


## Direct Tax Alert

August 12, 2020



# CBDT releases Guidance on Mutual Agreement Procedure (MAP)

### Background

- India has large network of Double Taxation Avoidance Agreements (DTAA) which, *inter alia*, provides for the avoidance of juridical or economic double taxation through the Mutual Agreement Procedure (MAP) process. MAP is an alternate dispute resolution mechanism available to the taxpayer in addition to the remedies available under the provisions of the domestic law. The Article governing MAP in the DTAA provides the legal basis for Competent Authorities (CAs) to discuss, negotiate and thus resolve a MAP case. There are enabling provisions in the domestic law of India to give effect to said resolution.
- The Action 14 final report on “Making Dispute Resolutions More Effective” recommended that all countries implementing Base Erosion and Profit Shifting (BEPS) must publish comprehensive MAP guidance.
- CBDT, with a view to align with best practices, amended its existing regulations on MAP by notifying Rule 44G of the Income Tax Rules, 1962 (substituting the erstwhile Rules 44G and 44H). The amended provisions apply to all MAP cases pending with the CA of India as on 6 May 2020. Rule 44G provides for the process to be followed by an Indian CA and field officers to resolve and implement the outcome of MAP. While the Rules state the procedure to be followed, there is no guidance on issues encountered during the process or the position of Indian Revenue on some of the technical issues.
- Acknowledging the above, CBDT has now issued detailed Guidance on MAP (‘the Guidance’) on 7 August 2020<sup>1</sup> with the objective of providing detailed information regarding MAP processes and guidance on issues related to such processes in a comprehensive and consolidated manner.
- The MAP guidance is presented in four parts – Part A: Introduction and Basic Information, Part B: Access and Denial of Access to MAP, Part C: Technical issues and Part D: Implementation of MAP outcomes.

<sup>1</sup> [https://www.incometaxindia.gov.in/news/map\\_guidance\\_7\\_8\\_2020.pdf](https://www.incometaxindia.gov.in/news/map_guidance_7_8_2020.pdf)



## Part A - Introduction and Basic Information

- MAP request can be made by a taxpayer when it considers that the actions of the tax authorities of one or both treaty partners results or will result, in taxation not in accordance with the relevant DTAA.
- MAP cases involve cross-border double taxation that could either be juridical double taxation (same income taxed twice in the hands of the same entity in two different countries) or economic double taxation (same income taxed in the hands of two separate entities, who are Associated Enterprises, in two different countries).
- Double taxation or taxation not in accordance with the DTAAs may arise in some of the following circumstances:
  - Transfer Pricing adjustments;
  - Existence of a Permanent Establishment;
  - Attribution of profits to a Permanent Establishment; and
  - Characterisation or re-characterisation of an income or expense.
- The time limit for filing applications for MAP is governed by the respective DTAA entered into between the said countries. In most of DTAAs signed by India, the time limit for making an application for MAP is three years from the first notification of the action giving rise to the taxation not in accordance with the DTAA.
- The guidance note has clarified that where DTAAs provide a different time limit, India would change such time limit to three years in accordance with BEPS Action Plan 14. CBDT has also stated that efforts are being made to amend those DTAAs.

### MAP application process

- An Indian taxpayer can make MAP application to the Indian CA in the prescribed Form 34F.
- If an Associated Enterprise (AE) or related party of an Indian taxpayer submits an MAP application before the CA of its country of residence (treaty partner) in respect of any order/action of the tax authorities of India, a copy of such MAP application must also be provided to the Indian CA.
- Once MAP Application is accepted/rejected by Indian CA, it shall deliver the decision to

the CA of the Treaty Partner through written communication.

- The decision of whether the application is accepted or rejected is communicated to Indian taxpayer by the Indian CA.
- The CA of the Treaty Partner would provide its position (position paper) to the India CA. The Indian CA that has jurisdiction over the case would exchange views and come to a decision and present a negotiating position.
- Upon reaching a resolution, the CA of the Treaty Partner would communicate the terms and conditions of the resolution to the taxpayer.
- Where it is not possible to reach a resolution, the MAP would be closed and recorded as unresolved.
- The Indian CA will endeavour to resolve MAP cases within an average timeframe of 24 months.
- Multilateral MAP will be executed in the form of a series of bilateral MAP cases if all the following conditions are satisfied:
  - All the participating countries have a DTAA with each other;
  - The transaction or issue in dispute has bearing, directly or indirectly, on all treaty partners; and
  - The CAs of all participating countries agree to negotiate Multilateral MAP.

