The Mutual Agreement Procedure: A Taxpayers' Tool Reinvented

Global Tax Alert

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By: Joel Cooper | Randall Fox | Shee Boon Law, Ph.D.

Tax risks of multinational enterprises are expected to continue to increase post-BEPS as tax authorities globally increase their scrutiny on their cross-border tax transactions.

This trend is anticipated in the OECD/G20 BEPS Action Plan: one of the Actions in it attempts to complement efforts to address BEPS with measures that ensure certainty and predictability for businesses in the face of increased tax controversy risks.

Action 14 of the BEPS Action Plan, in particular, seeks to improve the effectiveness of the mutual agreement procedure (MAP) in resolving treaty-related and transfer pricing disputes.

What is a MAP?

A MAP is a mechanism for competent authorities (tax authorities or representatives of the Ministry of Finance or similar) to discuss cross-border taxation of specific transactions or situations with a view to coordinate their approach for the benefits of the taxpayers involved. This process is available under a tax treaty entered into by two or more countries so that the treaty partners are able to resolve cases involving
Who can access MAP?

Taxpayers, both individuals and multinational corporations, can access MAP in the country in which they are resident.

There is generally no minimum requirement on the amount of taxes in dispute for accessing MAP. No tax dispute is too small, or too big, for a MAP.

How to initiate MAP?

The process for initiating a MAP is relatively simple. Most countries have designated competent authorities that deal with MAP requests initiated by their residents.

Tax authorities are likely to require that certain information be provided before they accept a MAP request. This means that taxpayers are expected to show they are entitled to treaty protection. Taxpayers also have to be prepared to put forward their case, showing taxation not in accordance with the applicable tax treaty resulting from the actions of the tax authorities in another country.

Why should you consider using MAP?

MAP is an additional mechanism that taxpayers can use in conjunction with the usual dispute resolution mechanisms available under the domestic law of every country. In most cases, this additional avenue can be explored in tandem with the domestic channels for dispute resolution.

A MAP process can bring pressures from another tax administration to the attention of the tax authorities with whom taxpayers are in dispute. Having another tax authority on your side in any dispute can help you attain a proper resolution to a dispute.

Another advantage of MAP is that it can often take the dispute out of the hands of local auditors and providing for a fresh set of eyes to look at the issue, perhaps from a different perspective.

Is MAP a viable alternative for dispute resolution?

While cross-border disputes are on the rise, the MAP, in our opinion is still underused, even though the number of MAP cases has increased internationally. This is mainly due to the lack of understanding of the MAP process and perceived legal and practical obstacles.

Recent changes to the MAP processes following countries' commitment to the minimum standards under Action 14 of the BEPS Action Plan[1] and the signing of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI)[2] should improve both the access to and effectiveness of MAP. These changes that countries have committed to are summed up in the side table below.

In addition to these developments, the European Union has proposed a new Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, which aims at resolving double taxation cases within the EU by agreement between the member states. This may become another tool that taxpayers can access in the EU in due course.[3]

It is anticipated that the MAP process will become more effective in the future as competent authorities interact more closely as a result of BEPS. MAP-related meetings and conferences taking place at the international level have broadened and strengthened bilateral competent authority relationships.

Furthermore, as part of Action 14, the OECD is providing competent authorities an incentive to accept cases and move them more quickly through to resolution, given the peer review and monitoring process that competent authorities are undergoing. Resources that countries have committed to MAP are also expected to increase as a result of the peer review process, which is likely to put sustained pressures on countries to improve the timely resolution of MAP cases.
Moreover, in this era, in which taxpayer information flows ever more freely among counties, a MAP can help a taxpayer resolve foundational tax issues.

Thus, multinational enterprises faced with disputes concerning cross-border transactions are well advised to proactively consider the use of MAP (as well as other alternative dispute resolution mechanisms such as bilateral advance pricing agreements – APAs), where available, while at the same time pursuing their options under the usual domestic avenues.

