



Brazil releases manual on Mutual Agreement Procedures

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Brazil has entered into 33 bilateral tax treaties, namely those with Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Israel, Italy, Japan, Luxembourg, Mexico, Norway, the Netherlands, Peru, Philippines, Portugal, Russia, Slovakia, South Africa, South Korea, Spain, Sweden, Trinidad and Tobago, Turkey, Ukraine and Venezuela. Under those treaties, taxpayers may request a Mutual Agreement Procedure (MAP) if taxation has occurred (or is likely to occur) that is not in accordance with the relevant treaty.

In addition to Brazil's tax treaties, Brazil's domestic tax law also provides for MAPs. See Law No. 5,172/66 and Normative Instruction No. 1,846/18, issued by the Revenue.

On November 29, 2018, Brazil's Internal Revenue Service (the Revenue) published a manual on MAP. The manual sets out the process through which taxpayers can request assistance from the Revenue, including the contents of the MAP application and the possible outcomes resulting from a request for MAP assistance.

Guidance for requesting MAP assistance in Brazil

Under the new manual, the Revenue has confirmed its commitment to resolving cases by mutual agreement with the competent authority of the other contracting state in accordance with the relevant tax treaty.

Most of the tax treaties entered by Brazil allow taxpayers to present a case to the Revenue within two or five years from the actions, giving rise to taxation not in accordance with the relevant tax treaties. In the event that a tax treaty is silent in relation to the maximum term to present a case, taxpayers have five years to present their case.

MAP assistance may be requested by the following:

- Brazilian residents, as defined in the relevant treaty
- Brazilian nationals when defined in a treaty (*i.e.*, the treaties with South Korea, Finland, Mexico, Trinidad, Turkey and Ukraine)
- Residents of the other contracting State when defined in a treaty (*i.e.*, the treaty with Argentina) and
- Non-residents of Brazil, if such persons were considered a resident at the time of the facts being considered under the MAP.

The MAP application

The template for the application to initiate a MAP is provided under Normative Instruction RFB No. 1,846/18, which is filed with the Revenue. When the application includes a request for a refund of Brazilian taxes, a specific form, also provided under the Normative Instruction, is attached to the initial request.

The application must include the following:

- identification of the taxpayer requesting the MAP
- identification of direct controlling investors where the MAP is requested by legal entities, and with disclosure of the jurisdiction of incorporation/formation
- identification of foreign related parties, when such parties are relevant to the MAP
- the period of the MAP
- relevant taxes to be the subject of the MAP
- identification of the relevant foreign competent authority
- a description of the rules and procedures applied by the relevant foreign jurisdiction, together with a thorough explanation of how such rules lead to a different tax impact than the treatment provided by the relevant tax treaty
- a description of the provisions of the relevant tax treaty which grant the taxpayer the different tax treatment
- any relevant correspondence received from the foreign competent authority, including any responses to this correspondence made by the taxpayer and
- an affidavit stating that all of the information provided with the MAP application is accurate and complete.

The Revenue may refuse the request in the following circumstances:

- there is no corresponding tax treaty
- the request was not filed within the correct period
- there is already a MAP on the same issue or
- the taxpayer did not provide additional information when requested.

Resolution of a MAP request

The Revenue may unilaterally resolve taxation not in accordance with a tax treaty raised in the MAP or engage with the competent authorities of the other contracting state to find a solution; taxpayers cannot appeal a decision under a MAP, but are free to exit from the procedure at any time.

The solution reached under a MAP will only be implemented when the foreign entities included in the procedure expressly agree to the MAP result. The acceptance must be filed within 30 days of the notification of the result.

Interaction with domestic remedies

MAP does not follow the general administrative procedures established under domestic law (for domestic litigation).

A MAP also does not suspend the enforceability of a tax, meaning that even during MAP negotiations, the Revenue may continue to pursue collection of the relevant taxes. In addition, interest will continue to accrue. Furthermore, a MAP is not substitute for refund request made to the Revenue.

While a MAP can coexist with domestic judicial or administrative litigation, upon filing the initial request, taxpayers must inform and provide evidence that the tax issue to be discussed under the MAP has been submitted for judicial or administrative analysis in Brazil, or in the other contracting state. This includes any advance pricing agreements (APAs), private letter rulings, tax rulings, etc. Upon the implementation of the solution reached under the MAP, taxpayers must relinquish any ongoing administrative or judicial appeals.

Key takeaways

While the publication of the manual on seeking MAP assistance is a positive development for taxpayers in relation to resolving current tax disputes, Brazil does not have an APA program in place that could help to mitigate transfer pricing disputes. This is largely due to the fact that the Brazilian transfer pricing rules do not follow OECD's arm's length standard. However, since Brazil is in the process of joining the OECD, APAs may be a possibility in the future once the Brazilian transfer pricing rules are modified to meet OECD's standards.

More broadly, a MAP is likely to become more effective as an alternative dispute resolution mechanism, with global tax authorities increasingly focused on auditing and challenging international transactions.

In this context, a MAP provides a mechanism for taxpayers to seek relief in situations where there is taxation contrary to a relevant treaty. Some examples of issues often taken to MAP include:

- Adjustments made by one country (for example in transfer pricing) that results in double taxation of income
- Determining beneficial ownership of income
- Assessment of capital gains tax
- Residency of a taxpayer
- Whether there is a permanent establishment (PE)
- Attribution of profits to a PE
- Classification of payments, such as interests, royalties or dividends

Find out more about using MAP in Brazil by contacting any of the authors. Also see our APA and MAP Country Guide for more information about the use of a MAP.

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