Mutual Agreement Procedure (MAP)

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This PPT shall be used only for reference purpose

Setting the context

"Like mothers, taxes are often misunderstood, but seldom forgotten" – Lord Bramwell

- Lord Bramwell's quote above emphasizes that one cannot escape the rigours of taxation as it is inevitable. There is a considerable certainty regarding levying taxes by a State, but the certainty buck stops there. The functional features of taxation have led to various complexities, eventually paving for tax uncertainty.

- OECD – 2019 Progress Report on Tax Certainty (July 2019) identifies dispute resolution as one of the factors from uncertainty.

- Fostering tax certainty remains the topmost agenda and need of the hour measure for the states.

Setting the context

"No matter how thin you slice it, there will always be two sides." - Baruch Spinoza

- Tax Treaties purpose is to reduce barrier to cross border trade and investment
- Growth of MNCs brought significant rise in tax treaty and transfer pricing disputes
- Treaty will achieve its goal only if the taxpayer can trust the Contracting States to apply the treaty in letter and spirit
- Domestic dispute resolution mechanism is laborious, time consuming and expensive.
- MAP resolution is over and above the domestic law remedy

Mutual Agreement Procedure

- MAP is an alternative mechanism for resolve tax treaty and transfer pricing disputes

- Disputes are revolved by the Competent Authorities (CA) through a negotiated settlement

- Does not include issues emanating out of domestic tax laws.

- Typically, the issues involved under MAP:
    - Adjustment arising from Transfer Pricing assessment
    - Characterization of income
    - Issues relating to existence of Permanent Establishment
    - Attribution of profits to Permanent Establishment
    - Issue pertaining to determination of residential status under the tax treaty
    - Interpretation of provisions of tax treaty

OECD Model Convention

- Article 25 provides mutual agreement procedure for resolving disputes arising out of the application of the convention

- Powers are delegated to CA’s concerning application and interpretation of the provisions of the convention

- Objective is to promote, through consultation and mutual agreement between CA’s, consistent treatment of individual cases

- Resolve difficulties or doubts as to the interpretation or application of the convention – the same should be done in a fair and objective manner, on its merits and it should be performed in a good faith

Short comings of MAP – Pre BEPS Era

- No deadline or timetables to resolve the disputes; hence the process is protracted unreasonably and time-consuming.
- Lack of domestic law support such as non-implementation of MAP due to domestic law conflict.
- Lack of training and capacity building initiatives by Governments for its CA on international tax issues, owing to financial constraints.
- Lack of guidance in MAP processes for taxpayers in emerging economies on the procedural and administerial aspects for initiating the MAP.
- Lack of dedicated and experienced resource personnel to focus on MAP, leading to an increase in MAP inventory.
- Lack of transparency from a 'taxpayers' perspective as they are not involved in the process; hence, taxpayers are apprehensive about resorting to MAP.
- There are risks of double taxation due to denial of corresponding adjustments in other state or re-opening of tax assessments in the other state, delay in issuing refunds etc.

BEPS Measures – AP 14

- Minimum Standards are certain measure that all countries (that are part of inclusive framework) must commit and comply
- AP 14 had included minimum standard in respect of :
  - **Proper Implementation & Process:** Treaty related obligations on MAP are fully implemented in good faith, and MAP cases are resolved on time.
  - **Prevention & Resolution of Disputes:** The administrative processes should promote the prevention and timely resolution of treaty-related disputes
  - **Availability & Accessibility to MAP:** Taxpayers meeting the requirements under Article 25(1) of the OECD Model Convention can access the MAP.
- Best practises for implementation were also suggested
- Forum for tax administration will conduct a peer review for effective implementation of minimum standards

MAP – Indian Perspective

- Section 295 of the IT Act r.w. Rule 44G provides for MAP Procedure
- Article 25 or equivalent article in DTAA's for MAP provisions

Erstwhile Provisions

- 2 Separate rules for inbound (Rule 44G) and Outbound MAP (Rule 44H)
- Rule 44G – application made with Indian CA in case of adjustment made in other country
- Rule 44H – application made with Foreign CA in case of adjustment made in India
- The existing rules were not exhaustive and had significant gaps compared to global practices.
- The OECD in its peer review report released in 2019 (Stage 1) pointed out significant areas for improvement

Amended Provisions

- As part of BEPS project and pursuant to the peer review, India had issued a detailed guidelines on 02 August 2020 on MAP procedure.
- The guidance note *inter-alia* include the introduction, access & denial, technical issues and implementation of MAP.
- Government amended Rule 44G and withdrew Rule 44H.

