Her Majesty's Revenue and Customs (HMRC), the UK tax authority, has published revised guidance on the Mutual Agreement Procedure (MAP) in its International Manual (INTM) (at INTM 423000 – INTM423130).

The new guidance, published February 1, 2018, closely aligns HMRC’s position with the recommendations of the Organisation for Economic Co-operation and Development’s (OECD) Base Erosion and Profit Shifting (BEPS) Action 14 (Making Dispute Resolution Mechanisms More Effective) Final Report, which includes minimum standards on accessibility to MAP.

The revised guidance is supplemented by Statement of Practice 1 (2018) (the Statement of Practice), which replaces Statement of Practice 1 (2011) and summarizes the UK’s practice in relation to methods for reducing or preventing double taxation, and the MAP process as provided in UK tax treaties and the European Union Arbitration Convention (90/463/EEC) (EU AC).

The revised guidance, together with the supplementary Statement of Practice, provides detailed information on the following:
Eligibility for MAP

The legal basis for making a MAP request in the UK is provided in the Taxation of International and Other Provisions Act 2010 (TIOPA 2010). A MAP request can be made when a person considers that the actions of one or both contracting states' tax authorities results, or will result, in taxation not in accordance with the relevant tax treaty. Whereas provisions in older UK tax treaties require that taxpayers approach the competent authority of their country of residence to request treaty relief, the Statement of Practice makes clear that, under new UK tax treaties, taxpayers can approach the competent authority of either contracting state with a request to initiate MAP. Alternatively, a taxpayer may choose to invoke MAP under the EU AC where double taxation has ensued or is likely to ensue as a result of an (upward) transfer pricing adjustment made by a tax authority. In such cases, MAP requests should be submitted to the competent authorities of both jurisdictions simultaneously.

Access to MAP

The revised guidance provides that the UK taxpayer's ability to request MAP is not affected by domestic administrative or statutory dispute resolution processes. Thus, HMRC may grant access to MAP, even in circumstances where the taxpayer and HMRC enter into an audit settlement (addressing a key concern raised in the OECD peer review of the UK's compliance with the BEPS minimum standards on MAP). However, it must be considered how entering into statutory or administrative remedies with other tax authorities might affect a taxpayer's accessibility to MAP.

In the revised guidance, HMRC also acknowledges that there may be circumstances in which foreign tax authorities enter into unofficial, non-statutory agreements with taxpayers, on condition that access to MAP is restricted. HMRC will still in such circumstances consider granting relief, although the likelihood of the complete elimination of double taxation is diminished in cases where dialogue between HMRC and the foreign tax authority is restricted.

The UK has also signed the MLI with no reservations on the MAP article, increasing accessibility to MAP and the potential for discussion of a broader range of double taxation issues between HMRC and the competent authorities of the UK's tax treaty partners.

Submitting a MAP request

A taxpayer must submit a MAP request to HMRC to initiate the MAP process. While there is no set form for submission, HMRC require sufficient information and documentation to enable a full assessment of the request. Detailed information and documentation requirements in respect of requests under a tax treaty and requests under the EU AC have been published in HMRC's INTM at 423130.

It is important to note that specific treaties may provide that certain information must be provided before it is accepted into the MAP program. The UK's tax treaty partners may also have more extensive domestic information requirements, and it is therefore advisable to check the relevant tax treaty, as well as the MAP guidelines of the relevant tax treaty partner.

Time limits

Where MAP is invoked under one of the UK's tax treaties, TIOPA 2010 requires that a case must be presented to HMRC before the expiration of:
the period of six years following the end of the chargeable period to which the case relates or
a longer period as may be specified in the relevant tax treaty.

Again, it is prudent to consult the relevant tax treaty to determine the time limit that applies and to ensure that the
deadline for presenting a case is not missed.

The most recent UK tax treaties follow Article 25 of the OECD Model Convention, which provides that a person
must present its case to the competent authority within three years of the first notification of the action which
results, or is likely to result, in double taxation. Since the first notification may occur after the expiry of six years
mentioned above, the relevant tax treaty article may extend that limit. It is not necessary to await the first
notification before presenting a case to invoke MAP.

Where MAP is sought to be invoked under the EU AC, the time limits for making a MAP request are contained in
Article 6(1), which employs wording similar to Article 25 of the OECD Model Convention. Here also, taxpayers must
present their case to the competent authority within three years of the first notification of the action which results,
or is likely to result, in double taxation.

Protective MAP requests

Protective MAP requests are unique to the UK MAP process, the purpose of which is to protect taxpayers against
missing the prescribed time limits. In some circumstances, MAP requests presented to HMRC may involve a
situation whereby it is not certain whether a transfer pricing adjustment will be made, or that double taxation will
arise. There may also be cases whereby it is not possible to quantify the profits that might be subject to double
taxation. In such circumstances, HMRC may defer MAP negotiations with the relevant tax treaty partner until it
considers such negotiations are likely to be meaningful and effective at avoiding double taxation.