## Part B - Access and Denial of Access to MAP

### Access to MAP

- Access to MAP is, *inter alia*, available in the following types of cases/situations:
  - Adjustment arising from Transfer Pricing assessment;
  - Issues relating to existence of Permanent Establishment;
  - Attribution of profits to Permanent Establishments, whether admitted or not by the taxpayers;
  - Characterisation or re-characterisation of an item of expense or payment (like Royalty or Fee for Technical Services (FTS) or interest); and
  - Characterisation or re-characterisation of an item of receipt as a taxable income



(like Royalty or Fee for Technical Services (FTS) or interest).

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

### **Dhruva's Comments:**

*There is no clarity whether MAP access would be provided if there is a disagreement between the taxpayer and tax authorities on whether the conditions for the application of domestic anti-abuse provisions conflicts with the provisions of the DTAA. In such a case where tax authorities invoke anti-abuse provisions, the taxpayer may not be left with an alternative solution under MAP but may have to pursue it as per the dispute resolution mechanism provided under the domestic law.*

- Where an obligation to deduct tax at source on a payment made by an Indian entity to a non-resident entity is enforced by an order passed under Section 201 of the Income Tax Act, 1961 (the Act) and the same is disputed by the non-resident entity, MAP access will be provided to the non-resident entity anticipating an event of double taxation or taxation not in accordance with the relevant DTAA.

However, MAP discussions will be taken up only after the assessment order is passed in the case of the non-resident taxpayer.

### **Dhruva's Comments**

*If case of an order under section 201 of the Act, assessment order in respect of the non-resident taxpayer would be a pre-requisite for undertaking MAP discussions. In other words, if there is no assessment order in the case of the non-resident taxpayer, there would be no resolution under MAP. Thus, even after an order under section 201, if no proceedings have been initiated against the non-resident taxpayer for taxing its income or the time limit for initiation of proceedings/suo-motto filing of the Return of Income has expired, the non-resident taxpayer would not be able to resolve the issue under MAP, thereby making the entire alternative solution of MAP redundant in these situations. This would particularly impact order under section 201 passed in case of intercompany payments holding the Indian subsidiary of the MNE Group to be an assessee in default for payments to other entities outside India.*

- Under the following circumstances, India would provide access to MAP but Indian CAs would not negotiate any other outcome than what has already been achieved in such circumstances.

### **Unilateral Advance Pricing Agreements (UAPA)**

- Where UAPA applications have already been filed and accepted, MAP applications on the same issues for the same years should not be made by the taxpayers.
- If a UAPA application is under consideration and negotiation, the Indian CA would allow access to MAP but would not process the application till the UAPA is entered. Once the UAPA is entered into, the Indian CA would not change the terms and conditions of the UAPA but would request the Treaty Partners to provide correlative relief.
- Where a UAPA is not entered into, the Indian CA will process the MAP application.

### **Dhruva's Comments:**

*The above clearly establishes CBDT's position that MAP and APAs cannot be resorted to in parallel on the same issues for the same years.*

### **Safe Harbour provisions**

- Where an Indian or foreign taxpayer applies Safe Harbour provisions and the Return of Income is accepted by the tax authorities of India, the CAs of the other countries may accept MAP applications from their taxpayers in respect of any decision of the tax authorities of the other countries, if such a decision disturbs the returns filed in pursuance of Safe Harbour provisions, and notify the CAs of India.
- The Indian CA will allow access to MAP but would not change the Arm's Length Price of the international transactions covered under Safe Harbour provisions but would request the CAs of the Treaty Partners to provide correlative relief.

