

# TAX FLASH NEWS

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## CBDT issues detailed guidance on Mutual Agreement Procedure

In October 2019, the Organisation of Economic Co-operation and Development (OECD) released the sixth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard on Action 14 (More Effective Dispute Resolution Mechanisms). The peer review process assessed a member's legal and administrative framework to determine how its MAP regime performs relative to the four key areas: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. The Report provided OECD recommendations on the key areas of improvements further to the requirements under Action Plan 14 minimum standard in relation to effective dispute resolution mechanism. MAP guidance was one of the recommendations of OECD as a part its peer review process.

On 6 May 2020, the Central Board of Direct Taxes (CBDT) has notified Rule 44G of the Income-tax Rules, 1962 dealing with the issue of implementation of MAP to substitute erstwhile Rules 44G and 44H. The rule provides, inter-alia, the processes to be followed by the competent authorities (CA) of India till the resolution of the issue of taxation not in accordance with the treaty and the processes to be followed by the field authorities to implement the outcome of the MAP. The new rule is applicable with effect from 6 May 2020 and, accordingly, applies to all MAP cases pending with the CAs of India as on 6 May 2020. Though erstwhile Rules 44G and 44H were in existence for a number of years, detailed information regarding MAP processes and related guidance were not available in a comprehensive manner.

Recently, CBDT has issued the MAP guidance<sup>1</sup> for the benefit of taxpayers, tax practitioners, tax authorities, and treaty partners. The MAP guidance contains the following four parts:

- Introduction and basic information
- Access and denial of access to MAP
- Technical issues
- Implementation of MAP outcomes

### The CBDT Guidance

#### *Introduction and basic information*

- The MAP Article included in India's tax treaties is largely based on Article 25 of the OECD Model Tax Convention. A MAP request can be made by the taxpayer when it considers that the actions of the tax authorities of one or both of the treaty partners results or will result in taxation not in accordance with the relevant tax treaty. Through this, the CAs of the contracting states may resolve differences or difficulties regarding the interpretation or application of the tax treaties on a mutually agreed basis. While the MAP is important to the proper application and interpretation of tax treaties, it has particularly emerged as a widely used mechanism for resolving transfer pricing (TP) disputes. The procedures for invoking MAP and giving effect to the MAP resolution for granting of relief in respect of double taxation or for the avoidance of double taxation are contained in Rule 44G.
- In most of the tax treaties of India, the time limit for making a MAP application is 3 years. In a limited number of tax treaties, the time limit is either less or more than 3 years. Therefore, it is expected to be

<sup>1</sup> Notification (F. No.500/09/2016-APA-I, dated 7 August 2020)

changed to 3 years as per the recommendation contained in the final report of BEPS Action 14. India would ensure this through the Multilateral Instrument (MLI) or through bilateral negotiations with the relevant tax treaty partners.

- *MAP application*

- The taxpayer resident in India can make an application in Form No. 34F to the CA of India having jurisdiction over the case 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. Such an application has to be made in Form No. 34F. Form No. 34F requires prescribed particulars<sup>2</sup> while making a MAP application to the CAs of India.
- Form No. 34F requires information about the name of the country or specified territory, the action of the tax authorities of which have aggrieved the applicant. The applicant should provide the facts of the case, the analysis of issue that are sought to be resolved under the MAP, and the reasons why the action taken by the tax authorities are not in accordance with the relevant tax treaties. Additionally, Form No. 34F requires the following documents to be furnished at the time of making the application:
  - ❖ Copy of notice or order giving rise to the action not in accordance with the relevant tax treaties.
  - ❖ Any documents as support for considering the order/action of the tax authorities of the treaty partners to be not in accordance with the relevant tax treaties.
  - ❖ Any documents as evidence of remedy sought in the other country or specified territory.
  - ❖ Any other document that the applicant may want to submit or the CAs of India may ask for.
- If the related party of an Indian taxpayer submits a MAP application before the CA of its country or specified territory of residence (treaty partner), in respect of any order/action of the tax authorities of India or of the tax authorities of such treaty partner, a copy of such MAP application must also be provided to the CA of India having jurisdiction over the case. The CAs of such treaty partners are expected to expeditiously intimate the CAs of

India about their acceptance of a MAP application. The MAP application in Form No. 34F or the copy of the MAP application filed before the CAs of other countries or specified territories (treaty partners) must be submitted to the CA of India having jurisdiction over the case.

