**Tax News and Horizon Scanning Podcast Series on Tax Disputes**

**Episode 4: Tax Disputes in India**

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| **Zoe Andrews** | Hello and welcome to our tax dispute series. I'm Zoe Andrews, co-host of our regular tax news podcast. Across the world tax risk is on the rise. What should you be concerned about and how can you prepare? Today we continue our tour of G20 countries on 6 continents with a stop-off in India. This podcast will be of interest to you if you're involved in a tax dispute with India, or if you're trying to avoid getting into a tax dispute in India, or even if you currently have no business concerns in India but take an interest in the global tax disputes landscape.<br><br>For this episode, I'm delighted to be joined by my colleague Sarah Osprey and Mukesh Butani, who is joining us online from India. Mukesh is the founder and Managing Partner of BMR Legal Advocates. Thanks for joining us today, Mukesh.<br><br>Please tell us a bit about yourself and your tax disputes practice. |
| **Mukesh Butani** | Thank you very much firstly for inviting me. My name is Mukesh Butani, I have been in the tax profession for over 3½ decades and I, initially, my first 20 years, were practising as a Chartered Accountant. The last 15 years I've been practising as a counsel focusing predominantly on international tax and transfer pricing, policy, advocacy and disputes. My disputes side of my practice includes disputes in the administrative courts as well as ordinary dispute resolution mechanism. The firm which is comprising of 25 lawyers is across Mumbai and New Delhi offices also focuses on international tax and transfer pricing disputes and policy related work. |
| **Zoe Andrews** | It sounds like you keep yourself very busy. I'm also joined today by Sarah Osprey, a tax partner and member of Slaughter and May's tax disputes practice. Sarah, would you like to tell us a bit about yourself and your experience of managing HMRC enquiries and disputes? |
| **Sarah Osprey** | So I've been with Slaughter and May since 2013 and I've been a partner for almost a year now and of course a big part of my work has been tax disputes. Now the subject of those disputes has covered a range of topics from purely domestic matters, things like deductibility of expenses and UK employment tax issues, but also cross-border matters. And I should add that, happily, all of the tax disputes that I've happened to work on have actually ended in settlements, so I've not had to take a case to the tribunal yet, but I suppose it's only a matter of time. |
| **Zoe Andrews** | That's a pretty good track record.<br><br>Mukesh, India has a reputation for having a very aggressive tax administration. In your experience, do you consider that reputation to be justified? |
| **Mukesh Butani** | Many people use the word “difficult”, I use the word “different” and India has a unique mechanism for addressing audits and disputes, as a result of which it is often perceived as difficult. And now, what are the key unique features? One unique |

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| | feature, and I'm just trying to compare this with the UK system or system in other advanced countries, is number one, the tax code, which is written down, is seldom supported by administrative guidance for interpretation purposes, so tax inspectors often give the benefit of doubt to the Revenue rather than to the taxpayer. So that's really the start of an audit or an assessment leading to a tax demand. Historically tax inspectors had unreasonable targets for tax collection as a result of which there is over enthusiasm and zeal amongst the tax inspectors to raise what we call a high-pitched assessment.<br><br>I think the third, and in my view, the most important contributor is that even if a taxpayer wins the appeal, let's say for instance that the first appellate level, which is before the Commissioner Appeals or before the Income Tax Appellate Tribunal, which is the last fact-finding authority, the Revenue has a tendency to file appeal in the higher appellate forum. So until and unless the matters achieve finality up until the Supreme Court of India, the revenue kind of keeps on appealing and that's also the reason why at a larger disputes level, successive committees of the government have pointed out that the government is indeed the largest litigator. So I think if you put all of these three reasons into place, our tax system is different, as a result of which there is a lot of trust by large corporates, particularly by multinationals on tax mitigation or tax risk mitigation strategies and approaches, getting the documentation right, making sure that the fact-finding authority has been given all the information in order to be able to do a credible audit.<br><br>The last point I wanted to make was that it's only in the last decade or a little over a decade that India is testing international tax principles, treaty principles for the first time. It's finding its way into the jurisprudence in the Indian courts. So, in a way you're dealing with principles which are evolving unlike the UK which has dealt with it, if not for centuries, then for several decades, particularly the nuanced issues on tax treaties and cross-border transactions. |
| **Zoe Andrews** | I think that's a very good way of looking at it. I like the way you use the word “different” rather than “difficult” or “aggressive”. I think that puts it all in perspective. Sarah, how does HMRC's approach to compliance compare to India? |
| **Sarah Osprey** | I think just picking up on that point of different versus difficult, that does sound like a, kind of the key way in which HMRC's approach can be described as different to that in India because whilst, and I can come onto this, I do think HMRC has become more aggressive in recent years, for many multinationals it will be seen as a more predictable tax authority to deal with or maybe seen as being a bit more structured in its approach. But in terms of how it goes about compliance, our UK listeners will know that HMRC tries to take a risk-based approach and it will assign a level of, a risk profile to a given business, and then the level of investigative work they typically undertake will then follow that risk profile that's been assigned.<br><br>In terms of what HMRC may classify as a higher risk multinational, you are probably looking at a group which has, or maybe historically has had, lots of complex cross- |