### **Dhruva's Comments:**

*The Guidance provides that the Indian CA will request the CA of the Treaty Partners to provide correlative relief. While this clarification would be helpful for taxpayers who have opted for Safe Harbour rules in India but have been facing*



disallowances in other jurisdictions, it will need to be seen whether the CAs of the Treaty Partner would agree to the requests of the Indian CA and, in turn, provide correlative relief.

- **Order passed by Income Tax Appellant Tribunal (ITAT) in respect of the same disputes that are being examined under MAP:**

- Where ITAT passes an order in respect of disputes examined under MAP, the Indian CAs shall not deviate from the orders of the ITAT for the relevant year when the dispute is decided on. This decision must have been based on merit.
- Regarding the above cases, the Indian CA would request the CAs of the Treaty Partners to provide correlative relief, if required.
- Where the order of ITAT sets aside the issue to be reconsidered, then access to MAP would be provided again after the decision is reevaluated by tax authorities.
- Further, even in cases where an order of ITAT (for the same assessment year that has been resolved under MAP) is pronounced/comes to the knowledge of the Indian CA after the MAP resolution but before the implementation of said MAP, the MAP resolutions would not be implemented by the Indian CA.
- The Indian CA would inform their counterparts of the outcome of ITAT order and request them to provide correlative relief for the adjustments sustained by ITAT, if any.

### **Dhruva's Comments:**

*The Indian CAs would not deviate from the ruling of ITAT (based on merit) for the relevant year on the same issue. The possibility of ITAT matters (primarily stay granted and large demand matters) being reevaluated before the conclusion of an MAP is high and since the decision is binding on Indian CAs, the taxpayer cannot get any better outcome under MAP once an ITAT order is passed.*

*In cases where taxpayers follow the Dispute Resolution Panel (DRP) path, the MAP initiation and ITAT filing will happen simultaneously once the final Assessment order is received. Whereas, in the case of the Commissioner of Income Tax (Appeals) (CIT(A)) path, the final order would be received well in advance of filing an appeal. The ITAT and MAP application can only be made after*

*payment of the 20 percent demand while the case is pending at CIT(A).*

*Given the above, where the taxpayer intends a resolution under the MAP route rather than ITAT for reasons such as unfavourable judicial precedents, the taxpayers may consider the option of following the CIT(A) path which would enable them to file MAP application faster and resolve the dispute under MAP before the matter is decided by ITAT.*

### **Denial of access to MAP**

The Indian CA can deny access to the MAP in the following situations:

- MAP application is made beyond the timelines outlined in the DTAA;
- The Indian CA forms an opinion that the objection raised by the taxpayer is not justified;
- The MAP application is incomplete, or the information/ documents requested by the Indian CA are not provided by the taxpayer;
- Where the taxpayer has obtained an order or the application is pending with Income Tax Settlement Commission (ITSC) on the same issue.
- Where the taxpayer has obtained an advance ruling or the application is pending with the Authority for Advance Rulings (AAR) on the same issue.
- Issues that are purely governed by India's domestic law.

### **Dhruva's Comments:**

*It is clarified that an Indian CA will not admit MAP application of a non-resident taxpayer or its AE in India or the relevant party to the transaction on which the advance ruling is sought has either obtained advance ruling or whose application has been admitted by AAR on the same issue. The reason for denying access to MAP is that AAR is an independent statutory dispute resolution body and it is a voluntary process where the taxpayer has to make a request. As per the express provisions of the domestic law, even if the non-resident taxpayer is not an applicant, the order of AAR would be binding on it in respect of the relevant transaction. Thus, a non-resident taxpayer would be denied access to MAP even if it has not obtained any order from AAR if the relevant transaction is covered in the application by the Indian resident.*



### Part C - Technical issues:

- **Downward adjustment:**

The Indian CA cannot go below the returned income as the same is expressly prohibited in Indian domestic law. However, in respect of MAP cases involving adjustments made by tax authorities of a Treaty Partner, the Indian CA may go below the returned income of the Indian taxpayer to implement the MAP.

- **Resolution of recurring issues:**

The Indian CA may resolve recurring issues on the same principles as adopted in a prior MAP resolution; however, they cannot resolve the issue in advance.