Parties to MAP

- Taxpayer
- Foreign Competent Authority
- Indian Competent Authority
- Tax authorities

India’s MAP Guidance

Introduction and Basic Information:

- Manner of filing MAP request (Form 34F)
- Contents of a MAP Application.
- Procedure to be followed in case MAP is filed in the home country against the order of the Indian tax authority
- Procedure to be followed by CA of India upon receipt of a MAP request
- Participation of Indian CA in multilateral MAP cases
- Communication of views between CA through a position paper

India has committed to resolving the MAP Cases within an average timeframe of 24 months

India’s MAP Guidance

Access to MAP

- Provide instances where MAP can be filed
- Commitment to provide MAP access in a situation where domestic anti-abuse provisions are applied
- Clarification of MAP access in case of an order under Section 201
- The situation where MAP access will be granted but India CA will not negotiate any other outcome than what was achieved earlier – e.g. Unilateral APA, Safe Harbour, order of Income-tax Appellate Tribunal - In these circumstances, Indian CA will request the other treaty partner to provide correlative relief

India's MAP Guidance

Denial of MAP

- Delay in filing MAP application
- The objection raised by the taxpayer is not justified – Treaty partner will be consulted before denial.
- Incomplete/defective application is not rectified within a reasonable time or non-filing of additional information within the time limit.
- Cases settled through Settlement Commission
- Cases before Authority for Advance Rulings (AAR)
- Issues governed by domestic law

India’s MAP Guidance

Technical Issues

- The CA can negotiate and eliminate all or part of adjustments provided it does not reduce the returned income
- Recurring issues can be resolved as per prior MAP. However, issues cannot be resolved in advance.
- Interest and penalty are consequential and hence not part of MAP
- Indian CA will make secondary adjustment as per law
- MAP cannot be proceeded where BAPA or Multilateral APA is filed
- Suspension of collection of taxes will be as per Memorandum of Understanding (MOU) entered with treaty partner; in its absence, domestic law provision will apply.
- Adjustment of taxes paid by payer according to order under Section 201 of the Act.
- India is committed to implementing MAP outcomes in all cases except when an order of ITAT is received for the same year before implementing MAP outcome. In such a case, India will intimate treaty partner and request them to provide correlative relief. In addition, taxpayers are provided with 30 days to convey their acceptance of the outcome.

Collection of taxes vs. MAP

- India has entered into MoU with countries providing suspension of tax demands during the pendency of MAP proceedings
- So far 5 countries where MoU is entered – US, UK, Denmark, Sweden and Korea (not effective as of today).
- Furnishing of bank guarantee equal to demand is a pre-requisite for suspension of collection of demand

Article 16 of MLI

Article	Scope	Remarks
16(1) – First Sentence	Taxpayer considers that action of one or both the contracting state's results will result in taxation <u>that is not according to the CTA</u>. Therefore, irrespective of the remedy under domestic law, ***the dispute can be presented to the CA of <u>either</u> contracting states.***	Aggrieved taxpayer can approach for MAP resolution with either of the contracting states and not necessarily to its resident jurisdiction
16(1) – Second Sentence	The time limit for presenting the case <u>**must be within three years**</u> from the first notification of the action resulting in taxation.	It is to ensure that there is no late claim made to burden the tax administration at the same time give adequate time to the taxpayers to initiate MAP access
16(2) – First Sentence	If objection appears to be justified and the CA is not able to achieve a satisfactory solution by himself, then the case must be resolved by mutual agreement with CA of other State – Bilateral MAP	Bilateral MAP- This clause ensures that where CA cannot resolve cases unilaterally, the concerned CA must enter into discussions with its counterpart CA for a resolution.
16(2) – Second Sentence	The contracting states' settled MAP agreement must be implemented irrespective of the timeline prescribed under the domestic laws.	Implementation of MAP agreement: This clause is to provide certainty to taxpayers that implementation of MAP agreements will not be obstructed by any time limits in the domestic law of the jurisdictions concerned.

India's Position on MLI?