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| | border affairs or financing arrangements, maybe less transparent reporting systems, poor track record of tax disputes or something like that.<br><br>But just in terms of what the increased trend in aggressiveness that I mentioned looks like, there are probably three things that I think it's worth mentioning. First, we are seeing a more aggressive focus on the detailed fact finding and evidence testing part of an inquiry which, in our experience, does make enquiries and audits much more lengthy than perhaps they need to be and maybe I'm speaking out of personal experience, but sometimes it can feel like that's borne from a fear by the case teams within HMRC of making decisions to move a dispute onwards.<br><br>The second trend that we are seeing is partly a proliferation of new anti-avoidance legislation, but also a willingness of HMRC to robustly use well established anti-avoidance legislation in particular areas which are perceived by HMRC or publicly as being spaces for effectively bad tax behaviour. So, we're seeing signs of increased inquiries in the transfer pricing space, employee remuneration and the deductibility of interest payments on debt, particularly cross-border debt and a lot of these anti-avoidance rules will quite often look at the purpose for which the business has done something. You know, looking for whether there are tax fingerprints on any given transaction or the way that that transaction which is otherwise entirely non-tax driven has been structured. And that kind of focus on the purpose of the transaction itself gives rise to those detailed questions of fact that can cause enquiries to last for quite a significant length of time.<br><br>And the third trend that I'd like to briefly mention, which is sort of an extension of the second one that I've mentioned, relates to advanced pricing agreements. Now in basic terms an advanced pricing agreement or APA is a contract between a business and one or more tax authorities pursuant to which they agree the pricing of intragroup transactions and therefore the level of taxable profit attributable to different group companies around the world and usually APAs are seen as a good tool for avoiding tax disputes in particular areas, including, in particular, transfer pricing.<br><br>Now we can talk about APAs in a bit more detail shortly, but we are finding a trend by which HMRC are looking for ways, well, to essentially undo the effect of transfer pricing agreements agreed in the past where they no longer quite like the outcome. And sometimes that can be through quite clever and crafty means and using new tools which are available now that weren't available when the advanced pricing agreement was first put in place. So whilst we should be looking at APAs as a useful tool for preventing cross-border tax disputes, if you're a multinational with a UK presence and you have an APA that's either recently expired or is coming to an end soon, I think that's definitely something to be keeping an eye on. |
| **Zoe Andrews** | Yes, definitely. So, as Sarah just mentioned, one way of avoiding transfer pricing disputes is to obtain an APA but if a dispute arises involving another jurisdiction, the mutual agreement procedure (or MAP) may be used to resolve it.<br><br>In our US episode, Clark Armitage mentioned that, with his clients, he sees a lot of activity in the transfer pricing space in India, and it sounded as if his clients' |