- **Interest and penalties:**

The Indian CA does not have the mandate to consider consequential issues of interest and penalties and negotiate disputes arising from such issues. Where the amount of interest/penalty is linked to the quantum of income, the same would undergo a proportionate variation based on the MAP resolution.

- **Secondary adjustments:**

The Indian CA would be obligated to make secondary adjustments as part of the MAP resolution in respect of cases pertaining to financial year 2016-17 or thereafter.

- **Bilateral and Multilateral APAs:**

In respect of issues for which a Bilateral or Multilateral APA application has already been filed and accepted; the CA shall not admit such MAP applications on the same issues for the same years. If the Bilateral or Multilateral APA fails, then MAP application can be made on the same issues for the same years.

- **Suspension of collection of taxes during the pendency of MAP:**

Countries such as Sweden, USA and UK have entered a Memorandum of Understanding (MoU) with India for keeping the collection of taxes under suspension during the pendency of MAP. Where no such MoU exists, the domestic law of India shall govern the procedures.

- **Adjustment of taxes paid pursuant to orders under section 201:**

Regarding the MAP resolution, the payment of taxes (excluding interest) may be allowed

to be adjusted against the tax liability of the non-resident taxpayer (payee entity).

### Part D – Implementation of MAP outcomes

- The Indian CA is to communicate the MAP resolution to the taxpayer.
- The taxpayer is to convey acceptance/rejection of MAP to the Indian CA (along with confirmation on withdrawal of appeals, if any) within 30 days of receipt of said MAP resolution.
- The Assessing Officer (AO) is to implement the MAP resolution and inform the taxpayer on any tax demand/refund within one month from the end of the month in which the communication was received by the AO.
- The taxpayer shall pay taxes as due and furnish proof of payment to the AO. The AO shall withdraw the pending appeal filed by Indian tax authorities, if any.
- The AO shall send a copy of the order implanting the MAP resolution to the Indian CA.

### Dhruva's Comments

*In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, the peer review report of OECD provided recommendations for India to improve on certain aspects which is now included in this Guidance. A summary of the same is provided as **Appendix**.*

*Guidance provided on some critical aspects will alter the way MAP is perceived as an alternative dispute resolution mechanism. The Guidance will help taxpayers to strategise their cases to ascertain the admissibility and consider MAP as a viable mechanism of controversy management in respect of tax matters.*



## Appendix

Sr no. in summary	Areas of improvement	Peer review recommendations <sup>2</sup>	Guidance
B1	Timelines for filing MAP application are shorter than three years in some DTAA.	India should modify the DTAA through Multilateral Instrument (MLI) to provide for a filing period of at least three years.	<b>Addressed</b> India to change time limit to three years either by way of MLI or bilateral negotiation with Treaty Partner.
B1	Access to MAP will be denied in certain cases where no double taxation occurred but where there may be taxation not in accordance with the DTAA.	India should not limit access in cases where no double taxation occurred but where there may be taxation not in accordance with the DTAA.	<b>Addressed</b> MAP request can be made when the action of the tax authorities results or will result in taxation not in accordance with the DTAA.
B2	No Indian DTAA has a provision which allows taxpayers to submit MAP request to the CA of a Treaty Partner and there is no documented bilateral consultation or notification process in place.	India should introduce documented notification process.	<b>Addressed</b> Indian CAs and Treaty Partners are expected to expeditiously communicate their acceptance or rejection of MAP application.
B4	Access to MAP will be given for issues resulting from applications of domestic anti-abuse provisions; however, such discussions will only focus on the elimination of double taxation and issues that do not give rise to double taxation or present the question of whether an application of domestic anti-abuse provisions is in conflict with DTAA will not be discussed.	India should change their policy to effectively allow access to MAP on issues of whether an application of domestic anti-abuse provisions conflicts with DTAA.	India will provide access to MAP even in a situation where the Indian tax authorities apply domestic anti-abuse provisions.  No clarity on MAP access regarding the issue of whether the application of domestic anti-abuse provisions conflicts with DTAA.
B8	MAP Guidance is not available.	India should introduce comprehensive MAP Guidance. Guidance should include the form in which the application is to be made, whether the MAP can be made for multi-year resolution of recurring issues, collection/suspension of taxes while the MAP is pending, the	<b>Addressed</b> The Guidance provides clarity on all issues covered in the recommendations.