- Officials responsible for MAP program in India: At present, India has two CAs for MAP cases and they are senior officers in the Department of Revenue, Ministry of Finance (Joint Secretary, FT&TR-I and Joint Secretary, FT&TR-II). The two CAs have territorial jurisdiction over the MAP cases depending upon the location of the tax treaty partner. Joint Secretary, FT&TR-I is responsible for MAP cases with tax treaty partner country/specified territory in Europe and North America (including the Caribbean). Joint Secretary, FT&TR-II looks after MAP cases with tax treaty partner country/specified territory in rest of the world. The CAs of India are independent of the tax authorities (who audit taxpayers) and take their own decisions that are only administratively governed by an internal governance mechanism within the CBDT, Department of Revenue.

- *MAP process*

- Once a MAP application is accepted by the CA of India having jurisdiction over the case, he/she shall intimate the CA of the relevant treaty partner about such acceptance through a written communication<sup>3</sup>. In such written communication, he/she would also briefly indicate why he/she feels that the action of the tax authorities of the treaty partner results or will result in taxation not in accordance with the relevant tax treaty.
- He/she would also request the CA of the treaty partner to provide his/her written position (position paper) on the order/action of the tax authorities of his/her country.
- If a MAP application is found to be not acceptable by the CA of India having jurisdiction over the case, he/she shall write to the CA of the relevant treaty partner informing about the reasons for which the MAP application cannot be accepted and request the latter to send his/her views/comments on the same.

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<sup>2</sup> Name, PAN, AY, Address, name and designation of tax authority in the other country or specified territory, date of notice, details of remedy sought in the other country, etc.

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<sup>3</sup> Notification or invocation letter

- Once the CAs of both the treaty partners have exchanged views and come to a common understanding, the decision on the MAP application shall be communicated by the CA of India having jurisdiction over the case to the Indian taxpayer who had made the MAP application.
- Once a MAP application is accepted, the CAs shall exchange views. The views shall be communicated through position papers.
- Once a position paper is received from the other CA, the CA of India having jurisdiction over the case would examine the same and come to a negotiating position. He/she may also provide his/her own written comments to the other CA or ask for further clarification from his/her. After exchange of positions and comments, both the CAs would try and negotiate a resolution to the dispute at hand.
- If both the CAs successfully resolve a MAP case, they would formalise a mutual agreement amongst themselves at the earliest possible.
- The CA of India having jurisdiction over the case would intimate the Indian taxpayer who had applied for MAP about the terms and conditions of the resolution.
- 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.
- If both the CAs are unable to resolve a MAP case, they would close the MAP case as unresolved. The CA of India having jurisdiction over the case shall inform the Indian taxpayer about the non-resolution of the dispute.
- In addition to the above bilateral MAP process, in appropriate cases, the CAs of India can participate in multilateral MAP discussions with more than one treaty partner.
- Multilateral MAP cases shall involve all the above processes (like exchange of position papers, negotiations, finalization of mutual agreements, etc.) on a multilateral basis amongst the CAs concerned. However, a multilateral MAP case shall be executed in the form of a series of parallel bilateral MAP cases.
- The CAs 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 tax treaties 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 tax treaties.
- ❖ The CAs of all the participating countries or specified territories agree to negotiating a multilateral MAP.

