Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

Mutual Agreement Procedure

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What is Mutual Agreement Procedure?

- MAP is an alternate mechanism for the resolution of international tax disputes under tax treaties – most Indian tax treaties have MAP article
- It entails resolution of disputes through the intervention of the Competent Authorities (‘CAs’) of each country who evolve a mutually acceptable solution. It is a mechanism for dispute resolution through a negotiated settlement
- Senior officers in Department of Revenue, Ministry of Finance are two CAs of India
- Scope is limited to only issues pertaining to tax treaties and does not extend to domestic tax laws. It may resolve issues including:
  - Adjustment arising from Transfer Pricing assessment
  - Issues relating to existence of Permanent Establishment
  - Characterization of income
  - Attribution of profits to Permanent Establishment
  - Issue pertaining to determination of residential status under the tax treaty
  - Interpretation of provisions of tax treaty
- Relief under MAP is in addition to the dispute resolution mechanisms available under domestic tax laws

Article 25 of OECD Model

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

India – USA tax treaty: https://incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx

BEPS: Action Plan 14

Minimum Standard

- Ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- Ensure that taxpayers can access the MAP when eligible

Best Practices (illustrative)

- Countries should include paragraph 2 of Article 9 in their tax treaties
- Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes
- Countries should implement bilateral APA programmes
- Countries should include in their published MAP guidance an explanation of the relationship between the MAP and domestic law administrative and judicial remedies
- Countries' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure

Monitoring Mechanism

- Implementation of minimum standard to be evaluated through a peer monitoring mechanism
- Peer monitoring report to identify strengths and any shortcomings

Indian Guidance on MAP

- BEPS Action Plan 14 recommended that all countries that implement the BEPS package of measures must publish comprehensive MAP guidance
- CBDT released guidance through circular dated August 7, 2020
    - A taxpayer resident in India can make application to CA of India if it considers that the actions of the tax authorities of the treaty partner resulted or will result in taxation not in accordance with the relevant tax treaty
    - Application for MAP to be made under Form no. 34F in accordance with Rule 44G.
- If CAs of other treaty partners accept MAP application, they are expected to expeditiously intimate the CAs of India about such acceptance
- **MAP Process:**
    - Once MAP application is accepted, the CAs of both Contracting States exchange views through position papers.
    - Once a position paper is received from the other CA, the CA of India would examine the same and come to a negotiating position. After exchange of positions and comments, both the CAs would try and negotiate a resolution to the dispute at hand. They may meet in person or negotiate remotely through teleconference, video conference, or email
    - Successful resolution: CAs to formalize mutual agreement and CA of India to intimate the Indian taxpayer who had applied for MAP. Acceptance or rejection of the MAP resolution is the prerogative of the Indian taxpayer but in either situation, the MAP case would be closed by both the CAs as resolved
    - Unsuccessful resolution: MAP case to be closed and CA of India to inform Indian taxpayer

Indian Guidance on MAP

- **Multilateral MAP Cases:** CA of India can agree to accept a multilateral MAP request if all the following conditions are fulfilled:
  - All the participating countries or specified territories have DTAAs with each other.
  - The transaction or issue in dispute has a bearing on all the treaty partners, directly or indirectly, and non-resolution of the dispute would result in taxation not in accordance with the relevant DTAAs
  - The CAs of all the participating countries or specified territories agree to negotiating a multilateral MAP.
- **Access to MAP cases**
- **Denial of Access to MAP**: Delayed MAP application, Taxpayer's objection not justified, Incomplete MAP documents,

Mandatory Arbitration

Loss of Sovereignty

- Countries are sovereign insofar as tax affairs are concerned, and have a right to direct their tax policies, including the right to adjudicate without being constrained by other countries.
- Emerging countries tend to regard the inclusion of a mandatory arbitration clause (as a form of MAP settlement process) as leading to a loss of sovereignty

Confidentiality

- Confidentiality of arbitration proceedings on the one hand provides flexibility to governments to resolve disputes without any external pressure.
- On the other hand, confidentiality could also lead to a lack of transparency and give rise to concerns of the arbitration system being biased, especially when public money is at stake

Time and Cost

- Most developing countries fear that international arbitration is likely to result in high costs as compared to domestic litigation.
- The costs could include travel costs, hiring external lawyers, share of the arbitrators' salaries, etc.
- While this would be a relevant factor, a one-time arbitration cost may turn out to be much more cost effective as compared to a multitude of domestic administrative appeals and delays before domestic tribunals