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| | experience has generally been positive. But I also understand that it can take a long time to resolve MAP cases and agree APAs. Of course, if you get the right result, it may be worth waiting, but can you comment on what is the cause of this delay? |
| **Mukesh Butani** | The ground level reality continues to be that India and the US have a fairly significant MAP inventory as well as bilateral APA. There are host of reasons why these APAs are slow or not getting finalised. There is a very excellent analysis of the APA annual report that is put out, the last annual report was for financial year 21/22 wherein the report has clearly laid down that what used to be a normal APA conclusion time of 44 odd months, has now gone to almost 58 months for conclusion of the bilateral APA. So here you see that investors are experiencing the pinch of these delays. |
| **Zoe Andrews** | Is there anything that investors can do to speed up the APA or MAP process from a practical perspective or is this out of their hands, really? |
| **Mukesh Butani** | The office of the competent authorities here are not just responsible for MAP and APAs, but they're also responsible for other functions such as treaty negotiations, exchange of information and as a result of which there has been pressure from a timing standpoint on the authorities. COVID delayed the bilateral APA and MAP negotiation processes until the time the world came to get to grips with the reality of virtual working. So, I think we lost about 18 months or so even in the COVID times but having said that, there is an anticipation that the resolution of MAP cases and bilateral APAs will pick momentum and our average APA time in the current financial year which is 23/24 would be less than what we saw in 22/23, but none of those statistics are available. I think we need to wait and see.<br><br>I think India being committed to BEPS action 14 mandate, which is India subjecting itself to not just the peer review process but also putting out the MAP statistics and the bilateral APA statistics, will certainly in my view, put pressure on the office of the competent authority to expedite the APA process. So, I continue to be optimistic insofar as the future of the APA programme is concerned. |
| **Zoe Andrews** | Yes, it sounds like it's a major resourcing issue really that there's just too many of these applications. They got too far behind during COVID and now they haven't got enough people solely working on it. As you say, the same people are also negotiating treaties and doing other things. So, I mean, are there any plans for the government to spend more money on increasing the resource or do you think they're just hoping that they'll become more efficient? |
| **Mukesh Butani** | I think the key lies in becoming more efficient. One of the unique features of India's APA programme is that you're dealing with two different sets of officials. So, we have the Office of Competent Authority, which is really the empowered authority to sign APAs, to bind the Union of India with the foreign jurisdiction. But we also have field officials who are responsible for field interviews and talking to the taxpayers and sometimes we have seen communication gaps between field officials, like the APA commissioner and the competent authority which is located in New Delhi. So, we had to some extent a decentralised APA mechanism. So, I think that is where most of the inefficiencies lie. I don't think that there is any plan to be able to centralise the |

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| | functioning of the APA but I think that, as officials get trained, there would be a set of common processes that would guide them to make the entire process more efficient than what it presently is. |
| **Zoe Andrews** | And Sarah, are you finding that APAs and MAP are still useful tools for clients or has their use reduced in the UK? |
| **Sarah Osprey** | Well, sort of, similarly to in India, HMRC publishes annual statistics on APAs and on MAP and our latest statistics which were published towards the end of January this year show a continued decline in the number of APAs agreed per year. So, in the 2022 to 2023 year, it was just 15 that were agreed with an average time of, I think this is similar to India, of nearly four years. Now, APAs apply only for a limited period of time anyway, now that's usually three to five years, so we have heard some say that given that time limitation, it might not be worth the kind of time and effort of agreeing them, although it is typically possible to agree with HMRC that there is at least a rollback period which can be helpful.<br><br>Now, notwithstanding that, and notwithstanding the point I mentioned earlier about reliance on historic APAs, I do still see a place for APAs as an important tool in managing transfer pricing risk and I do suspect that, over time, we will see a shift or at least continued interest by multinationals in agreeing bilateral and multilateral APAs because having as many sort of tax administrations agreeing the position as possible is the gold standard, as close as it can be, in terms of certainty on those sorts of issues.<br><br>Now in terms of MAP, the number of MAP cases resolved in 2022 to 2023 was 131, so about the same as for the previous year and the average time to resolve MAP cases has increased last year, but by 7 months to 28 months. So, a significant period of time still.<br><br>One interesting development that it's worth mentioning is that large multinational groups headquartered in participating countries, which includes the UK but not India yet, is an alternative route to obtaining increased and earlier tax certainty and this is through the International Compliance Assurance Programme or ICAP. ICAP is a voluntary programme intended to be a quick and efficient way to obtain a risk assessment from multiple tax administrations. |
| **Zoe Andrews** | The US is also a member of ICAP and Clark Armitage discussed ICAP in detail in the US episode. |
| **Sarah Osprey** | Mukesh, do you expect India to sign up to ICAP eventually? |
| **Mukesh Butani** | India's official view has been to not be a part of the ICAP because it feels that it has pursued a fairly aggressive agenda on tax digitalization by which it is able to collate a lot of information from within the artificial intelligence framework. Also, India historically has been championing the cause of tax information exchange agreements and as a result of which the flow of information on treaty-related matters |