### A Summary of Countries’ Commitment to MAP under Action 14 of BEPS

Countries 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).
- Provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to the application of treaty and domestic anti-abuse provisions.
- Commit to a timely resolution of MAP cases, committing to seek to resolve MAP cases within an average time frame 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.
- Enhance their competent authority relationships and work collectively to improve the effectiveness of the MAP by becoming members of the Forum on Tax Administration (FTA) MAP Forum.
- Provide timely and complete reporting of MAP statistics, pursuant to an agreed reporting framework.
- Commit to have their compliance with the minimum standard reviewed by their peers in the context of the FTA MAP Forum.
- Provide transparency with respect to their positions on MAP arbitration.
- Publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers.
- Publish their country MAP profiles on a shared public platform.
- Ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the country would like to see reflected in future amendments to the treaty.
- Not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.
- Ensure that adequate resources are provided to the MAP function.
- Clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP.
- If they have bilateral advance pricing arrangement (APA) programmes, provide for the rollback of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.
- Make both competent authorities aware of MAP requests being submitted so that the authorities are able to provide their views on whether the request is accepted or rejected.
- Identify, in their published MAP guidance, the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance.
- Commit that any agreement reached shall be implemented despite any time limits in their domestic law.

Is MAP an effective dispute resolution mechanism?

Following the signing of the OECD Multilateral Convention on June 7, 2017, 67 countries have committed formally to the new minimum standards in Action 14 of BEPS Action Plan to improve access to and effectiveness of MAP under their tax treaties.
According to the new rules, countries need to be committed to resolve MAP cases within an average time frame of 24 months. A small group of some 25 countries has signed up to mandatory arbitration under their MAP process. These countries are likely to face even more pressure to resolve cases on cross border disputes under the MAP, because those unresolved cases will be subject to binding arbitration by third parties.

**Four benefits of MAPs**

MAP can be used to resolve a wide range of disputes and to obtain a variety of benefits for taxpayers.

### 1. Eliminating double taxation

A MAP can be invoked by taxpayers so that a country can eliminate, by agreement with the other country, instances of double taxation resulting from the actions of the tax authority in the other country.

In the context of *transfer pricing disputes*, a MAP can be invoked by taxpayers to resolve potential double taxation arising from a transfer pricing adjustment initiated by a country. Taxpayers facing a transfer pricing adjustment may approach their country of residence to resolve any potential double taxation concern that can arise from this transfer pricing adjustment. In the first instance, the country of residence would have to consider, under the new rules in the OECD Multilateral Convention, providing a corresponding adjustment if it considers the adjustment to be consistent with the arm’s length principle. If the resident country does not agree to provide a corresponding adjustment, it may invoke MAP in an attempt to resolve this double taxation concern by agreement with the other country.

MAP is also used in many countries as a basis for initiating bilateral advance pricing agreements (APAs). In this approach, taxpayers take proactive steps to secure the agreement from two countries on the transfer pricing arrangement that they apply to their cross border transactions. A MAP is used in this context as a tool for prevention of transfer pricing disputes.

Click here for a link to DLA Piper’s global APA & MAP Country Guide 2017.

However, double taxation is not a pre-condition for accessing MAP. Tax authorities are committed to addressing taxation *not in accordance with a particular tax treaty* under the MAP process. These cases may involve resolving the residence status of a dual resident person, the ability of a country to impose withholding taxes, assertion of a taxable permanent establishment, cases of discrimination or any other matter falling within the scope of the treaty.

### 2. Determining the resident country of dual resident persons

MAP can be invoked by a taxpayer to ascertain which country has the right to impose tax on the taxpayer as the country of residence. In such cases, tax authorities may come to an agreement under the MAP on the country where a dual resident is resident for treaty purposes. The determination is important in order to ascertain which country has worldwide taxing rights and which is able to tax only when cross-border income has a source there, as well as to commit the resident country to provide double taxation relief.

### 3. Enforcing treaty limitation

Tax treaties offer protection to taxpayers by prohibiting or limiting a country’s ability to tax income from certain cross-border transactions. Where a country’s action under its domestic law is contrary to such treaty commitments, taxpayers are able to invoke MAP to enforce the treaty limitation. This may take place either because a country has attempted to put withholding taxes on certain income when no such right to tax can be exercised or when the rates of taxation exceed those permitted by the applicable tax treaty. It may also occur when a country attempts to tax non-residents based on the presence of a permanent establishment when the other country disagrees that one exists.