As it is unlikely that taxpayers making protective MAP requests will be in a position to provide all information and
documentation usually required, the minimum information required in a presentation for a protective MAP request is:

- details of the year(s) concerned
- a brief description of the action giving rise, or expected to give rise, to taxation not in accordance with the
  relevant tax treaty and
- the full names and addresses of the parties to which the MAP relates, including the UK taxpayer's HMRC office
  and reference number.

HMRC will defer its consideration of whether to allow the taxpayer access to the MAP program once all information
and documentation has been provided, as prescribed under INTM 423130. A protective MAP request will not trigger
the start date of a MAP case.

MAP and domestic relief

In circumstances where a case has been settled under the UK’s judicial process (by a court or tribunal) before it is
presented for MAP, HMRC will request that the matter be taken up under MAP.

While taxpayers cannot simultaneously pursue MAP in parallel with domestic legal remedies, a MAP request may
be accepted while domestic remedies are still available. In such cases, HMRC will require that the taxpayer agrees
to the suspension of these domestic remedies or will delay MAP until such remedies are exhausted. Although this is
the position of HMRC, the UK tax authority cannot guarantee that the relevant competent authority of the tax
treaty partner to the case will take the same position.

Mutual agreement

When an agreement between HMRC and the competent authority of the tax treaty partner is reached, the taxpayer
will be informed in writing of the decision, and an explanation of the result will be provided. If the outcome is
accepted by the taxpayer, written confirmation of the agreement is exchanged between the tax authorities and sent
to the taxpayer. Relief is then administered in accordance with the agreement. If the taxpayer does not accept the
agreement, the MAP process will be deemed to be concluded with no adjustments made.

It should be noted that where MAP is the first avenue of relief from double taxation pursued and a mutual
agreement has been reached, the taxpayer will be offered the option to reject the agreement and pursue available domestic remedies.

**Methods of relief**

A mutual agreement reached between HMRC and the competent authority of the relevant tax treaty partner under a tax treaty will be given effect, notwithstanding UK domestic legislation that may provide otherwise.

For mutual agreements reached under tax treaties, consequential claims might also be available to the taxpayer, based on the mutual agreement reached. In such circumstances, where normal time limits have expired before the mutual agreement was reached, consequential claims for relief are required to be made within 12 months following receipt of notification of the mutual agreement.

For agreements or opinions reached under EU AC, the normal time limits do not apply, and claims may be made in conjunction with giving effect to the solution or mutual agreement.

HMRC will grant relief in the form of a discharge, repayment of tax, tax credit or by amended assessment and will invite the taxpayer to lodge the claim or amended assessment online.

**Arbitration**

The revised guidance makes clear that the UK is in favor of using arbitration procedures in order to eliminate double taxation where competent authorities have been unable to reach agreement during negotiations in the MAP process.

Where relief is not granted through MAP, via either a tax treaty or EU AC, the taxpayer may still have recourse to:

- domestic administrative, statutory or judicial remedies or
- arbitration under the relevant tax treaty, where available or
- arbitration under the EU AC, where applicable.

The mandatory binding arbitration provision of the Multilateral Instrument (MLI) may also be applicable, depending on the tax treaty partner involved and if it has ratified the MLI.

**Arbitration post BREXIT**

There is no mention of the UK’s adherence to EU AC post-Brexit, or what status current or future cases will be granted under the EU AC. Furthermore, the EU Tax Dispute Resolution Mechanism Directive, adopted on October 10, 2017, provides measures that aim to ensure taxpayers are able to resolve all disputes related to the interpretation and application of tax treaties. While this directive will become applicable in the European Union from July 2019, it is unclear whether UK taxpayers will have access to its benefits due to the uncertainty surrounding the UK leaving the European Union.

**Key takeaways**

The revised guidance and Statement of Practice demonstrates the UK’s willingness to adhere to Action 14 of the BEPS minimum standards and follow the best practices set out therein. HMRC’s revised guidance addresses the weaknesses identified by the OECD peer review of the UK’s compliance with Action 14. It also shows HMRC’s intention to put in place processes that aim to quickly and effectively resolve disputes between taxpayer and tax authorities, which are likely to increase in the post-BEPS period.

Multinationals ought to consider more proactive use of the improved MAP, taken together with similar developments in other countries around the BEPS minimum standards, as a viable compliance risk management tool. Although double taxation is often a precondition in transfer pricing cases that end up in MAP, it is important to note that all issues concerning taxation not in accordance with tax treaties are eligible for MAP.

See our APA and MAP Country Guide and our recent article “The Mutual Agreement Procedure: A Taxpayers’ Tool Reinvented” for more information about MAP, or contact the authors to discuss your particular situation in the UK or elsewhere.
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