



Tax Insights

ATO releases revised guidance on MAP – what does it mean for you?

Snapshot

The ATO recently released on its website, revised guidance on the operation of the Mutual Agreement Procedure (MAP) article contained in Australia's double tax agreements.¹ The MAP process is a taxpayer activated bilateral tax dispute resolution option and can be initiated following an audit adjustment by one of the tax administrations. Most MAP cases involve transfer pricing matters, however, the process can be initiated by taxpayers on any issue in circumstances where the actions of a tax administration has placed, or has the potential to place, the taxpayer into a position of double taxation.

The MAP process allows a taxpayer to initiate a bilateral negotiation for the purpose of alleviating any potential or actual double taxation. During the MAP process, the merits of the case will be discussed and hopefully agreed

¹ The former ATO guidance on MAP (Taxation Ruling TR 2000/16) has been withdrawn.
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by the tax administrations of both countries. The delegated Government officials who negotiate the MAP are called 'Competent Authorities'. While there is no legal requirement in the tax treaty that the MAP case be resolved, the Competent Authorities are required to use 'best endeavours' to resolve the matters. Historically, MAP cases have taken about 2 years to resolve.

There has been a lot of discussion at the OECD, specifically BEPS Action Item 14, on improving and sustaining the international dispute resolution/MAP process, particularly in light of the other BEPS Action Items and the obvious increased activity of tax authorities around the globe. The revised ATO guidance looks to incorporate the minimum standards and best practices identified by the OECD, although it should be noted that Australia has historically (over the last 25 years) had a very successful MAP program, with only a handful of cases where agreement could not be reached.

Some of the key aspects of the Guidance include:

- To seek a MAP, the taxation not in accordance with a treaty needs to be 'probable' and not merely possible. On a practical level, this will usually be where a tax authority has issued a statement of audit position or a notice of assessment (this is known as the 'action'). However, in our view, MAP is justified where there is a position paper of some kind from a tax authority.
- Taxpayers can also seek MAP, following a 'good faith' self-initiated adjustment in either country
- There is usually a 3-year time limit to lodge a MAP request, which commences from the date of the 'action' of one of the tax authorities. The ATO has committed to the OECD 2 year time limit to finalise the MAP.
- The Guidance indicates that the MAP process is also available in situations where the general anti-avoidance rules have been used, including the Multinational Anti Avoidance Law and the Diverted Profits Tax. It is not clear what benefit this will mean in practice as the ATO also notes that, as Part IVA prevails over the treaty provisions, "the ATO cannot resolve a case under MAP to the extent that it involves the application of Part IVA". It is understood that in such a case, the ATO will work with the other country under MAP to obtain/implement double tax relief (if possible).
- In some cases a multilateral MAP process is possible, which would involve more than two jurisdictions. As the number of multilateral tax audits grows, this initiative will be helpful.
- The Guidance recognises that a number of Australia's tax treaties currently contain an Arbitration Article, and this will increase as countries ratify the Multilateral Instrument. This provides for a taxpayer to seek binding arbitration on an unresolved MAP case after 2 years. Of note, the arbitration decision is not binding on the taxpayer, only on the tax authorities.
- The ATO has maintained its position that it will not seek to collect tax in a MAP case arising from an ATO audit adjustment, except in situations where the ATO consider that there is a risk to the revenue or where the taxpayer has failed to meet its other tax

obligations. Further, any General Interest Charge (GIC) that accrues during the MAP period may be remitted in full.

Next steps

There is growing risk and audit activity by tax authorities and it is likely that the number of transfer pricing and other bilateral disputes will increase dramatically in the coming years. As such, the OECD initiatives to improve the MAP process and the revised ATO guidance are welcomed.

Chris Thomas and Brad Edwards both have considerable experience over many years working in the area of MAP, including having worked in Competent Authority roles in the ATO. They are well placed to assist and provide guidance on international tax disputes and resolution of any resulting double taxation issues.

Please contact either of them or your regular Deloitte contact if you would like further insights into the revised ATO guidance and the MAP process more generally.

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