- *Timeframe for resolving and implementing MAP cases*

India is committed to endeavour to resolve MAP cases within an average timeframe of 24 months. The commitment is in conformity with the minimum standards recommended in the BEPS Action 14 final report. The period of 24 months is to be computed from the 'Start Date' of a MAP case. Since, presently, most of the MAP cases before the CAs of India arise from a MAP application made by a non-resident taxpayer before the CAs of other countries or specified territories (treaty partners), the 'Start Date' is determined by the other CAs in accordance with the MAP Statistics Reporting Framework.

### **Access and denial of access to MAP**

- *Access to MAP*

India shall provide access to MAP in respect of the following types of cases if they result in taxation not in accordance with the relevant tax treaties:

- Transfer pricing adjustments.
- Determination of existence of a Permanent Establishment (PE).
- Attribution of profits to PEs, whether admitted or not by the taxpayer.
- Characterisation or re-characterisation of an item of expense or payment as a taxable expense or payment (like royalty or FTS or interest).
- Characterisation or re-characterisation of an item of receipt as a taxable income (like royalty or FTS or interest).

Following are the circumstances where India would provide access to MAP but the CAs of India would not negotiate any other outcome than what has already been achieved in such circumstances:

- Unilateral advance pricing agreement (UAPA) signed by an Indian taxpayer: In cases where any action of tax authorities of tax treaty partner disturbs the income of a taxpayer, as determined under the UAPA entered into with

India, the taxpayer shall have access to MAP. Also, MAP access can be granted during pendency of a UAPA application; but the resolution would be postponed until the conclusion of the UAPA application. Either way, the Guidance clarifies that India shall not be able to derogate from the conclusions made in UAPA and thus will only seek correlative relief at the level of tax treaty partner.

- Application of safe harbor rule by Indian taxpayer: Where an Indian or foreign taxpayer opts for the Indian TP safe harbor rate on its international transactions, MAP access can be given to such foreign taxpayers in the other countries or specified territories and the Indian CA needs to be notified of the same. However, the Indian CA would not change the transfer price for the international transactions covered under the safe harbor provisions; rather, request the CAs of the tax treaty partner to provide correlative relief.
- Orders of Income Tax Appellate Tribunal – Since MAP and domestic remedy proceedings can be availed by the taxpayers simultaneously, there could be instances where the Income-tax Appellate Tribunal (the Tribunal) in India passes an order in respect of the same disputes that are also being examined under MAP.

Since the Tribunal is an independent statutory appellate body, which is outside the administrative jurisdiction of the Indian tax authorities; and is the highest fact-finding body on tax matters, the CAs in India shall not deviate from the orders of the Tribunal where the dispute is decided on merits. In such cases the CA of India would request the CAs of the treaty partners to provide correlative relief, if required. Such MAP cases shall be closed as having been resolved by a domestic remedy. However, if the order of the Tribunal does not resolve the disputes but only sets them aside to be adjudicated afresh, then access to MAP would be provided again after the fresh adjudication by tax authorities, if requested for by the relevant taxpayers.

- TDS order: In situations where obligation to withhold tax on payment to a non-resident is enforced by an order for deduction of tax at source on a resident payor and the same is disputed by the non-resident, MAP access would be provided to such non-resident entity anticipating an event of double taxation or taxation not in accordance with the relevant tax treaty. However, such action being purely under domestic tax law and not being an order determining tax liability of the non-resident, the MAP discussion will be taken up only after an assessment order is passed in case of the non-resident taxpayer.

- India shall provide access to MAP even in a situation where the Indian tax authorities apply domestic anti-abuse provisions.

