



DRAFT

**MANUAL ON EFFECTIVE MUTUAL AGREEMENT PROCEDURES
(MEMAP)**

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PREFACE

This draft online manual is part of a broader project to improve the functioning of existing international tax dispute procedures and to develop supplementary dispute resolution mechanisms. More information about the project, the proposed supplementary dispute resolution mechanism, and other suggested improvements to the Mutual Agreement Procedures (MAP) process can be found at www.oecd/ctp under Dispute Resolution.

The recently released 2006 Public Discussion Draft and this preliminary Manual on Effective Mutual Agreement Procedures (MEMAP) are still in draft format as they are being released for public comment. Both will be the subject of a public consultation in Tokyo on 13 March 2006.

MEMAP is intended as a guide to increase awareness of the MAP process and how it should function. When finalised, it will provide tax administrations and taxpayers with basic information on the operation of MAP and identify best practices for MAP without imposing a set of binding rules upon Member countries.

The following points are important elements to consider in understanding the status of the manual or its interaction with other OECD guidance:

- The manual does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provision of any tax convention.
- Information contained in this manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of the OECD Model Tax Convention on Income and Capital and its Commentary and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.
- To the extent that there are any statements or information in the MEMAP which appear to conflict, or to be incompatible with a convention, domestic guidance provided by a country, the OECD Model Tax Convention, its Commentary, or the OECD Transfer Pricing Guidelines, then the latter guidance are of course controlling.
- “Best practice” is the term used in this manual to describe what is generally thought to be the most appropriate manner to deal with a MAP process or procedural issue. There is no priority or significance associated with their order or length of discussion of a particular practice. Although taxpayers and tax administrations should ideally strive towards implementing these best practices, it is recognised that it may not always be possible to apply a best practice as described in the manual or there may be situations where their application may not be appropriate.

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INTRODUCTION

About this Manual

The aim of this online Manual on Effective Mutual Agreement Procedures (MEMAP) is to make available, to both tax administrators and taxpayers in the Organisation for Economic Co-operation and Development's (OECD's) Member countries and non-OECD Member countries, basic information on the operation of **Mutual Agreement Procedures (MAP)** under bilateral tax treaties and to identify best practices for MAP.

Purpose of the manual

The overall purpose of this manual is the continued improvement of the MAP process as it applies in countries' treaty relationships. For both OECD Member countries and non-OECD economies, this means the promotion of greater consistency in how MAP issues are dealt with, as well as improving the speed and effectiveness of the process.

This manual should be viewed as a general guide for the MAP process that highlights the best practices of the **competent authorities** of the OECD Member countries. As such, the MEMAP will encourage countries to improve the effectiveness of MAP. While the MEMAP does not impose a set of binding rules upon tax authorities or taxpayers, it is intended to describe recommended approaches for conducting MAP activities. The best practices for MAP developed by the MEMAP will facilitate and support the resolution of **double taxation** cases and other cases eligible for MAP consideration, while remaining general enough to be applicable to most jurisdictions.

“Best practice” is the term used in this manual to describe what is generally thought to be the most appropriate manner to deal with a MAP process or procedural issue, and best practices are generally the practices followed by most OECD countries. They are grouped functionally and there is no priority or significance associated with their order or length of discussion. There may be certain situations where a best practice as described in the MEMAP is not possible to apply or is not necessarily the “best” approach to resolving a problem or issue in a particular case. Although taxpayers and tax administrations should ideally strive towards implementing these best practices, it is recognised that there may be situations where their application may not be appropriate.

The OECD website includes a series of **country profiles** on Mutual Agreement Procedures for OECD Member countries, with information about the specific practices of the Member countries. In situations where specific country guidance is not available for MAP, this manual should provide general guidance on the process and on obtaining assistance from a competent authority.

The MEMAP is intended as a guide to increase awareness of the MAP process and how it should function. It does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provision of any tax convention. To the extent that there are any statements or information in the MEMAP which appear to conflict, or to be incompatible with a convention, domestic guidance provided by a country, the **OECD Model Tax Convention**, its **Commentary**, or the **OECD Transfer Pricing Guidelines**, then the latter guidance is of course controlling.

Other references

The topics covered in this manual relate to issues addressed by the OECD publications noted below. Information contained in this manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of these documents.

- OECD Model Tax Convention on Income and Capital (**OECD Model Tax Convention**) and its **Commentary**, as amended from time to time.
- The principles of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (**OECD Transfer Pricing Guidelines**), as amended from time to time.

1. BACKGROUND

1.1. What is a Tax Convention?

A **tax convention**, or **tax treaty** as it is often called, is an official agreement between two countries on the administration of taxation when the domestic tax legislation of the two countries apply simultaneously to a particular issue or taxpayer (e.g., when a taxpayer resident in one country derives income from sources in the other country). Tax conventions provide a means of settling on a uniform basis the most common problems that arise in the field of **international double taxation**.

Most tax conventions typically include the following broadly defined sections:

- A preliminary section on the scope of the convention (e.g. covering taxes on income and capital) and the definition of terms used.
- The main part of the convention which settles the extent to which each of the two **contracting states** may tax income (i.e. dependent upon different classes of income and capital and based upon whether the state is a **source state** or **residence state**) and determines how international **juridical double taxation** and international **economic double taxation** are to be eliminated.
- A key section on special provisions such as the **MAP article**, which establishes the mutual agreement procedures for eliminating double taxation and resolving conflicts of interpretation of the convention.
- Finally, a section on the implementing provisions such as the entry into force and termination provisions of the convention.

The OECD Model Tax Convention is a model tax treaty which has been developed by the OECD. The first version of the OECD Model Tax Convention was published in 1963, and the Model has been frequently updated since then. More than 2000 bilateral tax treaties between countries of the world are based on the OECD Model Tax Convention.

1.1.1. Purpose of a tax convention

The primary purpose of tax conventions is to eliminate double taxation and to prevent fiscal evasion. A tax convention will also serve, in effect, to allocate tax revenues on transactions taking place between residents of signatory countries. To these ends, a tax convention may resolve some common disputes and provide rules determining:

- the country in which a taxpayer is resident;
- the treatment given to specific types of income;
- the allowable rates of withholding tax on specific types of cross-border payments; and
- the manner in which issues of taxation not in accordance with a tax convention are to be resolved.

1.1.2. Double taxation – juridical and economic

International juridical double taxation can be defined as the imposition of income taxes in two (or more) states on the same taxpayer in respect of the same income. Juridical double taxation can arise, for example, where a resident of one country derives income from sources in the other country, and both countries' domestic tax legislation would tax that income. It can also arise where each country considers the taxpayer to be resident in that country under domestic tax laws. Tax conventions reduce juridical double taxation by allocating taxing rights between residence and source states on various categories of income, typically by eliminating or limiting source country taxation or by requiring a **residence state** to grant relief for **source state** taxation through a credit or exemption mechanism. For example, tax conventions typically provide that one country may not tax the business profits earned by a resident of the other country unless that resident has a taxable presence in the form of a **permanent establishment** in the first country and the profits are attributable to that permanent establishment. Tax conventions also reduce juridical double taxation by establishing criteria for determining an exclusive residency status for taxpayers. The most common instances of juridical double taxation disputes are disputes over residency or permanent establishment status, or over the characterisation of particular items of income and their coverage under particular provisions of the convention.

Economic double taxation means the inclusion, by more than one state's tax administration, of the same income in the tax base when the income is in the hands of different taxpayers. **Transfer pricing** cases are the best example of economic double taxation. For example, a tax administration adjusts a price charged between related parties with a resulting tax charged on the additional income in the hands of one related party, where tax has already been charged in another country on that same income in the hands of the other related party.

Double taxation has a detrimental effect on the movements of capital, technology and persons and on the exchange of goods and services. Thus tax conventions, when properly applied, remove the obstacles of double taxation, thereby promoting the development and flow of international trade and investment.

1.2. What is a Mutual Agreement Procedure (MAP)?

The **MAP article** in tax conventions allows designated representatives (the "**competent authorities**") from the governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a convention.

Since most probable occurrences of double taxation are dealt with automatically in tax conventions through tax credits, exemptions, or the determination of taxing rights of the contracting states, the majority of MAP cases are situations where the taxation of an individual or entity is unclear.

A noteworthy point is that the MAP article in most conventions does not compel competent authorities actually to reach an agreement and resolve their tax disputes. They are obliged only to use their best endeavours to reach an agreement. Unfortunately, on occasion competent authorities are unable to come to an agreement. Reasons for unresolved double taxation range from restrictions imposed by domestic law on the tax administration's ability to compromise to stalemates on economic issues such as valuations.

Some conventions currently include **arbitration** clauses in their MAP articles. However since these procedures are new, there has been limited guidance and experience in their use. Even the **EU Arbitration Convention** that first entered into force in 1995 has only had a few actual cases concluded. This lack of experience may change in the near future if more cases line up for arbitration and the OECD considers

changes to the Model Tax Convention to update guidance on supplementary dispute resolution mechanisms for MAP.

1.2.1. Taxation of enterprises and individuals “not in accordance with the Convention”

The **MAP article** (Article 25 (Mutual Agreement Procedure) of the OECD Model Tax Convention) usually sets out three general areas where two states endeavour to resolve their differences. The first area, covered by paragraphs 1 and 2 of the Model Tax Convention’s MAP article, applies to situations where a taxpayer believes that the actions of one or both of the contracting states has resulted or will result for him in “taxation not in accordance with the provisions of the Convention”. This area is the most commonly used and most often referred to part of the MAP article since it deals with most international taxation disputes under tax treaties.

The taxpayer may request MAP assistance in these instances of taxation contrary to a convention, which in most cases involve double taxation. Historically the majority of these cases have been issues of **transfer pricing** where member companies of a **multinational enterprise** incurred economic double taxation due to an adjustment to their income from intragroup transactions by one or more tax administrations. Enterprises also request this kind of MAP assistance for non-transfer pricing cases, including disputes over such issues as the existence of a **permanent establishment**, the amount of profits attributable to a permanent establishment, or the application of a tax convention’s **withholding tax** provisions to their income.

On occasion, **individuals** require MAP assistance for cases of taxation not in accordance with a tax convention, when specific articles of a convention do not resolve a situation clearly. The most common occurrences for individuals are cases of **dual residency** (i.e., where an individual is considered a resident for tax purposes of two countries, under their respective domestic laws). This can happen quite commonly, because the domestic laws of the two countries may apply different tests for when residency is gained or lost. As part of its object and purpose of avoiding double taxation, a tax treaty will only allow one of these countries to treat that person as a resident for purposes of the treaty, and it therefore sets forth criteria to determine which of the two countries the person has the greater connection with. That will then be treated as the only country of residence when applying the treaty.