The ability of taxpayers to enforce this right is not dependent on any double taxation concern. For example,
a source country can be asked to exempt capital gains from taxation, if taxing such income would be contrary to the proper application of the relevant tax treaty, even when the gains qualify for participation exemption in the resident country (and thus no double taxation has occurred).

The ability to access MAP is also not dependent on meeting domestic or treaty anti-abuse rules. In other words, taxpayers do not have to prove that their transactions meet the domestic or treaty anti-abuse rules in order to access MAP.

4. Securing non-discriminatory tax treatment

A country’s domestic taxation rules that impose taxes that are more burdensome on non-residents and their permanent establishments compared with the country’s own residents may be inconsistent with certain non-discrimination principles in bilateral tax treaties. Taxpayers who find themselves in these situations may invoke MAP to secure equal taxation treatment based on the non-discrimination principles in the applicable tax treaty.

What is the right time to use MAP?

Because there is usually a time limit for invoking MAP, it is advisable for taxpayers to consider the use of MAP as soon as they become aware of a dispute. Failure to do so may result in the time frame for MAP expiring or decisions being taken (such as settling on a specific issue) which will impede the possibility to effectively seek relief through MAP.

The deadline for invoking MAP to resolve disputes in a given tax year depends on the applicable tax treaty. For instance, some treaties may require the taxpayer to notify the competent authorities within x number of years from the end of the taxable year to which the assessment relates or will relate. Other treaties may require a MAP notification within x number of years of the assessment being issued. In the absence of a specific treaty time limitation, the domestic statutory limitation will apply.

As part of the Action 14 minimum standard (as well as the recently signed OECD Multilateral Convention), countries have made a general commitment that taxpayers should be able to present MAP requests within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

How does MAP interact with domestic dispute procedures?

MAP can be initiated independent of domestic dispute resolution mechanisms that taxpayers may wish to pursue in the countries in which they operate. As a MAP is typically initiated in the country of residence of the taxpayers, the approach that needs to be taken can be decided independently of the domestic mechanisms. However, it is important that there is a level of consistency between the facts and arguments presented domestically in the countries in which taxpayers have disputes and those presented when filing for MAP in the country of residence.

Furthermore, it is also important to consider the impact of a domestic settlement agreement on the ability to obtain double taxation relief later as part of the MAP process. Domestic settlements on disputes associated with cross-border transactions can, in practice, limit the ability of the competent authority on the other side of the transactions to provide double taxation reliefs. This is mainly because such settlements restrict competent authority negotiation: the position agreed by the taxpayer with one tax authority may not be agreeable to the other. For US-based taxpayers, for example, a domestic settlement without the use of MAP can be particularly harmful, in that taxpayers must prove that they exhausted all effective and practical remedies to contest their liability for taxes, or their foreign tax credits will be denied by the US tax authorities.

Key takeaways

In summary, if you have a cross-border tax dispute where a tax treaty is applicable, MAP may be a useful mechanism that will assist in resolving the dispute. This possibility applies to a wide range of disputes, including disputes in transfer pricing, residency, application of source state taxes such as withholding taxes, taxes on capital gains and taxes on permanent establishment profits.
Thus, it is important, when considering MAP as an alternative dispute resolution mechanism, to:

- assess the possibility for use of MAP to secure or enhance your position in tax disputes concerning cross-border transactions, and to do so early in the dispute resolution process so as to develop and implement your strategy accordingly
- inform yourself about the role that MAP can play in having a fresh set of eyes look at an issue and/or having another government support your position
- when assessing whether to accept a domestic settlement offer, consider its impact on your ability to effectively access MAP and
- consider the possibility of combining a MAP concerning transfer pricing with a bilateral APA, which may help you get the most out of the process.

Contact any of the authors to discuss the possibility to make an application for MAP in your country, or to discuss your cross-border tax controversy strategy more generally.

Click here to view DLA Piper’s Global APA and MAP Guide 2017.

[1] See this page.

**AUTHORS**

**Joel Cooper**
Partner
London | T: +44 (0)20 7349 0296
joel.cooper@dlapiper.com

**Randall Fox**
London | T: +44 (0)20 7349 0296
randall.fox@dlapiper.com

**Shee Boon Law, Ph.D.**
Amsterdam | T: +31 (0)20 541 98 88
sheeboon.law@dlapiper.com