- *Denial access to MAP*

- The CAs of India can deny access to MAP in the following situations or in certain particular cases:

- ❖ Delayed MAP application - If the taxpayers make a MAP application to the CAs of India or to the CAs of the tax treaty partners after the expiry of the time period specified in the Article relating to MAP of the relevant tax treaties, the CAs of India would not provide access to MAP. This time period in most tax treaties is within 3 years from the first notification of the action/order of the tax authorities that results in double taxation. There are very few tax treaties where such minimum time period is missing.
- ❖ Taxpayer's objection not justified – If the CAs of India come to a conclusion that the objection raised by the taxpayer on the action taken by tax authorities is not justified, they can deny access to MAP. However, before denying the access to MAP, the CA of India having jurisdiction over the case would discuss the matter with the taxpayer and the CA of the treaty partner.
- ❖ Incomplete MAP applications/ documents/information – Where CAs of India point out some errors or defects in the MAP application (Form 34F) or ask for additional information, the Indian taxpayer should remedy the errors and should provide the information within a reasonable time period. There is no prescribed time period in Rule 44G for the Indian taxpayer to comply with such additional requirements. Hence, the CAs of India are expected to provide adequate time to the taxpayer to remedy the errors/defects and provide the information/documents. Normally, a time period of 30 days for remedying the errors/defects and 90 days for providing the additional information/documents should be provided by the CAs of India to facilitate the process, which can be extended by the CAs depending on the facts and circumstances of the case.

- ❖ Income Tax Settlement Commission (ITSC) and Authority for Advance Rulings (AARs)
  - The ITSC and AAR are independent statutory dispute resolution/prevention bodies. It is a voluntary process and is independent from the audit and examination functions of tax authorities. Once the application is accepted for settlement of disputes/advance ruling and the ITSC comes out with a settlement order or AAR issues an advance ruling, the same is binding on both the taxpayer and the tax authorities. In such cases, MAP access would be denied by the Indian CA in respect of the issues that are included in the MAP application to the extent they are addressed in the ITSC orders/AAR rulings. However, if the ITSC/AAR refuses to issue a settlement order/advance ruling, or ITSC issues an order without making a settlement and pursuant to this, there is a double taxation on account of Indian tax authorities' actions, MAP access shall be given to the taxpayer.
- ❖ In addition to the situations and particular cases above, it is clarified that no MAP access shall be provided in respect of issues that are purely governed by India's domestic law and arise due to the implementation of India's domestic legal provisions. Further, a MAP access can be denied if it is observed that the taxpayer's objection is not justified. For this purpose, the Indian CA having jurisdiction over the case would discuss the matter with the taxpayer and the CA of the tax treaty partner. A defective MAP application can also deny MAP access, unless the defaults are made good within the prescribed timelines that can range from 30 days to 90 days.

### **Technical issues**

- *Downward adjustment*
  - The CAs of India can negotiate a MAP case with their counterparts and withdraw all or part of the adjustments made by tax authorities in India. However, the CAs of India cannot go below the returned income, as the same is expressly prohibited in the Indian Income-tax Act.
  - In respect of transfer pricing cases, if the application of the arm's length price of an international transaction results in reducing the income chargeable to tax or increasing the loss, as computed on the basis of books of account maintained, then transfer pricing provision shall not apply. The CAs of India have to adhere to the provision while negotiating transfer pricing MAP cases involving adjustments made by Indian tax authorities.
- However, in respect of MAP cases involving adjustments made by tax authorities of a treaty partner, the Indian CA may go below the returned income of the Indian taxpayer to implement the MAP in full measure in accordance with treaty obligations.
- Interest and penalties – The CAs of India do not have the mandate to consider such consequential issues and negotiate disputes arising from such issues. These are to be administered under the domestic laws. There are provisions of fees/penalty under Indian Income-tax Act which are not connected to the quantum of income and, accordingly, those would not be affected by the resolution under MAP.
- Secondary Adjustments – The provisions relating to the 'secondary adjustments' are applicable with effect from the Indian financial year starting from 1 April 2016. These provisions are primarily intended to ensure that profit allocation between the associated enterprises is consistent with the primary TP adjustment. The said provisions envisage MAP resolution as well in order to require actual cash repatriation for the differential profit amount. The Guidance states that the CAs of India would be obligated to make such secondary adjustments part of the MAP resolution in respect of cases pertaining to financial year 2016-17 or thereafter.
- Bilateral and Multilateral APAs – In respect of issues for which a bilateral or multilateral APA application has already been filed and accepted, MAP applications on the same issues for the same years should not be made by the taxpayers. If such MAP applications are made either before the CAs of India or the CAs of treaty partners, the CAs of India shall consult with their counterparts and not admit such MAP applications. However, if a bilateral or multilateral APA application fails to result in resolution for any reason, then a MAP application on the same issue and for the same years can be made. The same may be accepted by the CAs of India if it satisfies all conditions of a MAP application.
- Suspension of Collection of Taxes during the Pendency of MAP – India has entered into a MoU with a limited number of treaty partners, under the ambit of the MAP Article. It provides for keeping the collection of taxes in a case under suspension during the pendency of MAP in that case. The taxes whose collection can be suspended are those that have arisen from the dispute that is under discussion in MAP. Taxpayers have to adhere to the terms and conditions mentioned in the MoU to be able to get the collection of taxes suspended.