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| | has been smooth. So, India has not become a part of the ICAP initiative. I don't anticipate India will join the ICAP initiative, but that's my guess. |
| **Zoe Andrews** | Another topic I thought I'd raise with you, Mukesh, is that the first few meetings have taken place on the proposed UN Framework Convention for Effective International Tax Cooperation and India is one of the 125 countries that voted in favour of the resolution, unlike the UK which voted against it. Mukesh, can you tell us what India expects to gain from this that's missing from the OECD's two pillar approach to international tax reform? |
| **Mukesh Butani** | First of all, India supports multilateralism. India has played a pivotal role in the G20 led OECD negotiation.<br><br>My feeling based on discussions with policymakers in New Delhi suggest that whereas India was very enthusiastic when Pillar One was announced because there ought to be separate taxing rights given to market jurisdictions. However, India felt that Pillar One becoming a casualty and Pillar Two gaining prominence, which India supports by the way, meant that the journey to market jurisdictions getting a separate taxing right is longer than what it was thought of when the, you know, building blocks for Pillar One were being finalised.<br><br>If, for any reason, the bilateral negotiations at the OECD do not result in an outcome of consensus, then at least it is putting forth before the world a credible alternative which is the UN and I use the word credible because at the end of the day, that's the only alternative which could avoid the ad hoc unilateral levies for which not just India but many other jurisdictions have come under criticism. |
| **Zoe Andrews** | It's a difficult one, isn't it, Mukesh, because in order to get that kind of consensus, you end up, when you've got so many countries involved, going down to the lowest common denominator and so it's very difficult to see how this one's going to be resolved, I think.<br><br>Well, shall we move on to talking about some recent litigation in India. I understand, Mukesh, that a recent India Supreme Court decision on the interpretation of the most favoured nation clause in tax treaties is causing quite a stir in India and in the international community at the moment and we'd love to hear about this case. Can you explain the purpose of the most favoured nation clause and why the Supreme Court decision has caused such concern? |
| **Mukesh Butani** | Yes, it has caused quite a stir. Let me just give you a little bit of background because it's circled around interpretation of this magical word called “is”, and the controversy circles around India's historical double tax avoidance agreements with countries such as Slovenia, Colombia, Lithuania that had a lower withholding tax rate on dividends in those treaties. And the question is the fact that these nations became OECD members after India signed the double tax treaties: what happens to countries such as Netherlands, Switzerland and France to whom India had given the most favoured nation clauses? |

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| | The Supreme Court seems to have confused itself with what they call it as the administrative mechanism under the Indian domestic law of notifying a treaty versus notifying conferring the most favoured nation treatment. So, all treaties in India have to be notified because, without the notification, the treaty does not come into force. India's treaties with Netherlands, France and Switzerland have been notified and ingrained in those treaties were also the MFN benefits. The Supreme Court has come and answered by saying hold on, we are not just talking about the notification of the treaty that contains the MFN clause but also notification after these countries (Slovenia, Colombia and Lithuania) have become OECD members and the use of the expression is very clear in the treaties. When India signed treaties with Netherlands, France and Switzerland, it was very clear that India will confer the most favoured nation treatment to an OECD member or countries who are OECD members. It doesn't say who were OECD members at the time India signed into treaties. |
| **Sarah Osprey** | So, what I'm hearing is: the issue is that companies in some OECD jurisdictions who have a tax treaty with India thought they were entitled to apply the lower dividend withholding tax rates in those historic treaties that you mentioned, you know, Slovenia, Colombia, Lithuania, from the point in time when those countries themselves joined the OECD. But it sounds like the Indian Supreme Court has said "no" and their reasoning hasn't been very clear. If that's right, then that's clearly important for multinational groups getting dividends out of India. Is there any chance of appeal of this decision? |
| **Mukesh Butani** | So, all in all, it has been a downer for multinationals given the manner in which the Supreme Court has interpreted the MFN controversy and there are taxpayers who were a part of the ruling who have sought a review. The Supreme Court power to review its decision is very, very limited. I would not like to comment anything more than that having been involved in the controversy, but there are other taxpayers who are wanting the Supreme Court to review the decision with the larger bench of the Supreme Court. That is something that we will see in times ahead. |
| **Zoe Andrews** | How would you expect this decision to affect those who already relied on a most favoured nation clause? For example, if they've withheld tax at a lower rate than they should have withheld if the most favoured nation provision didn't apply? |
| **Mukesh Butani** | Well, the Supreme Court decision is binding on all the subordinate courts as well as on all the taxpayers. If taxpayers have made use of the MFN withholding tax, they will have to pay up. However, I don't see how the tax authorities can recover any penalties because it was based on a bona fide belief that that is indeed the correct interpretation. So as things stand now, taxpayers who have availed of the most favoured nation treatment, whether from a withholding tax standpoint or from the scope of services standpoint, will have to pay up. |
| **Zoe Andrews** | OK that's quite harsh, isn't it, when the taxpayers have relied on established legal precedent at the time. I mean, what about time limits here - how far back could the Revenue assess people? |