Paragraph 2 of Article 4 (Resident) in the OECD Model seeks to solve this problem by a series of so-called “**tiebreaker**” tests, each serving to determine the single residence country for treaty purposes if the previous tests have not resolved the issue. In the application of those tests, there may be different views taken by the two countries, for example as to where the person’s “permanent home” or centre of vital interests is, and there might therefore be a need to resort to MAP to resolve differences between the treaty partner countries on this point.

Moreover, even if both countries agree on how the tiebreaker tests operate, these tests do not always give a result. The last of the tiebreaker tests tries to deal with this by providing, as part of the last test that “the competent authorities of the Contracting States shall settle the question [that is - of individual residence for treaty purposes] by mutual agreement.” In other words if the issue is not solved by the other tiebreaker rules, it should be solved by mutual agreement to help avoid double taxation.

1.2.2. Interpretation or application cases and double taxation in cases not otherwise provided for in a convention

Most MAP articles provide for the possibility of MAP in two areas other than instances of taxation “not in accordance with the Convention”. The other two areas, usually mentioned in a provision corresponding to **Article 25(3)** of the OECD Model Tax Convention, involve questions of “interpretation or application of the Convention” and the elimination of double taxation in cases not otherwise provided for in a convention.

Specifically, the first sentence of Article 25(3) typically authorises the competent authorities to try to resolve by mutual agreement “any difficulties or doubts arising as to the interpretation or application of the Convention”. Under this provision, issues that require clarification or interpretation can be discussed and agreed upon between the contracting states. These MAP discussions frequently relate to topics of a general nature which concern, or may concern, a category of taxpayers rather than a specific taxpayer’s case.

The competent authorities may rely on this provision, for example, to reach agreement on the definition of a term used in the convention or to agree upon procedures for granting the relief called for by a convention. Situations where this provision has been usefully applied include, for example:

- The **U.S.-Japan Memorandum of Understanding of 27 December 2005** on the meaning of the term “investment bank” in the Interest Article of their treaty;
- The **U.S.-Mexico Mutual Agreement of 22 December 2005** on the criteria and procedures to be applied for purposes of granting treaty benefits to fiscally transparent entities;

Best Practice N°1: Robust use of authority to resolve issues of interpretation or application

Many issues of a general nature regarding the interpretation or application of a treaty could be successfully addressed by competent authorities’ exercise of their ability under the first sentence of Article 25(3) to reach a mutual agreement on those issues, and competent authorities could greatly improve the implementation of treaties by identifying and pursuing opportunities to use that authority.

The second sentence of Article 25(3) also typically authorises the competent authorities to “consult together for the elimination of double taxation in cases not provided for in the Convention”. This authority might allow the competent authorities to address, for example, a case where a third country resident has **permanent establishments** in each of the two treaty countries, and they disagree about the amount of profits attributable respectively to each of the two locations.

1.3. What/Who is a Competent Authority?

A “competent authority” is a term used in tax conventions to identify the position, person, or body to whom issues can be addressed within the contracting state that is one of the two parties to a tax convention. The competent authority for each country is typically identified in the Definitions article of the tax convention (for example, under **Article 3 (General Definitions) of the OECD Model Tax Convention**). A typical designation would be “the Minister of Finance or his authorised representative” or “the Secretary of the Treasury or his delegate”. As will be described below, the authority is usually delegated within a tax administration to a level that will administer a country’s MAP program.

Assistance by a competent authority is generally provided under the **MAP article** contained in a tax convention. As well, competent authorities are often referenced in other articles of a convention and in certain situations other articles may apply directly to allow for competent authority assistance on particular questions (for example, under **Article 9(2) (Associated Enterprises)** or **Article 4(2)(d) (Resident)** of the OECD Model Tax Convention).

1.3.1. Overall purpose of a competent authority

Generally speaking, a competent authority is committed to ensuring a good faith application of a tax convention and endeavours to resolve competent authority requests in accordance with the applicable tax convention, the OECD's Model Tax Convention, its Commentary, and the Transfer Pricing Guidelines¹. To fully carry out this obligation, every effort should be made to reach a satisfactory resolution of the issues involved, including taking into account considerations of equity to give the taxpayer satisfaction where strict application of domestic law or the provisions mentioned above would not lead to an agreement.

Best Practice N°2: Principled approach to resolution of cases

In the resolution of MAP cases, a competent authority should engage in discussions with other competent authorities in a principled, fair, and objective manner, with each case being decided on its own merits and not by reference to any balance of results in other cases.

As part of a principled approach to MAP cases, competent authorities should endeavour to be consistent and reciprocal in the positions they take and not change position on an issue from case to case, depending on which side of the issue produces the most revenue.

Although a principled approach is paramount, where an agreement is not otherwise achievable, both competent authorities should look for appropriate opportunities for compromise in order to eliminate double taxation.

In order to improve the MAP process, competent authorities ideally strive to resolve cases in a timely manner and keep the taxpayer informed of the status of their request on an on-going basis. Once a decision has been made or a solution agreed to by the competent authorities on a particular case, the taxpayer should be advised of the decision in writing. It is understandable that a taxpayer may wish to know the basis of the competent authority decision or agreement on its case and therefore should be afforded a satisfactory explanation by the competent authorities. Each of these issues is dealt with in the relevant section of this manual.

1 . Other relevant sources such as other model tax conventions and commentaries may be useful as well, depending upon the origin or basis of a particular tax convention.

2. MAKING A MAP REQUEST

2.1. What is a MAP Request?

Where a person considers that the actions of one or both countries' tax administrations result or will result in taxation not in accordance with a tax convention, the person may request competent authority assistance under the MAP article of the relevant tax convention. In most cases, such an action is an adjustment to, or a formal written proposal to adjust, income related to an issue or transaction to which the person is a party.

Generally, taxpayers must approach the competent authority of their country of residence to request relief under a tax convention. In cases where an adjustment is made that affects related parties in both jurisdictions (e.g., a transfer pricing adjustment by one of the countries to the income or expense of one company from a transaction entered into with a related company in the other country), it is often advisable for each taxpayer to make a separate request for assistance to the competent authority of the country in which it is resident. If the taxpayer is a non-resident of the relevant countries but is entitled to a treaty benefit based on nationality in one of the countries (such as protection under a provision comparable to **Article 24(1) (Non-Discrimination)** of the OECD Model Tax Convention), then a request may be made to the country in which it is a national.

Some conventions are more flexible and allow a taxpayer to present a request to the competent authority of either contracting state. Taxpayers should refer to the text of the particular MAP article to determine their entitlement to present a request to a particular competent authority.

2.1.1. *Typical scenarios requiring competent authority assistance*

The following are some typical examples of taxation not in accordance with a tax convention where one might make a MAP request:

- A taxpayer is subject to additional tax in one country because of a **transfer pricing** adjustment to the price of goods or services transferred to or from a related party in the other country. The taxpayer may request that the competent authority of the first country reduce or withdraw the adjustment and/or that the competent authority of the second country allow a corresponding adjustment to the income of the related party to prevent **economic double taxation**.
- A taxpayer is considered to be a resident of two treaty countries under each country's domestic law, and each country asserts that the taxpayer is a resident of its jurisdiction for purposes of the tax convention. If unresolved, the taxpayer could be subject to taxation not in accordance with a convention and therefore liable for tax on the same income in both countries. A request to the competent authorities would initiate discussions between the competent authorities regarding the proper application of the **tiebreaker** rules contained in the **residency article** of the convention. The taxpayer should approach the competent authority of the country in which the taxpayer asserts residency.
- A withholding tax is levied beyond what is allowed within an applicable tax convention by one treaty country on a payment to a resident of the other country. The taxpayer may request the

competent authority of its country of residence to address the taxation not in accordance with the tax convention with the competent authority of the other country.

- A taxpayer operating a branch in one treaty country is subject to additional tax because of an adjustment by that treaty country of the income allocated to the branch. The taxpayer may ask the competent authority of its residence state to prevent double taxation by allowing an increased foreign tax credit or exemption or by seeking the other competent authority's agreement to give relief from the adjustment.
- A taxpayer subject to tax as a resident in one country on worldwide income, including income from carrying on a business in the other treaty country, is taxed in that other treaty country on the business income earned there, despite not having a permanent establishment in that country under the tax convention. The taxpayer may request the competent authority of its country of residence to address the issue of taxation not in accordance with the tax convention with the competent authority of the other country.
- A taxpayer is uncertain whether the convention covers a specific item of income, or is unsure of the characterisation or classification of the item related to a cross-border issue; the taxpayer may approach the competent authority for clarification.

In all of these situations a taxpayer may generally obtain assistance or relief via the MAP process.

In order for a taxpayer to seek assistance from its competent authority in cases of potential taxation not in accordance with the convention, it is generally sufficient if the resident establishes that such taxation is probable. In other words, an actual adjustment is not necessary and taxpayers may contact the competent authority to notify of an impending adjustment. Establishing the probability of inappropriate taxation does not mean that the taxpayer must prove this to a 51 percent probability, and in borderline cases it is appropriate for the competent authority to give the benefit of the doubt to the taxpayer for purposes of accepting the request. Further guidance on the probability of inappropriate taxation and the extent required to submit a request is provided in Paragraph 12 of the Commentary on Article 25 of the OECD Model Tax Convention.

A resident may also contact its competent authority for clarification as to the interpretation and application of a convention, as described in paragraph 3 of the MAP article. In such cases, the conditions of paragraph 1 of the MAP article relating to the need to establish probability of inappropriate taxation do not need to be met.

2.2. How to Make a Request for Competent Authority Assistance

In almost all cases, MAP cases are initiated through a taxpayer's request for competent authority assistance. Essentially the request is the means by which a taxpayer informs or notifies a competent authority that it believes there is an action by one of the treaty countries involved which has resulted or will result in taxation not in accordance with the relevant tax convention.

Some countries publish specific guidance on how to make a MAP request and how they conduct their MAP cases. The MAP country profiles of OECD Member countries published on the OECD website include references to such guidance and should be consulted by taxpayers considering making a MAP request.

Best Practice N°3: Transparency and simplicity of procedures for accessing and using the MAP

Competent authorities should, where appropriate, formulate and publicise domestic rules, guidelines and procedures concerning use of the MAP, and OECD Member countries should ensure that their country profiles on the OECD website including references to this information are kept up to date.

Notwithstanding the amount of information required to deal with some MAP cases and the necessity of some procedures, formalities involved in instituting and operating the MAP should be kept to a minimum and any unnecessary formalities eliminated.

Often, competent authority cases are fact-intensive, particularly transfer pricing cases, and therefore usually require considerable information. However, the amount of information required should be balanced with the complexity of the issues; it should recognise the burden such requests for information place on a taxpayer, and it should be specific to the issue being addressed.

2.2.1. General format of a MAP request

In cases where there are no prescribed forms for requesting competent authority assistance, the taxpayer should provide the following relevant information, if applicable:

1. the name, address, and taxpayer identification number of the taxpayer;
2. for transfer pricing cases, the name, address and, if possible, the taxpayer identification number of any related foreign taxpayer involved;
3. the name of the foreign tax administration involved and if possible identification of the regional or local tax administration office that has made, or is proposing to make, the adjustment (if relevant);
4. the tax convention article(s) that the taxpayer asserts is not being correctly applied, and the taxpayer's interpretation of the application of the article;
5. the taxation years or periods involved;
6. the relationship, situation, or structure of the transactions, issues, or related parties involved (advising of any changes in these matters that occur after the request has been filed would be helpful);
7. a summary of the facts and an analysis of the issues for which competent authority assistance is requested, including any specific issues raised by the tax administrations affecting the taxpayer and the related amounts (in both currencies and supported by calculations, if applicable);
8. for transfer pricing cases, documentation as described in domestic legislation of the taxpayer's state of residence, if available (where documentation is inordinately voluminous, a description of the documentation prepared in connection with the transactions which are the subject of the MAP request may be acceptable);
9. a copy of any other relevant competent authority request and the associated documents filed, or to be filed, with the competent authority of the other contracting state, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in

response to the action or proposed action of another tax administration (if applicable, translated copies are helpful and where documentation is voluminous, a description of the documentation may be acceptable);

10. an indication of whether the taxpayer or a predecessor has made a prior request to the competent authority of either contracting state on the same or related issue;
11. a schedule of the time limitations in each jurisdiction (domestic as well as tax convention time limits) in respect of the years for which relief is sought (in cases of multiple taxpayers, a schedule for each);
12. a statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or comparable document in either of the relevant jurisdictions;
13. where the request for competent authority assistance involves issues that are currently or were previously considered by the tax authorities of either contracting state as part of an **advance pricing arrangement**, ruling, or similar proceedings, a statement to that effect;
14. if consent has not already been provided for a person to act as an authorized representative, a signed statement that a representative is authorized to act for a taxpayer in making the request;
15. any other facts that the taxpayer may consider relevant;
16. a copy of any settlement or agreement reached with the other jurisdiction which may affect the MAP process; and
17. the taxpayer's views on any possible bases on which to resolve the issues.

The request should generally be signed by the taxpayer, or by an authorized person on behalf of the taxpayer, confirming the accuracy and completeness of the facts and information presented in the request. Alternatively, an accompanying document, stating as much, may be provided within a reasonable period of time after the submission.

Typically there are no fees charged by the competent authorities for MAP cases. There may be fees associated with **Advance Pricing Arrangement** programs (discussed elsewhere in the manual) or for the rare occurrences of using independent experts or mediators.

Best Practice N°4: Providing complete, accurate, and timely information to the competent authorities

The completeness and accuracy of the information included in a request has a direct impact on the time required for the competent authorities to carry out the MAP process. To deal with a case in an expeditious manner, a competent authority needs sufficient details to analyse, understand, and ultimately prepare to discuss a position with both the taxpayer and other competent authority.

Ensuring both competent authorities have the same information at approximately the same time will facilitate a common understanding of the facts and will undoubtedly encourage earlier resolution. On the other hand, if two competent authorities receive conflicting information, the outcome will likely be a delay in the MAP process until the parties can agree upon the information or facts presented.

Certain competent authorities may delay acceptance of a case where a taxpayer has failed to provide complete and accurate information or may deny competent authority assistance where the taxpayer has misrepresented facts.

Best Practice N°5: Allowing electronic submissions

For the benefit of the tax administration and taxpayer, electronic copies of a competent authority submission are often helpful and may ease the burden of submission for the taxpayer while facilitating the administration of a request by the competent authority. Some governments may not currently accept this medium of submission, while other governments may with a disclaimer.

2.2.2. Use of information within MAP process

All information obtained or generated during a MAP process is fully protected by the confidentiality provisions of the applicable tax convention, specifically the **Exchange of Information article (Article 26 of the OECD Model Tax Convention)** and in almost all cases by domestic legislation, as would be the case for domestic issues.

In addition, a competent authority should recognize that the disclosure of sensitive or confidential information such as a trade secret could harm a taxpayer's competitive position, and should ensure that all measures are taken to protect such information.

3. HOW MAP WORKS

3.1. The Basics

Where a request is made to a competent authority under the MAP article of a tax convention, the competent authority should first, if the request appears to be justified, attempt to resolve the matter unilaterally.

For example, in a case involving a taxpayer assertion that the action of one or both contracting states results in taxation contrary to the convention, if the competent authority considers that the request for relief is justified and this relief is within the bounds of the tax convention, it could provide the relief without consulting the other competent authority. If the competent authority is not able itself to arrive at a satisfactory solution, it will engage the other competent authority and endeavour to resolve the matter by mutual agreement.

Once notified of a case, the competent authorities discuss the merits (and in some cases deficiencies) of the case or issue usually based upon a position developed by one of the competent authorities. These discussions can take place via correspondence, telephone, videoconference, or in person. Typically after a thorough discussion, which may involve a formal rebuttal to a position paper, the competent authorities in most cases come to an agreement on a mutually acceptable resolution of the case.

In double taxation cases, the agreement between competent authorities will outline to what extent each jurisdiction will provide relief and how the relief will be provided. Details such as method of relief (e.g. adjustment to income, credit, exemption, etc.), repatriation, and timing are usually recorded as a summary record followed by an exchange of letters between the competent authorities, which formalizes the agreement.

In such cases, if the other competent authority (the competent authority in the jurisdiction where the issue or adjustment did not arise) agrees to provide all or some **correlative relief**, then in most cases the relief is provided through a **“corresponding adjustment”**. The term “corresponding adjustment” is used to describe an adjustment made by a treaty partner in order to relieve double taxation caused by an adjustment initiated by the first mentioned tax administration.

Once the agreement between the competent authorities has been finalized, the taxpayer is notified in writing of the decision and is provided with an explanation of the result. If the results require implementation, soon afterwards and upon the acceptance by the taxpayer, the results are processed by the tax administration and relief is obtained.

3.2. Acceptability of a MAP Request

While the suggested general format of a MAP request (above) may seem extensive, competent authorities normally seek the following key elements in considering a MAP request:

- there is an applicable tax convention covering the issue or transaction;

- the person considers that the actions of one or both countries results or will result in taxation not in accordance with the provisions of the tax convention;
- the competent authority is notified within the time limits specified in the applicable tax convention; and
- the issue or objection seems to be justified.

Often competent authorities require that an adjustment to income or issue be confirmed by the conclusion of the audit and a complete request be submitted before committing resources to the analysis or evaluation of a MAP process. Although this may delay the work by a tax administration on an individual case, it should not prevent notification or presentation of a case to a competent authority or in any way obstruct a person's access to MAP.

Best Practice N°6: Allowing early resolution of cases

A MAP application process that is capable of being initiated at an early stage of a potential dispute, perhaps in conjunction with a flexible initial review process, may help the competent authority to identify pragmatic solutions to the taxpayer's case which may become apparent before either the tax administration or the taxpayer becomes overly burdened with unnecessary costs or excessive preparation of a case.

Best Practice N°7: Earlier notification of a potential case

It is advisable for taxpayers to consider filing a MAP request and/or notifying the appropriate competent authorities of a potential MAP case as soon as it appears likely that an issue will result in taxation contrary to the applicable convention. This is the point when it becomes evident that there is a probability, and not just the possibility, that taxation not in accordance with the applicable convention will result.

Notifying or presenting a case in advance of a formal action giving rise to inappropriate taxation will not only help to ensure a convention's time limits for requesting MAP or notifying competent authorities are met, but also will allow for early resolution if an obvious solution is identifiable by the competent authority.

3.2.1. Time limits for requesting access to MAP

Tax conventions frequently include one or more time limits relevant to MAP requests. One type of limit is that found in **Article 25(1)** of the OECD Model Tax Convention. It provides that a case of taxation "not in accordance with the Convention" must be "presented" to the competent authority of the taxpayer's residence country "**within three years from the first notification**" of the action resulting in taxation not in accordance with the provisions of the Convention". For most tax administrations this generally means three years from the date of the notice of adjustment. (Further guidance on the starting point of the three-year time limit in the OECD Model Tax Convention is available in the Commentary to Article 25.) However, there are many variations of time limits in various countries' treaty networks and therefore it would be prudent to verify the specifics for any one particular case. If the taxpayer does not meet this timeliness requirement for presenting its case to the competent authority, it may be denied access to the MAP.

The general purpose of time limits within a convention is to prevent tax administrations from having to make or react to adjustments many years after the taxable period at issue. Such late consideration of

adjustments may be difficult since the information may very well be stale or no longer available. Records, information, and details regarding an issue or transaction may be very difficult to come by, especially in the case of a country that is unaware of the issue until long after the taxable period at issue.

Best Practice N°8: Liberal interpretation of time limits for requesting access to MAP

Balancing a tax administration's need for reasonable time limitations with the necessity of providing MAP assistance to those entitled to treaty benefits can be a difficult issue. Keeping in mind the spirit and objectives of the convention, however, taxpayers should not be unduly prevented from obtaining assistance via MAP due to overly strict interpretations of a convention's time limitation for requesting MAP. Simply put, taxpayers should receive the benefit of the doubt in borderline cases.

While the onus for making a timely request in order to preserve access to the MAP rests with the taxpayer, it would be helpful for a tax administration making an adjustment to advise the taxpayer of the need to make a timely request when it proposes the adjustment. This written notice or advice could be included at the time of formal notification of the proposed adjustment and could include guidance on the availability of MAP and how to go about protecting the availability of access to this mechanism. Some administrations have implemented this best practice of advising taxpayers of both their domestic and convention rights and obligations at the time of the proposed adjustment, with successful feedback and results.

Domestic law provisions, including time limitations, should not be an impediment to access to the MAP unless they are reflected in the terms of the convention itself. A competent authority relying upon a domestic law impediment as the reason for not allowing a taxpayer to initiate MAP should inform the other competent authority of this and duly explain the legal basis of its position.

3.2.2. Time limits related to the implementation of relief

Another type of time limit found in some conventions relates to whether a country's competent authority is obligated to implement any agreement reached through the MAP if that agreement would require the competent authority to give the taxpayer relief that is time-barred under that country's domestic law. The OECD Model Tax Convention states that once a MAP request has been timely made by the taxpayer, any agreement reached by the competent authorities shall be implemented notwithstanding any time limits in the domestic law of the contracting states. Some conventions, however, provide that a country is not required to implement a MAP agreement in contravention of domestic law limitations if that country's competent authority has not received notification that a MAP case exists within a specified period of time or if the year expires under another treaty time limit related to implementation.

While the onus for timely notification of a competent authority in order to preserve rights to relief through MAP agreements may rest with the taxpayer, it would be helpful for a tax administration making an adjustment to advise the taxpayer of the need to notify the other competent authority when it makes an adjustment. This written notice or advice could be included at the time of formal notification of proposed adjustment and could include guidance on the availability of MAP and how to go about protecting the availability of relief through this mechanism. Some administrations have implemented this best practice of advising taxpayers of both their domestic and convention rights and obligations at the time of the proposed adjustment, with successful feedback and results.

Where a country's tax administration has failed to advise a taxpayer of the likelihood of an adjustment until after the expiration of a time limit under the convention for notifying the other country's competent authority of the case, and the result is that the taxpayer would be barred from obtaining relief from the

other country, the first country's competent authority should be prepared to withdraw its country's adjustment unilaterally in order to prevent double taxation.

Where a convention expressly provides that a MAP agreement shall be implemented by each country notwithstanding domestic time or procedural limitations, both countries' competent authorities should be prepared to live up to that obligation.

Taxpayers should be cognizant that their failure to take timely protective measures to prevent treaty-based or domestic law time limitations from expiring may undermine the effectiveness of the MAP to provide relief from taxation not in accordance with the convention. Accordingly, taxpayers should take all reasonable steps to ensure that such time limitations do not expire without appropriate protective measures on their part.

Where a convention requires a competent authority to receive timely notification of a MAP case in order to be obligated to provide relief through the MAP, it would be contrary to the spirit of the MAP for this requirement to be overly strictly applied. For example, even though competent authorities may expect a notification to contain specific details of "tax not in accordance with a convention" such as identification of the issue, amounts of the adjustment, and calculations of the tax at issue, deadlines for these particular requirements should not be used to exclude a person unreasonably from obtaining assistance in MAP. This is especially true in cases where a tax administration is delayed in presenting these details to the taxpayer.

As well as reminders, confirmation by a competent authority that a taxpayer has in fact met the time limit and has duly and properly notified a competent authority could be considered a best practice. Furthermore, if a notification is considered improperly filed and therefore notification requirements have not been met, because it is late or for other reasons, it would be appropriate for a competent authority to advise the taxpayer of the reasons and how the situation may be rectified.

Best Practice N°9: Avoiding exclusion from MAP relief due to late adjustments or late notification

When an adjustment has the potential to give rise to a MAP case, tax authorities should notify the taxpayer as soon as possible of their intention to make the adjustment.

Double taxation may arise if one country makes a late adjustment and the other country is unwilling to grant relief through MAP because of time limitations in its domestic law. Some countries are unwilling to implement a MAP agreement by granting relief which is time-barred under their domestic law, even where the convention states that they are obligated to do so. Where the obligation of implementing mutual agreements notwithstanding domestic time limits is explicitly stated in the convention, a good faith application of the convention requires adherence to that obligation. In general, countries should adapt their domestic laws, if necessary, to ensure that domestic time limits do not effectively prevent taxpayers from obtaining relief through MAP. The allowance for protective claims or notification, whether domestically or within MAP, is considered beneficial in affording taxpayers the right to address issues in MAP without foregoing domestic recourse.

There are sometimes issues that some competent authorities have decided not to consider in MAP, notwithstanding the obligation under the MAP article to consider all "justified" objections of the taxpayer to taxation not in accordance with the convention. As an example, some competent authorities may not provide relief in the form of a notional expense for a notional income adjustment raised by a treaty partner. Other competent authorities may decline to engage in MAP if a taxpayer's situation presents an issue on which their tax administrations wish to obtain a judicial precedent. These types of exceptions to the availability of MAP tend to undermine the spirit and purpose of the MAP process. The recognised general principle of international law is that domestic law, even domestic constitutional law, does not justify a

failure to meet treaty obligations. It follows that countries should not likely take the view that a matter is not eligible for MAP consideration.

Best Practice N°10: Countries eliminate or minimize “exceptions” to MAP

It would be considered in the best interest of all stakeholders and would better reflect the spirit and purpose of the tax conventions for countries to rectify inconsistencies between domestic laws or policies and their network of tax conventions by eliminating issues that they exclude from MAP considerations. At the very least, these countries should publicise the exclusion so that taxpayers and other tax administrations are aware of the MAP exceptions.

A competent authority relying upon a domestic law impediment as the reason for not allowing a MAP to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position.

3.2.3. Tax avoidance and MAP

Some competent authorities have had a tendency not to accept or give full consideration to the merits of a case where an adjustment relies on anti-avoidance provisions of their country’s domestic laws. This means, generally, that if a competent authority were to consider a request for assistance in such a case, it would limit itself to forwarding the case to the other competent authority for any relief that the foreign competent authority may provide at the latter’s discretion.

It may be helpful to generally review whether domestic “anti-avoidance” laws conflict with a country’s obligations under the provisions of a tax convention. Of course this issue is very specific to the domestic laws of each country and any one particular tax convention. Some conventions specifically allow for domestic anti-avoidance provisions and therefore application of such provisions in a particular case may not necessarily be contrary to the convention. However, even under such conventions, the mere assertion that a domestic anti-avoidance provision may apply to a particular case is not enough to justify excluding from MAP the question of whether there is or may be taxation in contravention of the convention.

In other situations where there isn’t an explicit exception, one is left to look at whether a particular domestic “anti-avoidance” law or policy operates consistently with the convention and in particular, whether there is clear evidence that the convention is being abused, as described in OECD Model Tax Convention’s Commentary on Article 1. If it can be determined that the application of an anti-avoidance provision creates taxation not in accordance with the provisions of a convention, then in the absence of an explicit exception, the convention should override the domestic anti-avoidance law. Even in the absence of such a determination, however, countries should specifically observe the specific obligations enshrined in their tax treaties to relieve double taxation as long as there is no clear evidence that the tax treaties are being abused. In the absence of a special provision, there is no general rule denying perceived abusive situations going to MAP.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides more guidance on conflicts between conventions and domestic law and deals with this issue further.

Best Practice N°11: Consideration of MAP assistance for cases described as “tax avoidance”

Given the wide scope of the meaning or interpretation of the term “tax avoidance” in some countries, it would be reasonable for competent authorities of both contracting states to, at a minimum, consider granting assistance in MAP cases where an action taken by a tax administration is done under anti-

avoidance provisions, and the requirements of Paragraph 1, Article 25 are met. In the absence of a special provision, there is no general rule denying access to MAP in the case of perceived abusive situations. Even where a special provision exists, the mere assertion that a domestic anti-avoidance provision may apply to a particular case is not enough to justify excluding from MAP the question of whether there is or may be taxation in contravention of the convention.

Moreover, if the use of an anti-avoidance provision is supplementary or secondary to another domestic law provision, or of questionable basis, consideration should be given to the adverse and cumulative nature of the results of double taxation in combination with any anti-avoidance penalties and interest. Accordingly, the outright denial of competent authority assistance may have an unintended and added punitive effect.

In cases where the authorised application of domestic “anti-avoidance” laws prevents relief by one country’s competent authority, this should not prevent the other competent authority from providing any relief that the latter considers appropriate.

It is advisable that taxpayers review the specific country’s guidance on MAP and the relevant convention for further details or consult with the competent authority directly.

It is common for competent authorities to notify taxpayers in writing whether their request for competent authority assistance has been accepted or declined within a reasonable period of time (perhaps 30 days). Where a request is declined, it is constructive for the tax administrations to provide reasons for the decision.

In addition, where the decision to accept or deny a MAP request is borderline, it is important that the competent authorities bear in mind the spirit and objectives of the convention and also that the MAP process is designed to be inclusive as opposed to limiting participation.

This is especially true in cases where the issue of “probability of taxation” arises or cases where time limits exclude a person from competent authority assistance.

3.3. Role of the Taxpayer

3.3.1. Providing information to the competent authorities

Even though the taxpayer is excluded from parts of the MAP process, its participation and effort will have a considerable effect on the time it takes to complete a case. In the long-term, the taxpayer would be well served by providing information to the competent authorities in a timely manner. Once a competent authority request has been accepted, the taxpayer can best help itself by supplying the competent authority with complete and accurate information required to resolve the case. The taxpayer has every interest and advantage in keeping the competent authorities as up-to-date as possible on all material changes in the information or documentation previously submitted as part of, or in connection with, a request, as well as new information or documentation relevant to the issues under consideration.

Without proper information and documentation, competent authorities may be unable to resolve disputes expeditiously and the risk of unrelieved double taxation increases. As mentioned in the “*Best Practice: Providing complete, accurate, and timely information to the competent authorities*” section, where a request also involves a related foreign taxpayer making a request to a foreign competent authority, it would be constructive and advantageous for the taxpayers to ensure that the same information is provided to both competent authorities at the same time. It is particularly important to make sure that the two competent

authorities do not receive conflicting information from the taxpayer or its related party, so all submissions to each competent authority should be carefully reviewed for accuracy and consistency by the taxpayer and any foreign related party.

3.3.2. *Contributing to the MAP discussions*

MAP discussions between competent authorities are a government-to-government process in which there is generally no direct taxpayer involvement. Therefore, taxpayer involvement in the MAP is generally limited to presenting the taxpayer's views and assisting in the fact-finding without participating in the competent authority-to-competent authority discussions. However, taxpayers may be invited to make a presentation before the competent authorities, where appropriate, to ensure a common understanding of the facts of a particular case.

It is generally desirable for taxpayers to be given every reasonable opportunity to present the relevant facts and arguments to the competent authorities both in writing and orally.

Best Practice N°12: Taxpayer presentations to competent authorities on fact-intensive or complex cases

On very fact-intensive or complex cases it may be a valuable exercise to have the taxpayer make a presentation to both competent authorities at the same time and prior to the commencement of discussions. The purpose of the presentation would be to clarify issues, transactions, etc., and is typically limited to this type of information. In addition, experience has shown that proposals for resolution from the taxpayer can sometimes be valuable and constructive. Such a presentation would normally be pursuant to a mutual agreement by the competent authorities.

If a proposal for resolution is included, there is the risk that one competent authority may unduly rely upon this position as "the taxpayer's position" and therefore be unwilling to explore in good faith other options. All parties should bear in mind that the ultimate goal is resolution of the case, which may or may not have elements of a taxpayer's proposal.

3.3.3. *Interaction between taxpayers and competent authorities*

An expeditious MAP process is beneficial to all stakeholders. Consequently, making all relevant documentation and information accessible to a competent authority, as soon as it is available, will assist in the smooth and efficient operation of the MAP process. Likewise, competent authorities ensuring that taxpayers are well aware of the status of their case will foster a more productive relationship with taxpayers and will help to avoid misunderstandings regarding the acceptance, stage of work, or completion of their case.

Co-operation among the stakeholders involved in the MAP process is crucial to a responsive and well functioning MAP program. The provision of information and assistance when requested will promote transparency and consistency. Thus, cooperation amongst these stakeholders or parties (taxpayers and competent authorities) to the MAP process is paramount.

