

Business Standard

Global trends in tax disputes

India continues to be weighed down by its disputes

Parthasarathi Shome November 30, 2017 Last Updated at 22:43 IST



With the advent of the Base Erosion and Profit Shifting (BEPS) project of the G20-OECD, the global incidence of tax disputes is back on centre stage. BEPS Action 13 deals exclusively with this matter and Action 15 focuses on, among other things, how countries should come together on a common platform to sign on a mechanism for dispute resolution. Commensurately, the analysis of disputes has sharpened and the conclusions from such analyses have become more meaningful. One illuminating revelation at a recent London School of Economics (LSE) seminar was that a mere counting of disputes may yield erroneous conclusions and, instead, the measurement of disputes should be appropriately normalised across countries before comparing

and drawing conclusions on entry costs and exit costs for potential investors which is, after all, the crucial role that dispute resolution has to assume.

Baistrocchi and Hearson (*1*) delineated a step by step method of “normalisation”, covering all G20 countries. Through an expert survey comprising international tax experts, a “G20 Leading Tax Treaty Case Dataset” was compiled. First, only disputes over tax treaties were identified. Second, the list was narrowed down to court cases only. Third, the period was confined to the pre-BEPS Reports era (1923-2015). Fourth, out of these, only “leading” cases – those cited at least once in court or by the tax administration – rather than leading cases plus “progeny” cases – those that can be resolved in court through existing leading cases – were taken.

Two standardisation exercises were carried out. First, every list drawn up by the country expert was compared by the same expert against an alternative list available from an International Bureau of Fiscal Documentation (IBFD) database in order to view if and why any discrepancy may exist. Second, a specific definition of leading cases was discussed and arrived at a 2015 conference at LSE of the experts with the objective of evening out differences and ambiguities in national legal systems. Consequently, each entry became compliant with the same definition of a leading tax treaty dispute.

But just counting the absolute number of leading cases in each country would tend to weigh heavily towards those countries that have a tradition of earlier cases to be cited in court judgements whether or not such citations possess direct relevance to the particular case. This occurs in Germany and India. To “normalise” this factor, the number of leading cases in a country were taken as a proportion of the total number of tax treaty cases in court. Thus the analysis pertains to the relative importance of particular kinds of disputes in a country’s total disputes rather than on the absolute number of disputes.

From this voluminous and reflecting constraints of space I have drawn a dozen conclusions that I feel are useful to the practitioner. (1) In the 2000s, the US treaties account for one-third of the litigation among G20 countries, and the UK one-tenth. In fact, the US overtook the UK and the Netherlands. (2) Switzerland, the Netherlands, Belgium, Spain, and Germany are also among the top 10 litigated countries. Cyprus has also

become important in this respect. (3) The importance of the US for its treaty countries is revealed in that, for Australia, Canada, Japan, Mexico, and South Korea, half of their disputes are with their US treaties. On the contrary, for the US, treaties with Canada and the UK represent only one-fifth of the US tax treaty disputes. (4) The authors work out “poles” such as the US, Germany and Switzerland around which most disputes have appeared and how such poles have changed over time. For example, by the 1990s, Switzerland was replaced by the Netherlands in terms of the share of disputes. And in the 2000s, the US had become overwhelmingly dominant.

(5) Most litigated treaties emanate in source countries. Thus source country tax authorities have tended to resist tax treaty law more than those of residence countries, reflecting an inherent bias restricting the taxing rights of source countries in the OECD Model Tax Treaty. (6) India, a source country, has experienced “an unparalleled upsurge in tax treaty disputes in the 2000s, pulling away from the system alone,” indeed a most remarkably strong observation by researchers on the basis of sophisticated analysis at a globally renowned centre of learning.



Illustration by Binay Sinha

of the same scale.

(9) Examining individual Articles of tax treaties, variations are striking. Three-quarters of disputes over the definition of permanent establishment (PE) are won by taxpayers, but they win only one-fifth on capital gains. (10) OECD members have moved away from PE litigation as their PE structures are scaled back even as they grow in BRICS countries; but the OECD represent a larger share of capital gains cases (despite a handful of high profile cases such as Vodafone in India). (11) The academic researchers point to the clear evidence of the OECD’s movement away from the judiciary to the “parallel route” of mutual agreement procedures (MAP), led by the US and Germany. They believe this to be a more opaque route since the complete dimensions of a MAP may not be revealed.

(12) Finally, the authors view the international tax system as at a crossroads. Encouraging cross-country tax competition should stimulate growth though automatic exchange of information could improve transparency at the cost of growth. Optimising from the contradictory forces remains a challenging task.

Needless to say, the volume charts a new course and should be explored by professionals interested in international taxation and, in particular, by those working on dispute resolution pertaining to tax treaties.

1. Eduardo Baistrocchi, ed., A Global Analysis of tax Treaty Disputes, Cambridge University Press, London, 2017

(7) Government success rates have been declining over the decades reflecting changing attitudes of courts and a rising quality of private sector advocates. It also reflects a more aggressive approach of tax authorities thus lowering their thresholds based on likelihood of success. (8) “A particularly low government success rate in India is perhaps unsurprising, although (note) the 100 per cent (success) rate in China.” China boasts only tax authority rulings with no independent court judgements! Thus, China and India are at two ends