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| **Mukesh Butani** | Well, the reopening provisions under the statute are at two levels. One is the ongoing assessments which have a statute of limitation of three years and, second, is of past assessments which have a six-year time frame. So, I think that the tax authorities may look at reopening for the past six years to recover the back taxes |
| **Zoe Andrews** | That would be quite significant then. What advice would you give to other taxpayers who now might be wanting to invoke the most favoured nation clause in a treaty with India, what's the route that they need to take to make sure they can use the clause? |
| **Mukesh Butani** | Really, this decision needs to be taken at two levels. One is at the withholding tax level and second is at the final assessment level. Insofar as withholding tax is concerned, the door is shut because now the taxpayer is obligated to withhold tax without availing of the most favoured nation. The taxpayers who are filing tax returns may wish to still pursue their claims on the ground that some of the other taxpayers are seeking a review in the Supreme Court by way of the larger bench. |
| **Sarah Osprey** | Do you think that this case is going to have wider implications for the interpretation of tax treaties and the treatment of treaty protocols? |
| **Mukesh Butani** | If you ask this question purely as an academic theoretical question, the answer is yes. Practically, I see it's unlikely to have any adverse implication other than the adverse implication on dividend withholding tax on MFN.<br><br>India's position even from a constitutional law perspective is very clear, which is supremacy of international law, respect for double tax treaties and conventions. So even if you take this argument from a tax law to a constitution law, there is everything that supports the international investors. I have read many reactions, I mean, negative reactions post the MFN decision of the Supreme Court and I must, in all candour and humility confess that I don't share that pessimism that the Supreme Court decision in the MFN case is going to impact every facet of international agreements because the Supreme Court was dealing only with the limited issue of notification by the tax administration when it comes to the MFN benefit. |
| **Zoe Andrews** | While we're still thinking about perhaps crystal ball gazing what would you say the future holds for tax disputes in India? |
| **Mukesh Butani** | Well, India's tryst with dispute resolution has been the talk of town and MFN is a classic example. I think, at the policy level, the government is making, you know, a lot of effort to deal with the past disputes and address the first principle which is so important for investors, which is the principle of certainty. All of those have been welcomed steps. I think there is a lot of trust on the digitalization of the administration, which in my view is a game changer.<br><br>I see that the government will reform the first appellate level of tax dispute, which is the commissioner administration because you see 80% plus cases are getting stuck at the first appellate level. I also see that as the digitalization process of the administration throws up more and more artificial intelligence and more and more data that the enforcement machinery of the tax administration will look at |

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| | assessments based on a strict risk-based criteria and only pick up high-risk cases on which it is able to shower all the attention to make sure that the taxpayers, those class of taxpayers that are high-risk do really land up in assessments and the union emerges as a successful contender for those cases.<br><br>So, these are some of the changes that are taking place. I think at the appellate level in the courts, the Supreme Court and the high courts at least selectively are looking at constitution of tax benches so that tax cases can be fast-forwarded rather than lingering on for many, many years. So, I think a combination of all of this makes me again an optimist from a dispute resolution standpoint. Having said that, you would have the old forms of disputes coming up: virtual PE transfer pricing when it comes to unique intangibles, transfer pricing on market jurisdictions, application of strict treaty anti-avoidance provisions such as, you know, principal purpose and so on and so forth. |
| **Zoe Andrews** | You have plenty to watch in this space. |
| **Sarah Osprey** | Exactly and looking at the clock, I think we're coming towards the end of our time together, so let's try to kind of round up and recap a few things.<br><br>Obviously, the case we were talking about in relation to the most favoured nation clause will be of keen interest to any multinational taking dividends out of India but it's quite pleasing to hear that there is some optimism about the use of APAs in order to mitigate tax risk and in fact optimism in terms of resolving tax disputes in India more generally.<br><br>Zoe, what were the kind of key points that you've taken away from the conversation? |
| **Zoe Andrews** | Optimism seems to be the key message here and I really liked the way that you're encouraging us to rethink about the Indian tax authority rather than being aggressive or difficult it's just different the context is totally different, there is as you say less structure, there's less guidance and so it is a different sort of approach that you need as a taxpayer and as an investor to dealing with, say, the UK.<br><br>But one piece of advice that Mukesh gave, which I think is relevant to the UK as well, is the importance of providing all the facts as early on in the process as possible because then you do get the opportunity to resolve things sooner rather than later.<br><br>I've really enjoyed our stop off at India. Thank you so much to Mukesh and to Sarah for a very informative and interesting discussion. |
| **Sarah Osprey** | And that leaves me to thank you for listening. This was the fourth of six episodes in our special series on tax disputes. Next week, Tax PSL Counsel Tanja Velling and I will be speaking to Lolade Ososami of Udo Udoma & Belo-Osagie in Nigeria. |

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