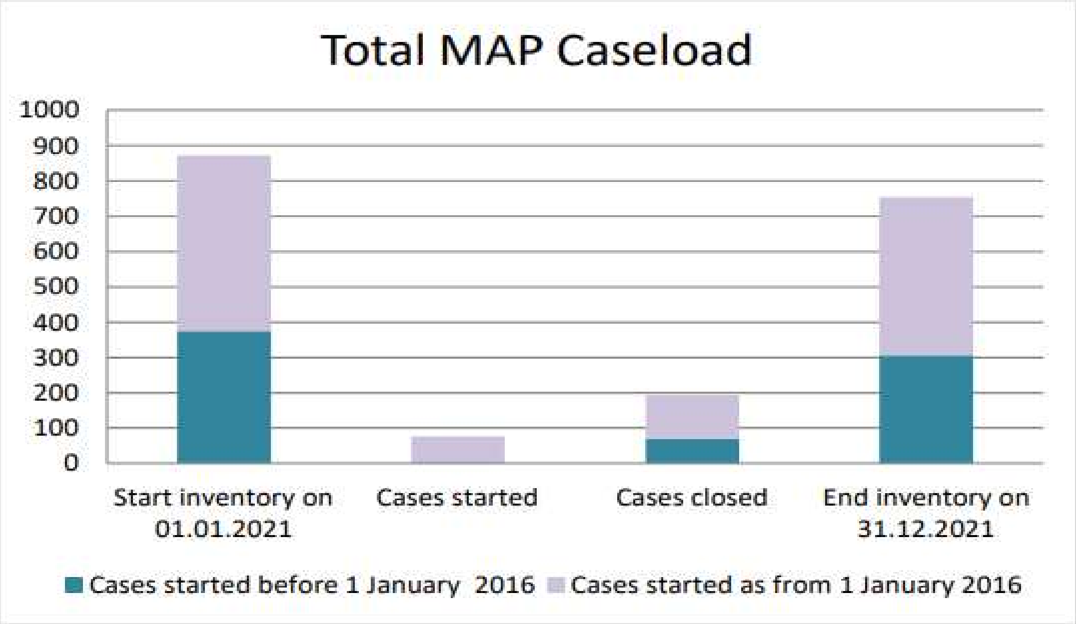
Lack of adequate talent

- Pool of international arbitrators is likely to come from developed countries, whereas complex disputes are expected to arise in developing countries
- The inexperience of emerging countries leads to a worry that potential arbitrators may not have adequate regard for the economic, political, cultural and financial realities of developing countries

Enforceability of arbitral awards

- A lack of assurance on the enforceability of arbitral awards could make it ineffective
- Non-binding arbitration could result in a waste of time and resources, making it appear that the arbitration process has been entered into merely to prolong the dispute process

MAP Statistics - India



Cases started before 1 January 2016	2021 Start inventory	Cases started	Cases closed	2021 End inventory
Transfer pricing cases	286	0	52	234
Other cases	89	0	17	72

Cases started as from 1 January 2016	2021 Start inventory	Cases started	Cases closed	2021 End inventory
Transfer pricing cases	422	62	115	369
Other cases	75	14	10	79

Average time needed to close MAP cases

Cases started before 1 January 2016	Average time
Transfer pricing cases	103.87
Other cases	148.34

Note: the average time taken to close MAP cases that started before 1 January 2016 was computed by applying the following rules:
(i) start date: the date when the MAP request was received; and
(ii) end date: either the date of the closing letter sent to the taxpayer or the date of final closure of the case if no agreement was reached.

Cases started as from 1 January 2016	Start to End	Receipt to Start	Start to Milestone 1	Milestone 1 to End
Transfer pricing cases	39.28	1.19	14.40	11.96
Other cases	31.88	1.05	15.54	33.38

Note: the average times to close MAP cases that started as from 1 January 2016 were computed according to the MAP statistics reporting framework available at http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-reporting-framework.pdf

MUMBAI

93 B, Mittal Court, Nariman Point
Mumbai 400 021, India

Tel +91 22 6669 5000

SILICON VALLEY

220 S California Ave., Suite 201
Palo Alto, California 94306, USA

Tel +1 650 325 7100

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd
Bangalore 560 025, India

Tel +91 80 6693 5000

SINGAPORE

Level 24, CapitaGreen
138 Market St
Singapore 048 946

Tel +65 6550 9855

NEW DELHI

13-H, Hansalaya Building, 15
Barakhamba Road, Connaught
Place
New Delhi 110 001, India

Tel +91 11 4906 5000

MUNICH / AMSTERDAM

Maximilianstraße 13
80539 Munich, Germany

Tel +49 89 203 006 268

NEW YORK

1185 6th Avenue, Suite 326
New York, NY 10036, USA

Tel +1 212 464 7050

GIFT CITY

408, 4th Floor, Pragya Towers
GIFT City, Gandhinagar

Gujarat 382 355, India