- Adjustment of taxes paid in pursuance of demand raised by a TDS order under Section 201 – Payment of taxes (excluding interest) made as a result of demand arising out of an order passed under Section 201 on the Indian taxpayer (payer entity) may be allowed to be adjusted against the tax liability of the non-resident taxpayer (payee entity) in the event of resolution of MAP in the case of such non-resident taxpayer for the relevant issues and relevant years.
- Resolution of recurring issues: CAs of India may resolve recurring issues on the same principles, as adopted in a prior MAP resolution. However, the Guidance states that they do not have the power to prevent the tax authorities from making an order that is not in conformity with prior MAP resolutions in case of the same taxpayer and on the same issues.

### **Implementation of MAP outcomes**

- Implementation of MAP – The Guidance clarifies that the MAP resolution shall be implemented in all cases except where the Tribunal order (for the same assessment year that has been resolved under MAP) comes to the knowledge of the CAs of India after the MAP has been resolved or is pronounced after the MAP has been resolved but not yet implemented. In such cases, the outcome of the ITAT order is applicable and thus Indian CA will only seek correlative relief at the level of the tax treaty partner. Further, specified timelines as per amended MAP rules shall be strictly adhered to in order to ensure speedy implementation of the MAP resolution.
- Timelines – The new Rule 44G provides clear timelines for the taxpayer and the tax authorities in India to implement a MAP that has been resolved by the CAs of both treaty partners. The taxpayer has been provided a time period of 30 days to convey its acceptance of the MAP resolution and to submit evidence of withdrawal of domestic appeals.
- Information to CAs of India - The AO, in addition to sending a copy of the order giving effect to the MAP resolution to the CA of India having jurisdiction over the case, must also provide information regarding the amount/date of payment of taxes by the taxpayer or amount/date of issue of refund to the taxpayer (as the case may be), withdrawal of appeals filed by the tax authorities, and any other relevant details.

### **Our comments**

The Guidance provided by CBDT is a welcome move and it will provide speedy resolution of tax cases to the taxpayers opting for MAP. With these guidelines, more taxpayers may be inclined to opt for MAP to resolve their tax disputes in India. The guidelines not only provide for resolution under bilateral MAP applications,

but also multilateral MAP applications, where a cross border transactions involve more than two tax treaties in a multinational enterprise set-up.

As noted in the OECD's peer review report, due to resource constraints, there has been some delays in the discussion and resolution of MAP/APA cases. Considering the recommendations of OECD, CBDT may also need to provide supportive teams to take care of MAP cases.

MAP guidance lays down the procedure for accessing MAP clarification on technical issues and implementation process. This would help taxpayers and CAs of India as well as treaty partner countries to understand India's position. The CBDT guidelines are in accordance with the OECD recommendation under BEPS Action Plan 14.



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