<sup>2</sup><http://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-india-stage-1-c66636e8-en.htm>



Sr no. in summary	Areas of improvement	Peer review recommendations <sup>2</sup>	Guidance
		consideration of interest and penalties, the process by which the MAP will be implemented, the timeframe for complying with additional information requests, etc.	
<b>B10</b>	Effect of statutory dispute settlement process on MAP not addressed.	India should clarify when the case is settled through a statutory dispute settlement process.	<b>Addressed</b> Guidance has dealt with the effect on MAP if an issue resolved through ITAT/ITSC/AAR order.
<b>C3</b>	MAP cases were closed after an average of 35.66 months instead of 24 months.	India should undertake appropriate administrative steps and try to resolve issues within 24 months.	<b>Addressed</b> Indian CAs will endeavour to resolve MAP within an average timeframe of 24 months.



## ADDRESSES

### Mumbai

One World Center, 11<sup>th</sup> floor,  
Tower 2B, 841, Senapati Bapat Marg,  
Elphinstone Road (West),  
Mumbai 400013  
Tel: +91 22 6108 1000 / 1900

### Ahmedabad

B3, 3rd Floor, Safal Profitaire,  
Near Auda Garden,  
Prahlanagar, Corporate Road,  
Ahmedabad 380015  
Tel: +91-79-6134 3434

### Bengaluru

Prestige Terraces, 2nd Floor  
Union Street, Infantry Road,  
Bengaluru 560001  
Tel: +91-80-4660 2500

### Delhi / NCR

101 & 102, 1st Floor, Tower 4B  
DLF Corporate Park  
M G Road, Gurgaon  
Haryana 122002  
Tel: +91-124-668 7000

### Pune

305, Pride Gateway, Near D-Mart, Baner,  
Pune 411045  
Tel: +91-20-6730 1000

### Kolkata

4th Floor, Unit No 403, Camac Square,  
24 Camac Street, Kolkata  
West Bengal 700016  
Tel: +91-33-66371000

### Singapore

Dhruva Advisors (Singapore) Pte. Ltd.  
20 Collyer Quay, #11-05  
Singapore 049319  
Tel: +65 9105 3645

### Dubai

WTS Dhruva Consultants  
U-Bora Tower 2, 11th Floor, Office 1101  
Business Bay P.O. Box 127165  
Dubai, UAE  
Tel: + 971 56 900 5849

## KEY CONTACTS

### Dinesh Kanabar

Chief Executive Officer  
dinesh.kanabar@dhruvaadvisors.com

### Vishal Gada (Mumbai/Ahmedabad)

vishal.gada@dhruvaadvisors.com

### Ajay Rotti (Bengaluru)

ajay.rotti@dhruvaadvisors.com

### Vaibhav Gupta (Delhi / NCR)

vaibhav.gupta@dhruvaadvisors.com

### K. Venkatachalam (Pune)

k.venkatachalam@dhruvaadvisors.com

### Aditya Hans (Kolkata)

aditya.hans@dhruvaadvisors.com

### Mahip Gupta (Singapore)

mahip.gupta@dhruvaadvisors.com

### Nimish Goel (Dubai)

nimish.goel@dhruvaadvisors.com

---

WTS Dhruva Consultants has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR European Tax Awards 2020.

Dhruva Advisors has been consistently recognised as the **“India Tax Firm of the Year”** at the ITR Asia Tax Awards in 2017, 2018 and 2019.

Dhruva Advisors has also been recognised as the **“India Disputes and Litigation Firm of the Year”** at the ITR Asia Tax Awards 2018.

Dhruva Advisors has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a Tier 1 firm in **India’s ‘General Corporate Tax’** and **‘Indirect Tax’** ranking tables as a part of ITR’s World Tax guide. The firm is also listed as a **Tier 1 firm** for India’s **‘Transfer Pricing’** ranking table in ITR’s World Transfer Pricing guide.

#### Disclaimer:

This information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and opinion. Before acting on any matters contained herein, reference should be made to subject matter experts and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication