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Answering queries

Mutual Agreement Procedure

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What is Mutual Agreement Procedure (MAP)?

MAP is an alternative available to taxpayers for resolving disputes giving rise to double taxation whether juridical or economic in nature.

The agreement for avoidance of double taxation between the countries would give authorization for assistance of Competent Authorities in the respective jurisdiction under MAP. In the context of OECD Model Convention for the Avoidance of Double Taxation, Article 25 provide for assistance of Competent Authorities under MAP.

- The main benefit of pursuing MAP is elimination of double taxation (either juridical or economic). It is very rare that a case under MAP is not resolved.
- Also, cases involving certain jurisdictions (US, UK and Denmark), the Indian authorities have entered into an agreement under which the taxpayer can choose to provide a bank guarantee for the outstanding tax demand. In such cases, the tax demand would not be pursued by the tax authorities until disposal of the MAP application.
- The MAP resolution, once accepted, eliminates the need for protracted litigation.

What are the key benefits of pursuing MAP?

What kind of issues can be taken for resolution under MAP?

Generally, the issues giving rise to double taxation (either juridical or economic) are submitted by the taxpayers for resolution under MAP. Some of the instances giving rise to double taxation are:

- Adjustment arising from Transfer Pricing assessment
- Issues relating to existence of Permanent Establishment
- Characterisation of income
- Attribution of profits to Permanent Establishment

The taxpayer of the country having to bear the incidence of double taxation can apply for assistance of Competent Authorities under MAP to resolve the issue of such double taxation.

E.g.: ABC Co Ltd is an Indian subsidiary of ABC Inc in US. ABC Co Ltd provides contract software development services to ABC Inc and is compensated on a 'cost plus' basis for the contractual services. During a Financial Year the international transaction of ABC Co Ltd were scrutinized by the Transfer Pricing Officer in India and an upward adjustment to income was made. The upward adjustment to the income, due to higher transfer price, in the hands of ABC Co Ltd would give rise to double taxation to ABC Inc., US. In such cases, under the India - US Tax Convention, ABC Inc can apply for assistance of Competent Authorities under MAP to resolve such incidence of double taxation.

Who can apply for assistance of Competent Authorities under MAP?

What is the time limit for filing of MAP?

The time limitation for filing an application for MAP is governed by the respective Treaty for Avoidance of Double Taxation entered into between the countries. Generally, the time limit ranges between two to three years from the date of the notice giving rise to double taxation. Based on our experience, the date of order of the original Assessment would be reckoned for computation of time limitation for filing an application for assistance of Competent Authorities under MAP.

Certain Conventions for Avoidance of Double Taxation between the countries provide for three years from the date of receipt of first notice giving rise to double taxation. (E.g., Convention between India – Australia, Convention between India – China, Convention between India – Germany etc.)

In cases where the Convention for Avoidance of Double Taxation does not provide for time limit the domestic tax provision on time limit has to be looked into for filing an application for assistance of Competent Authorities under MAP. E.g., the Convention for Avoidance of Double Taxation between India and UK does not provide time limit for filing for assistance under MAP. However, the UK domestic regulation provides a time limit of six years from the end of the relevant financial year to which adjustment relates.

The language generally used in the tax Conventions allow the taxpayers to apply for MAP even in anticipation of a dispute giving rise to double taxation. Technically, one can file a MAP application upon receipt of the draft Assessment Order. However, from a practical perspective, the Competent Authority might not begin the negotiation process until the final Assessment Order has been issued as the tax demand would only crystallize upon issuance of the final Assessment Order.

Considering that, pursuant to Finance (No. 2) Act, 2009, the Assessing Officer would first issue the draft Assessment Order in cases involving transfer pricing adjustment and foreign companies; can an application for assistance of Competent Authorities under MAP be made?



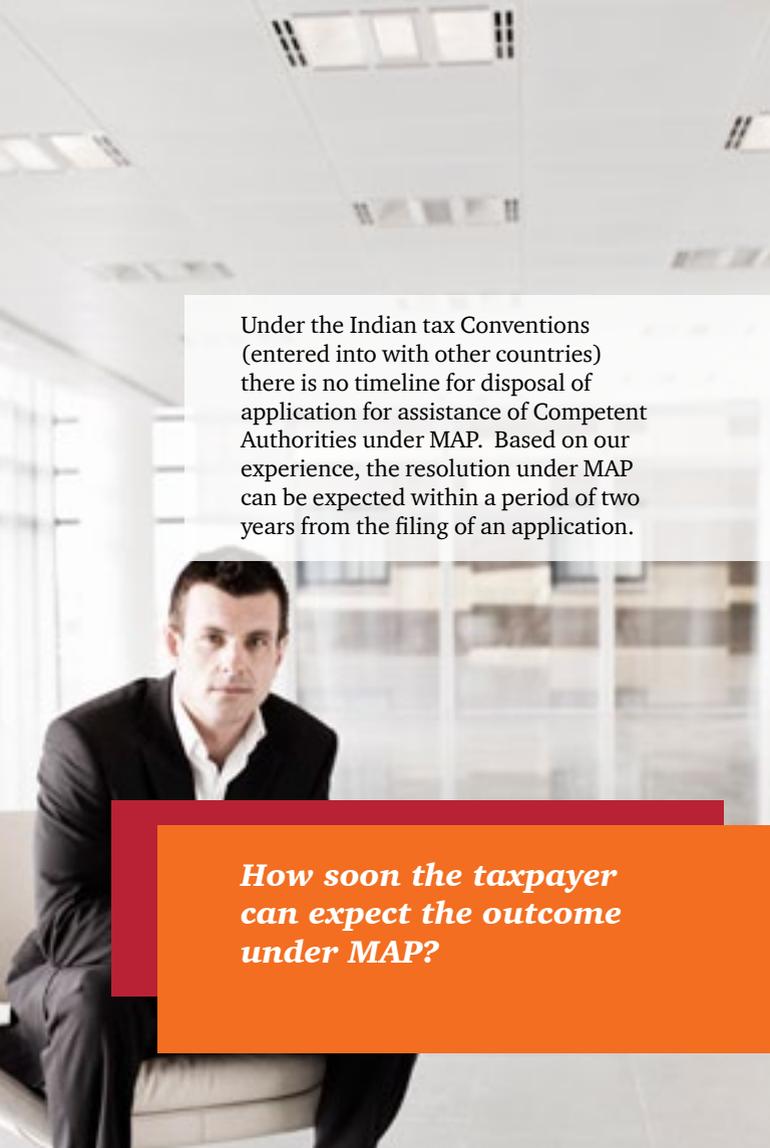
Option of resolution under MAP is an additional dispute resolution option available to the taxpayer. It can be pursued simultaneously with the dispute resolution options available under domestic regulation.

Does the taxpayer have to exhaust the appeal options available under the domestic litigation route to apply for assistance under MAP?

Can a taxpayer participate in the negotiation process between the Competent Authorities?

The negotiation process between the Competent Authorities of countries under MAP, are generally a ‘closed door’ event. Thus, the taxpayer would not have access to and cannot participate in the negotiation process between the Competent Authorities.

Taxpayers can work with the Competent Authorities to explain their own case and positions prior to the negotiation meetings between the Competent Authorities.



Is the outcome under MAP binding on the taxpayer and the Revenue?

Under the Indian tax Conventions (entered into with other countries) there is no timeline for disposal of application for assistance of Competent Authorities under MAP. Based on our experience, the resolution under MAP can be expected within a period of two years from the filing of an application.

How soon the taxpayer can expect the outcome under MAP?

While the taxpayers have the option of either accepting or rejecting the resolution arrived at under MAP, should the taxpayer opt to accept the MAP resolution, it will be binding on the Revenue for that international transaction and for that Assessment Year.

Rule 44H (4) of the Indian Income Tax Rules, 1962 provide that the Assessing Officer shall, within 90 days of receipt of the resolution by the Chief Commissioner or Director General of Income Tax, give effect to the resolution provided:

- The taxpayer gives his acceptance to the resolution arrived at under MAP; and
- Withdraw the appeal filed under the domestic litigation provisions

The resolutions under MAP are for the particular issues and the Assessment Years covered in the application for assistance of Competent Authorities under MAP. Thus, strictly speaking, the resolution under MAP for one year cannot be applied for the subsequent year.

That said, the principle agreed upon for one year is likely to be followed in MAP proceedings for the subsequent years should the taxpayer choose to apply for MAP for the those years. However, since the MAP resolution is in the nature of settlement between two Competent authorities, it cannot be used as a basis for supporting arm's length nature under the domestic litigation process.

Can outcome under MAP for a year be applied even for subsequent years?

Can a resolution under MAP be treated as an Arm's Length Price?

The resolution arrived at by the Competent Authorities under MAP are based on the negotiation with the objective of settlement of issues. The negotiated settlement cannot be considered as an Arm's Length Price which needs to be based on principles of Transfer Pricing.



If the taxpayer accepts the resolution arrived at under MAP, a letter indicating the acceptance of resolution under MAP, and withdrawal of appeal (to the extent of the issues covered under the MAP resolution) need to be made to the Assessing Officer and the Appellate Authorities before whom an appeal is filed under domestic litigation provisions.

What is the procedure for withdrawal of domestic appeal in case the settlement under MAP is accepted?

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