

**Australia Indonesia Partnership
for Economic Governance**



Mutual Agreement Procedures – Best Practice

**SGATAR
Bali 2012**



 **NORTON ROSE**

Mutual Agreement Procedures

- OECD Manual on “Effective Mutual Agreement Procedures”
 - Awareness of the MAP process;
 - How it should function;
 - Best Practice;
 - Guidance only;
 - How does it relate to SGATAR?

Resolving and publishing issues of interpretation or application;

- Article 25(3) - All efforts should be made to resolve issues;
- Publication of outcomes has been suggested:
 - May have limited application;
 - May have potential if a particular methodology is adopted for an industry;
 - Issues should be settled based on the facts & circumstances;
 - Communication to taxpayers and advisers.

Robust use of Articles 25(3) power to relieve double taxation;

- Strict interpretation of the application of the Convention should be avoided in MAP;
- Competent Authorities should act in good faith, and:-
 - Endeavour to resolve;
 - Seek opportunities to compromise;
 - Resolve in a satisfactory manner.

Principled approach to resolution of cases;

- Resolve on a fair, objective and principled basis;
- Based on the merits of the case and not to balance out results;
- Consistent outcomes – positions can't be changed if there maybe a potential revenue loss;
- Aim is to achieve outcomes based on principles but also consider compromise;
- Agreement on recurring issues for the future;
- Keep the taxpayer informed of progress.

Transparency and simplicity of procedures for accessing and using the MAP;

- Procedures and policy should be simple and not a burden;
- Guidelines on policy and procedures for MAP should be publicly available;
- Possible website information.

Providing complete, accurate and timely information to the Competent Authorities;

- Taxpayers should be aware of the need to provide timely information to fully analyze and prepare for MAP negotiations;
- Information should be provided to both Competent Authorities (“CA”) at the same time;
- Allow both sides to gain a common understanding;
- Lack of information will extend the period of MAP.

Allowing electronic submissions

- Proposal that e-copies of information would be provided to both countries at same time;
- Some Tax Administrations allow this while others have concerns on privacy issues;
- ATO does communicate with limits but does not send sensitive information by email although taxpayers will send it to ATO.
- Question – how much security is provided by emails?

Allowing early resolution of cases;

- The question is whether a MAP is necessary?
- Are there alternatives before a lengthy MAP is undertaken?
- Perhaps an internal review panel could examine issues for potential alternatives.

Earlier notification of a potential case;

- Seeking of MAP can start when there is a probability (not possibility) of double taxation;
- A position paper may be “probability” factor;
- Seeking of MAP in the early stages will assist in fulfilling time limits.

Liberal interpretation of time limits and advising of treaty rights;

- Double taxation is to be avoided;
- Flexibility and benefit of doubt should be given to taxpayer;
- Proposal that rights (domestic and international) and time limits to lodge MAP are advised to taxpayers when adjustments are made;
- If one CA considers that domestic issues impose a barrier to MAP, they should explain the legal basis.

Avoiding exclusion from MAP relief due to the late adjustment or late notification

- CA should notify taxpayers at an early stage – not at late stage;
- Should take all reasonable steps to ensure taxpayers have sufficient time;
- If one country adjusts after time limit, there should be consideration to withdraw adjustment unless perhaps it is fraud, gross negligence, etc.

Consideration of MAP assistance for cases described as “tax avoidance”

- Domestic application of anti-avoidance rules should not prevent MAP;
- If the requirements of Article 25(1) are met, MAP should proceed;
- Refusal of MAP may result in additional punishment as a taxpayer has been hit with double taxation without relief as well as penalties.

Countries eliminate or minimize “exceptions” to MAP

- Countries should limit barriers to MAP by rectifying domestic laws to avoid inconsistencies;
- Countries with a barrier in place should publicize it and be able to provide a legal basis for not entering into MAP;

Taxpayer presentation to Competent Authorities;

- Taxpayers are not involved in negotiations;
- Taxpayers can be invited to make a presentation to clarify issues, transactions, etc. or allow a site tour of the business.
- Not a standard practice;
- Taxpayer may present a proposal to resolve;
- CA should consider all options to resolve.