A party's failure to co-operate during any part of the competent authority process may have direct consequences on the length of time to obtain relief and whether such relief can ultimately be provided under the MAP. For instance, a competent authority may request additional information beyond that which was requested during an audit, or it may request information that was requested but not provided during an audit, still keeping in mind the purpose of this information is to resolve double taxation. Or perhaps a taxpayer's request to generally review or discuss a competent authority's position, prior to its formal

discussion with the other competent authority, goes unanswered. In either of these cases, the lack of cooperation may create undue delays thereby preventing the completion of a case in a reasonable period of time.

Where the failure to provide information within a reasonable time hinders a party's ability to perform its respective duties related to MAP in an efficient and effective manner, it may lead to disengagement, delays, or ultimately double taxation or taxation not in accordance with a tax convention.

Best Practice N°13: Cooperation and transparency

It is to the benefit of all (governments and taxpayers) to be fully cooperative and transparent to ensure an efficient competent authority process. The timely provision of requested information is essential to enable the competent authorities to reach an equitable and expeditious conclusion.

For taxpayers, providing the same documentation package to both competent authorities with all relevant details will go a long way in advancing the competent authorities' common understanding of the facts.

For tax administrations, timely and frequent communication with the taxpayer regarding the status or issues of a case will increase transparency in the process and help to ensure a clearer understanding of the case and a faster and more appropriate resolution.

3.4 Analysis and Evaluation by the Competent Authorities

Competent authorities customarily commence their evaluation of a MAP case upon receiving a detailed submission from the taxpayer. This is the beginning of the second stage of the MAP process, as outlined in the timeline in Annex 1. To encourage consistency and move forward in this stage of the process, competent authorities may wish to ensure that they are both dealing with the same information.

Since a misunderstanding of, or disagreement over, the facts of a case is one of the primary reasons for delays or disputes in MAP cases, a common understanding of the facts is vital to a smoothly running MAP case. If both competent authorities can agree upon the facts of a case, then a MAP case often comes down to international tax principles, policy concerns, and choosing an appropriate result upon which all stakeholders can agree.

Involvement of the taxpayer at this stage may be beneficial to both competent authorities for the purposes of clarifying any outstanding issues regarding the taxpayer's particular situation, relationships, environment, etc. as outlined in *Best Practice: Taxpayer presentations to competent authorities on fact-intensive or complex cases*.

A competent authority's view or position on an issue or transaction is the principal outcome of the analysis and evaluation of a case. In order for this position to be well founded and conveyed in a comprehensible manner, competent authorities should be prepared to explain in sufficient detail the nature of the adjustment and to a lesser extent the applicability of domestic law. Most important however, are the laws and principles that the two jurisdictions have in common, namely: the tax convention between the two contracting states; any commentary, technical explanations, or specific country guidance related to that convention; and finally published guidance by the OECD. All of these elements should be taken into account in the analysis and evaluation of an issue.

In many MAP cases the overriding principles that both competent authorities adhere to, beyond the applicable tax convention, are found in OECD guidance such as the Model Tax Convention, its Commentary, and the Transfer Pricing Guidelines.

In some cases, the competent authorities may take a different approach from audit to explain an outcome or address an issue. This may be a valid exercise, especially for a transfer pricing case and should not necessarily be considered as “redoing the audit”. However, if a case is without merit and not well substantiated at the audit stage, the competent authority of the state that initiated the adjustment should provide unilateral relief by withdrawing the adjustment without engaging the other competent authority. The guiding principle should be that the competent authority’s function is to ensure a fair and appropriate application of the convention, not to seek to uphold all adjustments proposed by the tax authorities of its country.

3.4.1. Position papers

To achieve timely resolution and to facilitate meaningful discussions, it is recommended that the competent authority consider the preparation and transmission of a position paper as a matter of priority. Sufficient detail in a position paper will enable the other competent authority to understand the issue and determine the best course of action, in other words the best method to relieve double taxation or resolve the issue. The type of information and level of detail suggested for the position paper are set out below.

The country that has taken an action that led to the taxation which is alleged to be contrary to a convention routinely provides a position paper (regardless of whether that is the competent authority to which the taxpayer has made its request). To facilitate consideration of a MAP case, a position paper provided on a timely basis and containing all the necessary information, as listed below, for the relieving competent authority would be helpful.

- a) Legal name and address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;
- b) The contact details of the competent authority official in charge of the case.
- c) Overview of the issue, transactions, business, and basis for adjustment;
- d) Applicable taxation years;
- e) Amount of income and tax adjusted for each taxable year, if applicable;
- f) Summary of relevant information from the original tax return;
- g) Description of the exact nature of the issue or adjustment and the relevant domestic laws and treaty articles;
- h) If relevant, calculation with supporting data (may include financial and economic data and reports relied upon and explanatory narratives as well as taxpayer documents and records where relevant and appropriate);

In transfer pricing cases, the following additional information would be helpful:

- i) Outline of comparable transactions and methods for adjusting differences;
- j) Description of the methodology employed for the adjustment;
- k) An explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length

outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer's submission).

In response to a position paper, the other competent authority naturally reviews the case and then provides its views. In cases where there is disagreement or clarification is required, a rebuttal position or a request for more information may be warranted. This exchange of positions and evaluation by the competent authorities is best undertaken as a matter of priority. To enable the competent authorities to identify the areas of disagreement and to understand the position of the responding competent authority, a rebuttal or response paper could include the following:

- a) Indication of whether a view, proposed solution, or relief proposed in the initial position paper can be accepted;
- b) Indication of the areas or issues where the competent authorities are in agreement or disagreement;
- c) Requests for additional information and explanations necessary to clarify particular issues;
- d) Presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and
- e) Submission of proposals or views to resolve the issue.

If the competent authorities involved intend to hold a face-to-face meeting, some of the issues listed above may then be addressed at the meeting. In such a case, it would be beneficial if a response to an initial position paper includes item e) above.

3.5. Interaction between Competent Authorities

Taxpayers, tax administrations, and the international tax community in general are all committed to a streamlined and effective MAP process. For their part, tax administrations can attempt to continually enhance communication and coordination between competent authorities.

Case analysts or competent authority analysts, who are charged with the analysis and development of a position as well as the day-to-day management of a case, are encouraged to consult with their counterparts to discuss or clarify specific issues throughout the MAP process. All such discussions between analysts are best documented to provide a historical summary if the file must change hands within the competent authority office.

Although the competent authorities need not exchange copies of all documents provided by the taxpayer, since doing so may simply replicate the documents already submitted by the taxpayer, an appropriate mechanism could be arranged to corroborate the completeness and details of documents and information supplied by the taxpayers.

Competent authorities often discuss MAP case via means such as letters, facsimiles, e-mail, telephone, and face-to-face conferences. Although it is recognized that face-to-face conferences are often the most productive means by which to discuss a MAP case, the competent authorities are encouraged to determine the most appropriate means of communication to best resolve a case in an expeditious but practical manner. It is also considered beneficial, if face-to-face conferences are conducted, to involve the specific competent authority case analysts whenever possible and practical. In addition, in order to achieve a timely resolution of a MAP case, the competent authority staff with the authority to resolve a case should be present at the time of discussion.

Best Practice N°14: Face-to-face meetings between competent authorities

Face-to-face meetings may allow for a more open discussion and collegial approach and a perhaps a more relaxed environment. A more unified approach towards problem solving may in turn lead to “win-win” solutions in the resolution of MAP cases.

One other benefit of meeting in person is usually it triggers a milestone event in the timeline of any one particular case that often causes a level of activity and progress. In other words, meeting in person usually helps advance a case. Preparation prior to a meeting and the generation of follow up plans afterwards generally produces results.

Conference calls can be easily postponed, deadlines can get pushed back, but meetings once committed to and arranged can be difficult to treat indifferently.

Considering the diverse cultures and the proliferation of MAP cases, it is recognized that in some cases interpreters may be required to help facilitate face-to-face meetings.

3.5.1. Problematic cases

The early identification of problematic cases is crucial to concluding these cases in a reasonable period of time. Once identified, a specific case plan that addresses the critical issues can be developed and monitored. Allocating sufficient resources and experienced personnel to the most contentious cases may also improve the results in these cases.

Although these actions can be carried out in one country, it is best if both competent authorities approach this as a joint effort. A bilateral focus, with appropriate oversight can have a very positive effect on the outcome of MAP cases.

Alternative methods other than the traditional MAP process have been considered and tested as of late. Arbitration, mediation, and the use of experts all bring specific attributes to the process. Expertise in the specific area of the taxpayer’s business (e.g. banking, pharmaceutical, etc.), in tax law, economics, etc. can bring clarity to issues and help identify key information and concepts to resolve the case.

Process-related assistance such as the use of a mediator or facilitator could help provide a perspective on the discussions, identify process hindrances, and in some cases bring more of a problem solving focus to the discussions. Neutrality and impartiality on the part of the mediator/facilitator is crucial to a successful outcome.

The use of any independent third party in the MAP process would of course require that all stakeholders are in agreement on the terms and conditions of their participation and that they adhered to the relevant confidentiality provisions.

Best Practice N°15: Bilateral process improvements

Some competent authorities have devoted considerable time to bilateral and multilateral deliberations on both process and on substantive treaty issues, which has proven to advance the MAP process. Specific process improvements have been produced by way of published MAP guidance ranging from specific process timelines to establishing broad objectives or mandates. (See, e.g., 25th October 2000 Administrative Arrangements agreed between U.S. and U.K. competent authorities, as well as PATA Guidelines). The benefit of these undertakings is that they reaffirm what is sometimes intuitive to

experienced personnel and then memorialise the outcome via agreement and publication. The result is a legacy agreement or understanding that will encourage its continued application.

Where treaty partners have significant caseload, bilateral memoranda of understanding have been successful in enhancing consistency and providing a roadmap for continued improvements. Bilateral training where competent authorities have taken the exact same training courses or have carried out joint sessions has been extremely successful. Maintaining these process improvement initiatives over an extended period of time would likely continue to serve the MAP process well.

3.6. Competent Authority Agreements

Competent authority agreements or resolutions are often case and time specific. They are not considered precedents for either the taxpayer or the tax administrations in regard to adjustments or issues relating to subsequent years or for competent authority discussions on the same issues for other taxpayers. In fact, the letters exchanged between competent authorities to resolve a case often state as much. This is because the competent authorities have reached an agreement that often takes into account the facts of the particular taxpayer, the differences in the provisions of the tax law in each country, as well as the effects of the economic indicators on the particular transactions at the relevant time. Any review or adjustments of subsequent years by a taxpayer or tax administration is best based upon the particular circumstances, facts and documentary evidence existing for those years.

In most cases, a taxpayer cannot accept the terms of an agreement for only some issues or taxation years involved, unless both competent authorities agree. This is due to the fact that the competent authorities commonly consider the original request by the taxpayer, which is usually multifaceted, in its entirety and often consider all aspects (issues and taxation years) involved at one time and as one case, and ultimately one outcome. Practical and pragmatic solutions to contentious MAP cases are regularly the result of compromise and concessions made by parties involved and therefore a holistic approach is routinely used.