Article 16 of MLI

Article	Scope	Remarks
16(3) – First Sentence	If any difficulty or doubts arise as to interpretation or application of CTA, then the CA shall endeavour to resolve this by mutual agreement	There may arise cases concerning the interpretation or the application of tax treaties that are generic and do not necessarily relate to individual cases. In such a scenario, this provision makes it possible to resolve difficulties arising from the application of the Convention.
16(3) – Second Sentence	CA may also consult together to eliminate double taxation in cases not provided under CTA.	This provision enables the CA to deal also with such cases of double taxation as they do not come within the scope of the provisions of the Convention. For, e.g. resident of a third state having PE in both the contracting states.
17	Normally in a transfer pricing adjustment, a taxpayer in a Contracting Jurisdiction (State A), whose profits are revised upwards, will be liable to tax on an amount of profit which has already been taxed in the hands of its associated enterprise in another Contracting Jurisdiction (State B). In such a scenario, State B shall make an appropriate adjustment to relieve the economic double taxation.	

Article 16 of MLI

Article	Scope for MAP	India's position
4(1) – Dual Resident Entities	If a person other than an individual is resident in more than one state, the CA shall endeavour to determine residency for CTA. In the absence of agreement, the person shall not be entitled to relief or exemption from tax except to the extent and manner agreed by CA. In effect, CA can agree and provide relief at their discretion.	India has notified 91 treaties (except Greece and Libya). Further, India has agreed to the discretion of CA to provide relief in a case where dual residency is not resolved. Australia and Japan (illustratively) have reserved application of discretionary relief. Hence India CTAs with these treaties', the CA cannot exercise discretionary powers to grant relief or exemption
7(4) – PPT	Deny treaty benefits if reasonable to conclude that one of the principal purposes of arrangement is to obtain tax benefits. Based on MAP request, the CA can provide treaty relief after consideration of facts and circumstances	India has not opted for discretionary relief provision as they have notified the same under Article 7(17)(b). Therefore, once the treaty benefits are denied, the CA cannot provide any relief at their discretion. Notwithstanding the above, the taxpayer can avail the treaty benefit if it can be established that the tax benefit is in accordance with the object and purpose of the CTA as stipulated under Article 7(1) without resorting to MAP. Under this circumstance, the tax authorities can grant treaty benefits.

Article 16 of MLI

Article	Scope for MAP	India's position
7(12) – SLOB	If a person is not a qualified person as para 7(9) nor entitled to benefits as per para 7(10)/7(11), the CA may grant relief subject to certain conditions and requirements.	India has opted for the provision of SLOB in addition to PPT . However, the provision of SLOB shall apply to India tax treaties only if other contracting states have also notified SLOB provisions
10(3) – PE in third state	Suppose the benefit of CTA is denied under Para 10(1) regarding an income derived by a resident. In that case, CA of another contracting state (source state) may nevertheless grant these benefits subject to consultation with the resident State CA.	India is silent on this Article. Accordingly, the Article will be applicable subject to notification & reservations made by the other contracting jurisdiction as per Article 10(5) and 10(6) of the MLI.

MAP Statistics – 2019 vs. 2021

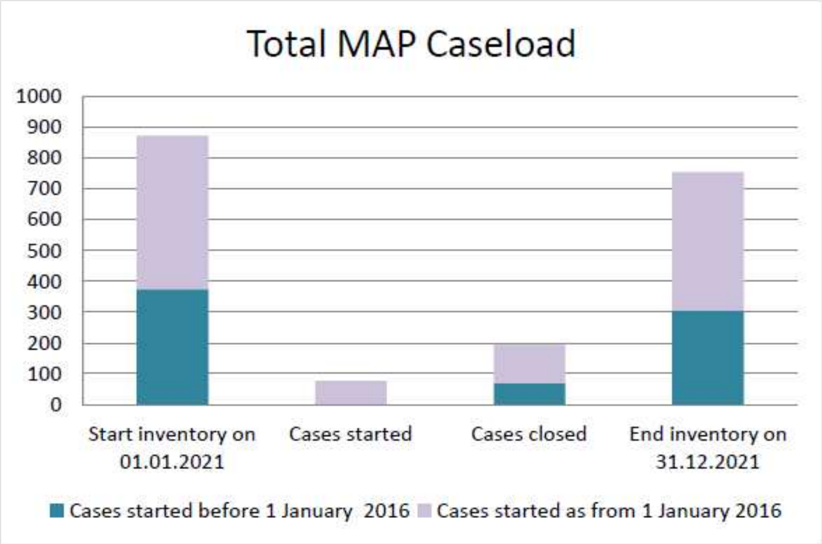
MAP Caseload as on 2019 end inventory and time frame of resolving – as per 2019 Report

Particulars	TP cases	Others
Cases started before 01 January 2016	380	96
Cases started after 01 January 2016	410	65
The average time before Jan 2016 case - to resolve MAP [months]	64.86	61.97
Average time after Jan 2016 cases - to resolve MAP [months]	18.48	19.02

MAP during 2016-2019 – as per 2021 report

Particulars	Attribution/ allocation cases	Others
Opening Inventory 01 January 2016	594	101
Cases started	541	75
Cases Closed	345	15
End Inventory – 31 December 2019	790	161
Average time - to resolve MAP [months]	34.32	36.13

MAP Statistics – Latest Report



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

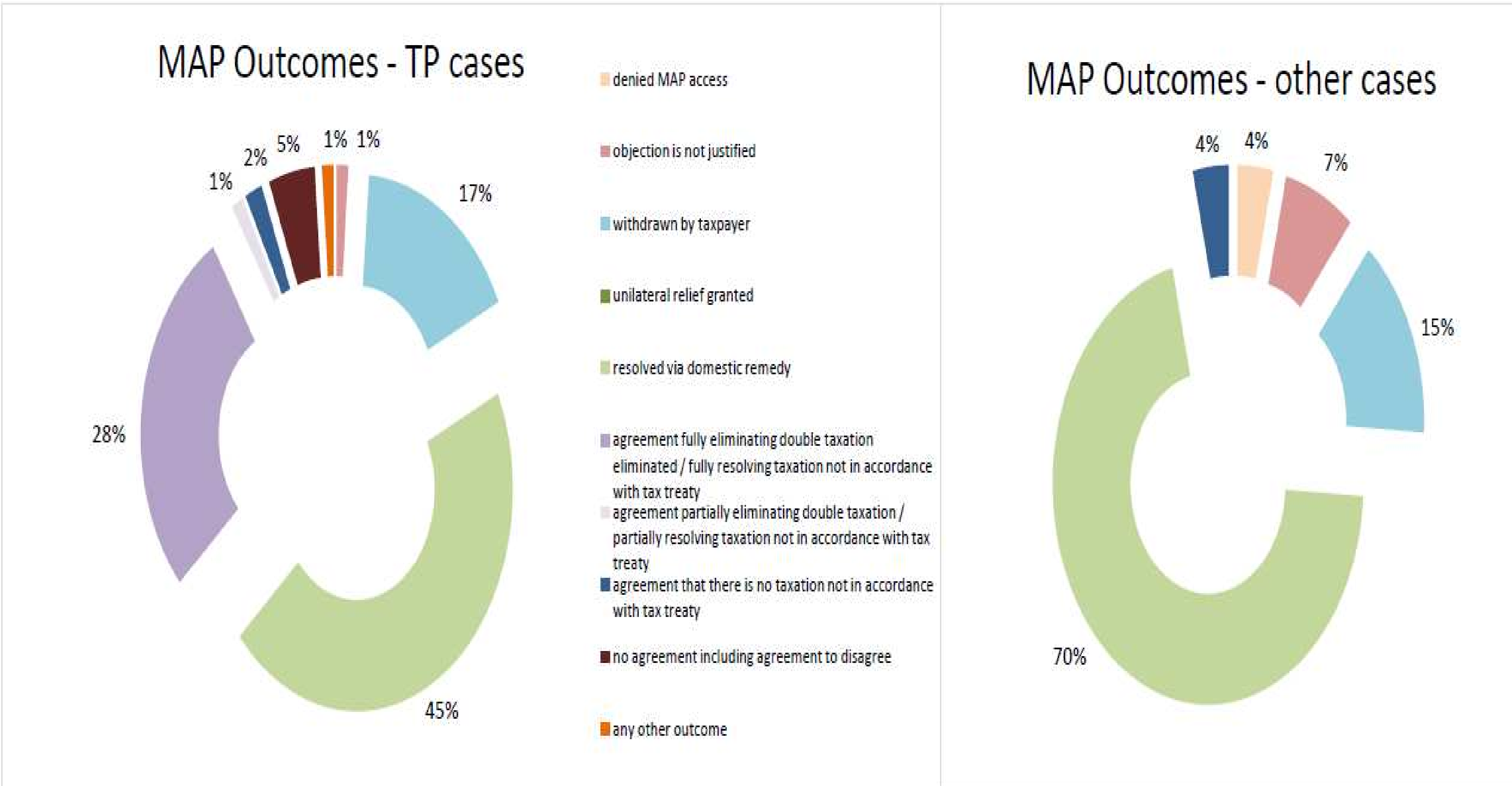
Cases started before 1 January 2016	Average time
Transfer pricing cases	103.87
Other cases	148.34

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

MAP Statistics – Outcome



Thank You

Q & A