Cooperation and transparency;

- Co-operation from both taxpayers and CA;
- Same information to be provided to both CA with all the relevant details;
- Communication with taxpayer and providing feedback on progress of MAP;
- “Homework” input from taxpayers.

Face to face meetings between Competent Authorities

- Communication can be by mail, phone, email;
- Best is “face to face” meeting as it:-
 - Allows open discussions and “time outs” to reflect on issues being discussed (real time consideration);
 - Allows timely consideration of points raised;
 - Allows significant progression of a case in days instead of months;
 - Consideration of compromise outcome in a meeting.

Bilateral process improvements;

- Some countries have provided:
 - Guidelines for procedures of MAP for their taxpayers;
 - Guidelines to cover several countries – PATA – Japan, USA, Canada and Australia;
 - Bilateral Memorandum of Understanding may assist in applying consistent treatment of MAP cases.

Decision summaries;

- Taxpayers should be provided with the reasons and the principles behind any settlement;
- Suggest that a meeting be held with taxpayers to discuss and explain the reasoning;
- Ensure all the elements of the decision are clearly understood;

Recommendations for MAP cases beyond 2 (two) years

- Recommendation is that MAP should not exceed 2 years;
- Examine the issues why the 2 years have expired, and
 - Consider a flexible approach to extend if resolution is viable;
 - If resolution is not viable, consider the escalation to senior officers to review.

Avoid blocking MAP access via audit settlement or unilateral APAs;

- CA should not settle with a taxpayer (unilateral APA or audit settlement) and block access to MAP;
- Settlement of the issue with your taxpayer without involvement of the other country is not in the best interest of any tax administration;
- Taxpayers should not suffer double taxation due to one administration's approach to resolve it.
- Co-operation and a reciprocal attitude should be shown to each country.

Interest relief:

- What should the policy be on interest?
- Interest relief for MAP is usually not discussed;
- Relief is usually limited to double taxation on profits and not additional tax for understatement of profits.

Suspension of collection during MAP

- What policy should be in place?
- 50% payment and balance placed on hold?
- What interest will be charged?
- What is the credit worthiness of the taxpayer?
- Best practice is suspension of whole or part of the debt but not to be abused by taxpayers.

Readily available access to a Competent Authority (CA)

- Is the CA known to the public?
- Is that person or members of the CA team readily available to be contacted?
- CA or team members should be involved in meetings with taxpayer;
- Taxpayer should have access to CA;
- Open communication between all parties.

Independence and resources of a competent authority.

- Separation of CA team from Audit activity (e.g. PATA guidelines);
- CA should review “audit” and may consider that the case has no merits and withdraw the adjustment prior to MAP;
- CA should have sufficient budgets and resources (e.g. qualified Transfer Pricing) to handle MAP cases;
- Resources should include training, funding, program needs, etc.

Performance indicators for the competent authority function and staff.

- Debate on whether there should be some sort of indicators:-
 - Consistent outcomes;
 - Time to resolve;
 - MAP outcomes;
 - Training to overcome short comings
- Difficult as each case will often have its own facts and circumstances or will rely on co-operation from other CA team.

Implementing and promoting ACAP (accelerated Competent Authority Procedure) and Bilateral APA Program;

- Can a MAP be considered under the ACAP?
- Need to consult with other CA.
- A Mature program will provide alternatives such as bilateral APA to provide certainty;
- Promotion of APA program;
- Reduce international tax disputes before they arise;

Country Profile

- Best Practice would include understanding the other country tax laws (e.g. Transfer Pricing) and why certain issues may arise;
- OECD profiles;
- Big 4 Accounting firms have summaries on various countries including Transfer Pricing.

Questions or comments?

-