As mentioned in the section, “*What happens when a MAP agreement is reached?*”, if a taxpayer is not satisfied with the agreement arrived at by the competent authorities, the taxpayer may reject it. If this occurs, the competent authorities may consider the case closed and advise the taxpayer accordingly. Assuming a valid notice of objection or an appeal has been lodged under applicable domestic procedures, the taxpayer typically has the option to proceed through the appeals process and/or to court, if applicable. If the other redress mechanism (appeal or court decision) does not reverse the adjustment in its entirety, double taxation may remain.

In such cases, it would be appropriate for the competent authority to accept another request by the same taxpayer on this same issue and years to address any remaining double taxation. For the most part, competent authorities only present it to the other competent authority for it to provide relief to the extent it believes is warranted and will not itself consider the provision of relief on a second request. Taxpayers should be cautioned that both competent authorities may share the same view or policy that relief will not be provided on a second request when full relief was offered and rejected by the taxpayer on the initial MAP case.

3.7. Debriefing the Taxpayer

Although competent authority proceedings are a government-to-government process and taxpayers do not have a specific right to attend or observe discussions between the competent authorities, the competent authorities recognize that the taxpayer is a stakeholder and client in the MAP process.

As such, it is appropriate to debrief the taxpayer after each substantial MAP discussion (usually via telephone) and at the conclusion of a file. The debriefing need not be a detailed summary of the meeting nor should it be a full disclosure. The debriefing should give the taxpayer a general sense of the direction of its case and some estimation, if possible, of the time to resolve it.

3.7.1. Transparency at the resolution stage

Transparency is one issue where competent authorities in general can improve. It becomes even more important at the resolution stage of the MAP to dispel allegations that competent authorities have traded cases. Thus, advising the taxpayer not only of the outcome but how the competent authorities arrived at the decision is important.

Best Practice N°16: Decision summaries

Decision summaries provided to the taxpayer, which describe the underlying reasons and principles of an outcome, may assist in exploring why a particular result was agreed to.

These summaries can be either via closing letter to a case or provided orally in a closing meeting. Meetings would be beneficial in contentious cases or cases with unusual outcomes to ensure all elements of the decision are understood.

3.8. What Happens When an Agreement is Reached?

When the competent authorities resolve a MAP case, this resolution should be confirmed by an exchange of letters. Since some MAP agreements can be rather complicated, it is best to exchange these letters soon after the conclusion of the discussions to ensure an accurate reflection of the terms agreed upon. At this time it would be appropriate for the competent authorities to agree upon a tentative schedule for the implementation of the agreement.

In addition, competent authorities are encouraged to communicate the terms of the resolution to the taxpayer as soon as possible. This communication may take place prior to the exchange of letters if mutually agreed to by the competent authorities.

If the terms and conditions of the resolution are not satisfactory to the taxpayer, the taxpayer may be entitled to withdraw from the MAP process and pursue other domestic redress mechanisms still available. If the terms are satisfactory, the taxpayer usually accepts the MAP results in writing and agrees to withdraw its domestic objections (if filed) or to refrain from seeking any further recourse on the same issue and years.

Competent authorities should not implement the resolution under the MAP process with a taxpayer until the exchange of letters between competent authorities has occurred.

Once letters have been exchanged and the taxpayer has accepted the resolution, a competent authority should give, or arrange to give, it effect in its jurisdiction.

3.9. Recommended Timelines for MAP

Whilst the time taken to complete a MAP case may vary according to its complexity, most competent authorities endeavour to complete a case within two (2) years from the date of acceptance of the taxpayer's MAP request.

Regular updates to taxpayers and the other competent authority can be a valuable tool to focus a competent authority (and more specifically competent authority analysts) on the specific timelines of a case. During the evaluation stage, the competent authorities may find it particularly useful to advise each other on their progress at least every three (3) months. Regular reports may be provided by way of telephone, briefing notes, correspondence, teleconferencing, face-to-face meetings or any other form of communication acceptable to the competent authorities. The objective of these communications is to ensure that both competent authorities are kept informed of a case's progress to facilitate timely resolution.

A common goal of four (4) to six (6) months for a competent authority to provide an initial position paper is widely considered to be realistic and appropriate. This time period would most appropriately begin with the latter of: (i) the receipt of a complete submission of pertinent information and (ii) the receipt by the competent authority responsible for drafting the initial position paper of confirmation of the competent authorities' mutual understanding to accept the case. If this goal is not achievable, advising the other competent authority in writing as to the reasons for the delay and the likely timeframe for producing a paper would help competent authorities to manage cases, office workload, and resources.

It is expected that the evaluation and response (written or verbal) by the other competent authority be within the six (6) months following receipt of the position paper. Should it be necessary, supplementary questions and responses prior to a meeting can be helpful to explain any remaining unclear issues. In addition, it would be constructive to exchange relevant information well in advance of a face-to-face meeting in order to conduct more efficient and productive meetings. This will allow competent authorities to have sufficient time prior to the meeting to give due consideration to a particular case or issue.

Best Practice N°17: Recommendation for MAP cases beyond two years

In some instances a competent authority may not be able to meet a two-year timeframe (or other timeframe agreed upon by the competent authorities) to complete a case. For example, this may occur when information is not received in a timely manner or the particular case is unusually complicated. In such situations, the competent authorities may simply continue their discussions or may find it useful to agree to a reasonable extension of the timeframe within which they expect to be able to resolve the case. For cases that have exceeded, or are likely to exceed, a reasonable period of time, it is advisable for senior officials of the competent authorities to undertake a review of the case to determine the reasons for the delay and then agree upon an approach to ensure the efficient completion of the case.

See [Annex 1](#) for a chart of a suggested timeline for a typical MAP process. Of course timelines may be extended or cut short depending upon the facts and circumstances of a particular case.

4. MAP AND DOMESTIC LAW

4.1. Interaction between MAP and Domestic Recourse Provisions

With respect to adjustments or actions by a tax administration, it is advisable for taxpayers to protect, for greater certainty, their rights of domestic appeal or redress and they should take note of the domestic processes for doing so. Although in most cases the competent authorities reach agreement and relieve taxation not in accordance with the tax convention, there is no further recourse when a MAP agreement cannot be reached using all of the available mechanisms or programs of MAP (including possible avenues in MAP such as mediation, arbitration, advance pricing arrangements, etc., if available) if domestic rights have not been protected.

In most cases, tax administrations prefer to deal with an issue either via MAP or domestic recourse, but not both at the same time (with the exception of some countries offering a simultaneous MAP and domestic recourse program) to avoid duplication of effort. Therefore depending upon which process is chosen, it is recommended that the other process be held in abeyance pending the outcome of the first, taking into consideration the consequences of doing so in each jurisdiction.

Choosing domestic recourse such as court proceedings over MAP may in some jurisdictions result in a tax administration's being bound by the decision of the court and prevented from providing relief through MAP. Where a competent authority takes the position that it cannot, or will not, deviate from domestic court decisions in MAP, it should make this position public and duly explain the legal basis of its position.

Notwithstanding the above, a taxpayer may in many instances make a competent authority request regarding one issue of an adjustment, and independently pursue another separate issue with domestic recourse.

Competent authorities are not bound by a decision given by a foreign court or a foreign appeal settlement. The granting of any relief to a taxpayer by a competent authority in such situations will depend more on the merits of the case rather than on another country's inability to provide relief. Therefore, a country refusing access or to MAP or relief cannot genuinely expect the other country to provide unilateral relief for that lone reason.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides for further guidance on the interaction of MAP and domestic recourse provisions.

4.2. Taking Protective Measures to Preserve Ability for MAP Agreement to be Implemented

The OECD Model Tax Convention provides an avenue of recourse as established in Paragraph 1, of Article 25, "...irrespective of the remedies provided by the domestic law of those States...". Paragraph 2 of the same article provides the means by which a mutual agreement is implemented: "[a]ny agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States."

However, not all countries follow the exact wording of the Model Convention in their specific treaties. As a result, it is advisable that taxpayers verify the wording of the applicable convention in order to protect their ability to obtain relief. Alternatively, if specific OECD wording (or something similar) is not

included in either the MAP article or other appropriate article of the convention, a taxpayer would be well advised to ensure that the years in question do not expire due to time limits under domestic law (i.e. becoming statute-barred). Taking this extra precaution ensures that the competent authority is able to provide the requested relief despite the expiration of the normal domestic time limits. In this regard, a taxpayer should protect its domestic rights by filing waivers of domestic time limits on assessments (if possible), a protective claim, or lodging an appeal, if applicable.

Valid waivers (or similar extensions of time limits) may permit tax administrations to make adjustments, thereby providing relief or otherwise amend an adjustment as a result of competent authority negotiations for years that would otherwise be legally barred from being adjusted.

However, in some jurisdictions a waiver, in itself, does not constitute a presentation of a request to a competent authority. A separate presentation to the competent authority is often required. Again, depending upon the domestic tax system, taxpayers are sometimes responsible for keeping their other relevant income tax filings (regional, state, provincial, etc.) open, where consequential adjustments may be made.

In cases involving related foreign parties, it is advisable also to take such timely action as may be necessary with the foreign tax administration. The reason for doing so is that competent authorities will often not rescind an initial adjustment solely for the reason that the taxation year of the related foreign taxpayer is beyond the time limits (or its statute-barred date) in the foreign jurisdiction.

In some jurisdictions, other levels of government (states, provinces, territories) have the ability to assess and charge income tax but are sometimes not bound by tax conventions. Even though competent authority settlements are often automatically implemented in these jurisdictions it would be prudent for taxpayers to review domestic law and where necessary preserve their domestic rights to appeal or otherwise change their taxes payable to coincide with the competent authority settlement.

4.3. Audit Settlements

Audit settlements have been used as a resolution tool in many countries to promote a quicker conclusion of audit files, and both tax administrations and taxpayers alike have welcomed the ability to come to an agreement on the pragmatic conclusion of an audit file. As the word settlement implies, there are usually concessions made on behalf of the parties involved which creates a difficult issue for the MAP process.

One concession tax administrations sometimes seek is a limit on further recourse, in other words the adjustment agreed to at the audit stage is the final adjustment. Unfortunately, some tax administrations have lumped the MAP process into these requested concessions (i.e., by conditioning the audit settlement on the taxpayer's agreement not to pursue MAP for the issue), and in many cases taxpayers have offered to agree not to seek MAP assistance. The unfortunate result of these types of settlement arrangements can often be the occurrence of double taxation. Effectively, these arrangements preclude the tax administrations from resolving double taxation under MAP in such situations and may indeed cause the other government to deny relief under its domestic law for the tax paid to the first government upon settlement of the audit.

