation

1. Basic requirements for the future tax mediation :

- q Mediators should be natural persons;
- q High level of personal responsibility;
- q Interference in the work of the mediator should be prohibited;
- q Secrecy of a mediation procedure protected by the law;
- q Prohibition of removing the documents and information submitted to the mediator during a mediation procedure by parties;
- q Legal expertise (degree) and/or professional training for mediators;
- q Financing mediators from the state budget to ensure impartiality.

2. Basic requirements for the mediation agreement: Matters to be mediated and/or legal issues? Preconditions and limitations; Legal consequences of mediation decision; Mediation costs.

VIII. Outlook: The Future of The Resolution Disputes in BRICS

1. Russia, in general, has not taken on the MLI obligations in respect of tax arbitration (like other BRICS states);
2. Though the implementation of MLI is slow, officials of the FTS actively participates in most developments (OECD, JITSIC SPOC Meeting);
3. There are APAs experience on TP cases (7 agreements in oil and gas, 10 agreements in air transport);
4. Despite there is no tax arbitration experience, Russia still has some *mechanisms for resolving tax disputes* (International Arbitration; Tax Dispute Resolution within the Regional Organizations (EAEU, BRICS, etc.).

Obrigado pela sua atenção!

Спасибо за внимание!

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