In some jurisdictions where a taxpayer has, in return for giving up the right to MAP, obtained procedural advantages or concessions from a tax administration that would reduce the administration's competent authority ability to defend its case in a MAP discussion, then those jurisdictions often impose the policy that the related issues cannot be reviewed or revisited in MAP proceedings.

In other jurisdictions a taxpayer cannot forfeit its right to access MAP, regardless of the deals struck at the audit level. Still, even if this right is explicit in these countries, taxpayers may be unwilling to test this

right if they have already agreed not to seek the assistance of MAP. This may be especially true in cases where the taxpayer will encounter the same tax administration office and auditor in the next cycle.

As mentioned, sometimes taxpayers offer to settle and not to go to MAP, since they had not planned to go anyway. In these cases, taxpayers often see a larger risk in exposing themselves to the other tax administration, where they have not yet been audited. Cautious taxpayers are often concerned that exposure in the MAP process could potentially lead to an audit referral.

4.4. Unilateral APA

Similar to audit settlements, unilateral Advance Pricing Arrangements (APAs) are one-sided tools addressing a bilateral issue. They are useful in certain circumstances, covering issues or transactions where no applicable tax convention exists. They do not, however, provide the tax certainty of a bilateral APA. In consultations, business has advised that on rare occasions previously concluded unilateral APA may preclude a taxpayer in some jurisdictions from accessing MAP if they later find themselves subject to double taxation. Such preclusions would diminish the effective operations of MAP and should be avoided.

Best Practice N°18: Avoid blocking MAP access via audit settlements or unilateral APAs

It is a best practice for both taxpayers and tax administrations to avoid the inclusion of a waiver of access to MAP in audit settlements. Since MAP involves bilateral issues it is inappropriate to have two parties (the taxpayer and one tax administration) not include a third involved party (the other tax administration) in the final resolution of a file.

First of all, taxpayers may not realize the potential implications of double taxation and the fact that an adjustment by the other tax administration may complicate the issue. Secondly, tax administrations should consider the issues of cooperation and reciprocity as well as the fact that one-sided settlements will not serve tax administrations well in the long run.

As for unilateral APAs, since these arrangements effectively replace domestic audits, it would be beneficial if they could be treated as such when it comes to the availability of MAP. If a foreign adjustment is raised against a transaction or issue covered by a unilateral APA, the unilateral APA could be treated as just the taxpayer's filing and therefore adjustable, as opposed to an irreversible settlement.

4.5. Relief from Collections, Interest, and Penalties

Many countries have differing views on whether interest and penalties are covered by a convention. The scope of some tax conventions does not extend to cover interest or penalties. In such cases, the competent authority is sometimes prohibited from directly waiving or dealing with interest or penalties resulting from adjustments that are the subject of a request for competent authority assistance.

For example, the application of a transfer pricing penalty is often a compliance issue that is not covered by the MAP of a tax convention. Accordingly, a competent authority may not be able to address the amount or applicability of a transfer pricing penalty (depending upon the structure of the penalty) with a foreign tax administration. However, in many cases a transfer pricing penalty is linked to, or is a function of, the size of the adjustment to income. In these cases, the penalty gets adjusted indirectly.

The relief of interest for the period of time a taxpayer is in the MAP process may seem warranted given that the taxpayer is not in control of large segments of the MAP process, such as the competent authority-to-competent authority discussions. In some jurisdictions, factors that may be taken into account in considering interest relief include taxpayer cooperation; however interest relief should not extend to

interest accruing outside the time boundaries of MAP, since the MAP process is not the appropriate vehicle to try to harmonise divergent domestic policies in this area.

The collection of tax prior to the conclusion of MAP imposes actual double taxation. If the tax in question is in jeopardy of being lost due to bankruptcy or the taxpayer being a flight risk, then collection practices allowing for immediate recovery seem appropriate. Collection practices generally assess risk and therefore one would expect that a similar assessment could be made of the MAP applicants.

If risk assessment is not a possibility for some tax administrations, then allowing for the provision of security or the payment of interest by the tax administration on refund balances (if current laws or policies do not allow this already) could minimise the detrimental effect of double taxation. This provision is less desirable than outright suspension, since a taxpayer's working capital and therefore liquidity is normally affected by the encumbrance of an asset or the provision of the type of security required by a tax administration.

Many states may require legislative changes to implement the suggested best practices on both interest relief and the suspension/deferral of collections.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides for further guidance on the interaction of collections, interest, and penalties with MAP.

Best Practice N°19: Interest relief

It is considered a best practice to consider waiving or cancelling a portion of the interest that accrues during the period of time that a competent authority request remains outstanding. This period could be considered to start once a competent authority request has been accepted. The general intention is to consider interest relief for the time that is not controllable by the taxpayer. Relief may sometimes be considered on a case-by-case basis, depending upon factors such as cooperation.

Best Practice N°20: Suspension of collections during MAP

The collection of tax as a condition to entering a program to relieve that very tax seems somewhat unreasonable. Thus a best practice and goal for tax administrations is to suspend or defer the requirement to pay a tax liability (including interest thereon) or the collection action of a tax administration on income tax that is the subject of the request for competent authority assistance. The decision to suspend or defer collection could be made after a risk assessment has been conducted by the tax administration to determine ability to pay or the creditworthiness of the taxpayer. The suspension/deferral could begin at the time of application and remain in place until the resolution of the case by the competent authorities.

In some countries suspension or deferral of collection actions is not possible due to various reasons beyond a policy determination. In these cases, the acceptance of security in lieu of payment during competent authority proceedings may be an opportunity to lessen the effect of double taxation.

4.6. Secondary Adjustments, Withholding Tax, and Repatriation on Transfer Pricing Adjustments

Transfer pricing adjustments made under domestic law may also give rise to so-called "secondary adjustments" (for example, the amount of the income adjustment to a subsidiary for its excessive payment on a transaction with a non-resident parent may be treated by the subsidiary's jurisdiction as a deemed dividend paid to the parent and therefore a withholding tax may be applicable. Nevertheless, the secondary

adjustment may be reversed if the primary adjustment is reversed or, in the case where correlative relief is provided by the other competent authority, if the taxpayer repatriates funds from the non-resident equivalent to the amount of the transfer pricing adjustment. In these two instances, relief from the secondary adjustment should be a consequence of the MAP settlement.

A mutually agreed upon settlement between the competent authorities in respect of a transfer pricing adjustment will also often include agreed terms for repatriation of funds involved in the primary adjustment. These terms are specific to the particular settlement between the two governments. The terms may vary, but generally allow for the repatriation of funds to be effected either by a direct reimbursement or through an offset of inter-company accounts. Typically, the agreed terms also allow a taxpayer to repatriate within a mutually agreed reasonable time period, free from withholding taxes by the country out of which the repatriation is made and from taxable treatment in the country to which the repatriation is made. Repatriation may be subject to audit verification. Subject to the discussions and best practices on *Interest and penalties relief*, normally there is no waiver for interest applicable to the tax liability attributable to the initial primary adjustment, or part thereof, if it remains in place as part of the MAP resolution. However, where the country to which the repatriation payment will be made would otherwise require that payment to include an interest component to compensate its resident taxpayer for the foreign related party's use of that taxpayer's funds between the time of the initial transaction and the repatriation, the competent authorities may agree to allow the repatriation to occur without any interest component, in order to minimize the complications from the repatriation.

A repatriation agreement reached at an audit stage should not preclude a request by the taxpayer for competent authority assistance nor should it indicate concurrence or agreement with an audit adjustment. Where a taxpayer proceeds to request competent authority assistance after concluding a repatriation agreement, it is appropriate for the competent authority to amend the repatriation agreement for any changes made to the amount of the adjustment as a result of the MAP process and to waive any requirement for the repatriation to include an interest component. Where a taxpayer proceeds to request competent authority assistance without having concluded a repatriation agreement at the audit stage, the competent authority may agree on terms of repatriation with the competent authority of the treaty country.

5. GUIDELINES FOR COMPETENT AUTHORITY OPERATIONS

5.1. Authority and Accessibility

Tax conventions typically designate the person who is to act as each country's competent authority (e.g., "the Minister of Finance or his authorised representative" or "the Secretary of the Treasury or his delegate"). The subsequent delegation of powers of a competent authority usually happens within a country's tax administration. Since designations can be at a fairly senior level within government, it is for practical and administrative purposes that the powers and authority of the competent authority function are typically delegated to officials who will carry out the day-to-day responsibilities of the function.

Therefore most competent authorities delegate the full powers of the function (in other words, the legal authority to conclude a MAP arrangement) to the required personnel who carry out, or are involved in, the day-to-day functioning of the MAP program. It is advisable to have key personnel who will ultimately make the important decisions on a file intimately involved. In doing so, competent authorities will alleviate one common constraint to the success of any type of resolution process, which is having decision-makers too far removed from the information.

In order to administer tax conventions as effectively and efficiently as possible, it is beneficial to have a competent authority that is readily accessible to taxpayers and has the authority to complete its mandate.

Best Practice N°21: Readily available access to a competent authority

It is important for a government to publicise the identity of the officials who have been delegated the responsibility to carry out the competent authority function, along with their contact details. OECD Member countries should ensure that their MAP **country profiles** with this information on the OECD website are kept up to date.

Moreover, the competent authority officials involved in the day-to-day casework are often the representatives who require the delegated decision-making powers to conclude a MAP arrangement. MAP discussion may become hindered if the "decision-maker" is not involved in the ongoing cases. Nevertheless, competent authorities may decide to consult broadly within their offices and make decisions via consensus (for example, an informal, internal review committee) to ensure consistency and internal transparency.

5.2. Structuring the Competent Authority Function

Sometimes the competent authority function is split between an area responsible for resolving taxpayer-specific cases (i.e., taxpayer requests about taxation "not in accordance with the Convention" as described in the first two paragraphs of the MAP article, or cases of double taxation not provided for in the Convention as described in the third paragraph of the MAP article) and a policy area for issues involving general interpretation as well as general issues concerning the application of the tax convention where specific taxpayers are not involved.

Competent authorities often have areas of expertise within their offices to handle the wide range of MAP cases. In some cases it is helpful to group files based upon geographical regions or industry specialisation, depending upon the composition of a competent authority's inventory of MAP cases. Industry specialisation may be advisable to strengthen industry knowledge or technical expertise, whereas geographical emphasis may assist in enhancing relationships between competent authorities if files are discussed with the same counterparts over a period of time.

In some countries the competent authority office is very small and therefore sometimes must rely upon expertise from elsewhere. One benefit of a small competent authority office may be greater consistency, however the disadvantages of limited resources and the inability to build in-house expertise may make the competent authority function reliant upon other areas that may have their own priorities.

Case or workload management has a significant effect on timelines for MAP cases. A well-organized data management system can save significant time and prove extremely valuable in the management and monitoring of cases. Case-specific as well as aggregate program statistics can be useful in improving the performance and timeliness of a MAP program.

To enhance the level of objectivity, it is recommended that competent authorities remain largely independent from the field staff who were directly or indirectly involved in the initial adjustment and that the latter should not take part in the competent authority discussions. However, with the agreement of the competent authorities, they may be asked to serve in a consultancy role in order to provide details of the case and the basis for any adjustments that have been made and answer factual queries that may arise.

Best Practice N°22: Independence of a competent authority

In order to enhance the independence of a subsequent review of a case by a competent authority, it is recommended that competent authorities maintain a level of autonomy from the audit function of a tax administration.

5.3. Performance Indicators and Training

Performance indicators such as time taken to resolve a case, consistency, and case outcomes focusing on principled and objective results, help support the overall goals and objectives of the MAP program. Use of personnel evaluations based upon these criteria, especially for new staff, may help reinforce these key elements.

Best Practice N°23: Performance indicators for the competent authority function and staff

Appropriate performance indicators for the competent authority function and staff relating to consistency, the time to resolve cases, and principled and objective MAP outcomes will reinforce these important goals for MAP.

One indicator which must not be used to measure a MAP program or its staff's performance is the sustention rate of tax revenue. Although tax administrations may wish to collect related data to assist in the evaluation of the quality of initial adjustments by an audit program, it is suggested that this information remain segregated from that used to assess competent authority programs.

A competent authority sufficiently staffed at an appropriate level to address typical or anticipated workload will greatly enhance the efficient resolution of issues and cases. In addition to the appropriate number of staff, the appropriate skill set to address the issues at hand (for example, transfer pricing or treaty

interpretation issues) would improve not only the qualitative output but also the efficacy of a MAP program.

Training in the area of soft skills such as conflict resolution and consensus building can be helpful in achieving amicable resolutions of MAP cases. Specific training on the “win-win” proposition would further promote the concept of joint problem-solving.

6. OTHER MAP PROGRAMS

6.1. Accelerated Competent Authority Procedure (ACAP)

In addition to a request for competent authority assistance in respect of a specific adjustment to income, some competent authorities allow taxpayers to request assistance for subsequent filed taxation years on the same issue. Once an ACAP request has been received, a competent authority may consult with the appropriate authorities within the tax administration (audit function or field office) to determine whether an ACAP is suitable for the taxpayer's particular circumstances. Normally, the issue must be one that is recurring and relevant to a specific adjustment.

The competent authority then consults with the foreign competent authority under the MAP process endeavouring to resolve the issue. In most cases, the request or acceptance of an ACAP will not preclude or diminish a tax administration's right to later examine or review the issues addressed by the ACAP.

6.2. Advance Pricing Arrangements (APAs)

Many competent authorities also deal with APA requests. APA programs assist taxpayers in determining, in advance, transfer pricing methodologies and their application to specific cross-border non-arm's length transactions for specific periods of time, with the objective of avoiding double taxation that may otherwise occur. If an APA program is available, a taxpayer may request a bilateral APA with respect to specified cross-border transactions, which is conducted via the MAP article of a tax convention. Once concluded, bilateral APAs provide an increased level of tax certainty in both tax jurisdictions, thereby considerably lessening the likelihood of double taxation.

Bilateral APAs are becoming more popular because they proactively prevent disputes and over the long term are a cost effective tool for both taxpayers and governments. Many countries publish APA annual reports describing their programs and publicising statistical results to promote their use and ensure transparency in the process. For more details about the various APA programs available, please refer to the most current version of the OECD Country Profiles to obtain country specific guidance.

Best Practice N°24: Implementing and Promoting ACAP and Bilateral APA Programs

Establishing and actively promoting ACAP and APA programs will reduce the number of international tax disputes and provide taxpayers and tax administrations with greater tax certainty. Mature ACAP and APA programs have provided taxpayers with an effective alternative to the typical MAP process.

6.3. Other Types of MAP Proceedings

Although not typical, a competent authority may, in rare cases, initiate competent authority proceedings and subsequent discussions without a specific request from a taxpayer in any situation where there is taxation not in accordance with a tax convention in order to protect domestic interests.

For example, a competent authority may disagree with the interpretation by its treaty partner of a provision in a tax convention. Such a situation could involve a specific taxpayer or a group of taxpayers. In either case, taxpayers may be advised of the competent authority proceedings and outcome.

Other MAP proceedings initiated without a taxpayer, where competent authorities seek to clarify with their treaty partner their interpretation or application of a convention, are more common. These proceedings often follow similar steps and timelines as taxpayer specific cases, albeit without documentation relevant to a specific taxpayer.

ANNEX 1 – SCHEMATIC FOR TIMELINE OF A TYPICAL MAP PROCESS

Stage	Action	Illustrative Target Time Frame
First	Initiation of MAP by taxpayer: submission of MAP request	Time-limit provided for by the treaty (OECD Model Convention: 3 years from notification of action giving rise to taxation not in accordance with the convention).
	Confirmation of the receipt of MAP request to the taxpayer and advising the other CA of the request. In transfer pricing cases, the taxpayer or associated enterprise in the other country is also encouraged to contact the CA in the other country and to promptly and simultaneously provide all supporting materials. Preliminary review of case by CA that received request. Possible requests for additional information to taxpayer	Within a month after initiation by taxpayer of MAP.
	Determination of eligibility for MAP by CA that received the request. Notification to taxpayer by that CA if the case is accepted or rejected (If accepted) Proposal to the other CA to start MAP discussions: issuance of opening letter	Within a month after the necessary information is provided to the CA that received the request
	Confirmation by the other CA of receipt of MAP request, preliminary screening for completeness of request and notification of decision to accept or reject request.	Within a month after the receipt of the opening letter.
Second	Analysis & Evaluation by the CA that initiated the adjustment. Initiation of MAP consultations with other State (if the adjusting CA is unable to arrive at a satisfactory solution – i.e. provide unilateral relief – at this point): Issuance of position paper by adjusting CA	Ideally within 4 months, but no later than 6 months after agreement between CAs to enter into MAP consultations

	Review of case by relieving CA, preliminary screening for completeness of position paper and notification of missing information and determination whether it can provide unilateral relief to taxpayer. Response to the position paper by relieving CA.	Within 6 months of receiving the position paper.
	Negotiation between the CAs ²	6 months
Third	Mutual Agreement between the CAs: document the CA agreement in the form of memorandum of understanding	Within 24 months of the acceptance date of a MAP request.
	Taxpayer's (and other interested parties ³) approval of mutual agreement.	To be submitted immediately after conclusion of mutual agreement. 1 month deadline to respond.
	Confirmation of mutual agreement with terms and conditions: exchange of closing letters	As soon as possible after acceptance of mutual agreement by taxpayer (and possibly other parties).
	Implementation of mutual agreement.	No later than 3 months after exchange of closing letters.

² Face to face meeting(s) between the CAs can be organized in this stage, or in any other stages when necessary.

³ Where the administrative-territorial subdivision's or any local tax authorities' consents are necessary or required.

ANNEX 2 – BEST PRACTICES

- Best Practice N°1:** Robust use of authority to resolve issues of interpretation or application
- Best Practice N°2:** Principled approach to resolution of cases
- Best Practice N°3:** Transparency and simplicity of procedures for accessing and using the MAP
- Best Practice N°4:** Providing complete, accurate, and timely information to the competent authorities
- Best Practice N°5:** Allowing electronic submissions
- Best Practice N°6:** Allowing early resolution of cases
- Best Practice N°7:** Earlier notification of a potential case
- Best Practice N°8:** Liberal interpretation of time limits for requesting access to MAP
- Best Practice N°9:** Avoiding exclusion from MAP relief due to late adjustments or late notification
- Best Practice N°10:** Countries eliminate or minimize “exceptions” to MAP
- Best Practice N°11:** Consideration of MAP assistance for cases described as “tax avoidance”
- Best Practice N°12:** Taxpayer presentations to competent authorities on fact-intensive or complex cases
- Best Practice N°13:** Cooperation and transparency
- Best Practice N°14:** Face-to-face meetings between competent authorities
- Best Practice N°15:** Bilateral process improvements
- Best Practice N°16:** Decision summaries
- Best Practice N°17:** Recommendation for MAP cases beyond two years
- Best Practice N°18:** Avoid blocking MAP access via audit settlements or unilateral APAs
- Best Practice N°19:** Interest relief
- Best Practice N°20:** Suspension of collections during MAP
- Best Practice N°21:** Readily available access to a competent authority
- Best Practice N°22:** Independence of a competent authority
- Best Practice N°23:** Performance indicators for the competent authority function and staff
- Best Practice N°24:** Implementing and promoting ACAP and bilateral APA programs

ANNEX 3 – MEMAP GLOSSARY

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A	<p>Advance pricing arrangement ("APA")</p> <p>Arbitration</p> <p>Arm's length principle</p> <p>Arm's length range</p> <p>Associated enterprises</p> <p>Assessment - taxation by</p>
B	<p>Base company</p> <p>Beneficial owner[ship]</p>
C	<p>Commentary</p> <p>Commercial intangible</p> <p>Comparability analysis</p> <p>Comparable uncontrolled price ('CUP') method</p> <p>Compensating adjustment</p> <p>Competent authority</p> <p>Contracting State</p> <p>Contribution analysis</p> <p>Controlled foreign corporations ('CFCs')</p> <p>Controlled transactions</p> <p>Correlative adjustment</p> <p>Corresponding adjustment</p> <p>Cost contribution arrangement ("CCA")</p> <p>Cost plus mark up</p> <p>Cost plus method</p> <p>Country profile</p>
D	<p>Deduction at source</p> <p>Direct tax</p> <p>Double taxation</p> <p>Dual residence</p>
E	<p>Economic double taxation</p> <p>EU Arbitration Convention</p> <p>Exemption method</p>
F	<p>Force of attraction</p> <p>Foreign tax credit</p> <p>Functional analysis</p>

G	General definition Article 3 MTC Global formulary apportionment method Global income Goodwill Gross profits
I	Immovable property Independent enterprises Indirect tax Individual Intangible property Intra-group service
J	Juridical double taxation
M	MAP article – OECD MTC Marketing intangible Movable property Multinational enterprise group (MNE group) Multinational enterprise (MNE) Mutual agreement procedure
N	Net income Nominee
O	OECD MTC & Commentary OECD TPG
P	Partnerships Report Permanent establishment ('PE') Place of effective management Primary adjustment Profit split method Protocol
R	Ratification Remittance based taxation Resale price margin Resale price method Residence State Residual analysis Retroactive Retrospective
S	Secondary adjustment Secondary transaction Shareholder activity Simultaneous tax examinations Situs State 'Source' Tax Source State
T	Tax Sparing Thin capitalisation

	'Tie-breaker' rules Trade intangible Traditional transaction methods Transactional net margin method Transactional profit method Transfer pricing Transfer pricing adjustment Treaty Shopping
U	Uncontrolled transactions Underlying tax credit Unitary tax Usufruct
W	Withholding Tax