



New Regulation No. 240/PMK.03/2014

The Indonesian Ministry of Finance issued a new regulation No.240/PMK.03/2014 (“PMK-240”) on 22 December 2014, which provides new updates to the existing regulations in relation to the implementation of the Mutual Agreement Procedure (“MAP”). The new regulation is effective from 22 December 2014. The new regulation is also applicable to any on-going request of MAP which was submitted prior to the issuance of this regulation but not yet concluded. The salient updates that require attention are provided below:

Deadline for submission of MAP

The regulation specifies that any request for MAP should be filed within the timeline specified in the Double Tax Avoidance Agreement (“DTA”) from the first notification of the action resulting in taxation not in accordance with the provisions of this agreement. The first notification times are: a) date of the tax assessment letter; b) date of withholding/collection of income tax evidence; c) other time as stipulated by the Director General of Taxation (“DGT”).

An MAP request cannot be submitted after the last hearing is concluded by the Tax Court.

Continuance of domestic dispute resolution

PMK-240 reinforces what had been stipulated in Government Regulation No. 74 of 2011 (“GR-74”): the flexibility for taxpayers to apply for an MAP and to continue domestic resolution at the same time. This includes applying for a tax objection, appealing to the Tax Court, and requesting reduction or cancellation of an incorrect tax assessment.

In cases where the MAP results in a mutual agreement after the issuance of a tax assessment but the taxpayer does not file an objection or apply for reduction or cancellation of the tax assessment (or seeks the aforementioned remedies but later this is revoked or rejected due to lack of certain requirements), the DGT will amend the tax assessment letter.

In cases where the MAP results in a mutual agreement and the taxpayer files an objection but the objection result has not been issued, the DGT will take the mutual agreement into account in the objection decision.

Similarly, for an appeal request, where the MAP results in a mutual agreement after the issuance of an objection decision but the taxpayer does not appeal the decision or it is appealed but later revoked, the DGT will amend the objection decision.

In all situations where the MAP does not result in a mutual agreement, all the DGT’s assessment or decisions shall remain in force.

Who can file a request for an MAP?

The regulation specifies that the request for an MAP can be filed by:

- 1) An Indonesian resident taxpayer through the DGT;
- 2) The DGT itself; or
- 3) The tax authority of a treaty partner country.

MAP filed by Indonesian taxpayer through the DGT

The regulation points out that the request for an MAP by an Indonesian resident taxpayer can be filed, among other reasons, when:

- 1) There is an action by the tax authority of a treaty partner country which has resulted or will result in the imposition of double taxation to the Indonesian taxpayer from a transfer pricing transaction with the foreign taxpayer;
- 2) There is an action by the tax authority of a treaty partner country to an Indonesian taxpayer’s PE in that country which has resulted or will result in tax imposition which is not in accordance with the DTA;
- 3) Dual Residence issue; or
- 4) Application of provisions that are not in accordance with the DTA on income sourced from a tax treaty country, including withholding tax deducted by the tax resident of the tax treaty country.

The information needed when applying for an MAP by an Indonesian resident taxpayer includes, among other things:

- 1) The identity of the Indonesian taxpayer and its counterpart in the other country, which relates to a transfer pricing transaction;
- 2) Fiscal year and/or the tax period with respect to the MAP request;
- 3) Explanation on the correction made by the tax authority of a treaty partner country including the substance of transaction, the amount, and basis of the correction; and
- 4) The Indonesian taxpayer’s opinion regarding the above correction.

The application and supporting documents shall be submitted to Director of Tax Regulation II. This is a change, as previously the MAP request was submitted through the Tax Office where the taxpayer is registered.

The MAP request can be retracted at the latest before the mutual agreement is obtained.

MAP filed by the DGT

The DGT can file a request for MAP if it deems this necessary. Certain issues that are deemed necessary, among other things, are:

- 1) Review of past Mutual Agreements which have indications of incorrect information;
- 2) Request for corresponding adjustment by the DGT;
- 3) Follow-up of a taxpayer's Advanced Pricing Agreement request; or
- 4) The interpretation of certain provisions in the Double Taxation Avoidance Agreement.

MAP filed by the tax authority of a treaty partner country

The tax authority of a treaty partner country may request MAP, in the following cases, among others:

- 1) The DGT issues a tax assessment to a tax resident of a tax treaty country which has a Permanent Establishment in Indonesia or to an Indonesian resident tax payer in relation to a transaction with foreign taxpayer, which assessment is considered not to be in accordance with provisions in a relevant DTA, including transfer pricing correction;
- 2) Request for corresponding adjustment by the tax authority of a treaty partner country;
- 3) Dual Residence issue; or
- 4) Follow-up of a foreign taxpayer's Advanced Pricing Agreement request.

PMK-240 has answered the ambiguity left from the previous MAP regulation, because case 1 above clearly shows that the tax authority in a treaty partner country (most likely from the request of taxpayer in that country) may invoke MAP to provide relief from double taxation that has arisen due to a transfer pricing adjustment made by the DGT on transactions with a related party in Indonesia. So, if the Indonesian taxpayer would like to request an MAP for the tax assessment by the DGT, the initiative must come from the counterpart in the treaty partner country via the counterpart's competent authority. The DGT will then follow up the request to the Indonesian taxpayer and request supporting documents and information from either the tax authority in the treaty partner country or the Indonesian taxpayer.

The MAP request must be submitted to Director of Tax Regulation II. The tax authority of the treaty partner country can retract the MAP application before the conclusion of mutual agreement.

The regulation also provides a list of documents and information that the tax authority of a treaty partner country should submit in order to file for an MAP. The information needed, among other things, is:

- 1) The identity of the foreign taxpayer and its counterpart in Indonesia;
- 2) Fiscal year and/or tax period with respect to the MAP request;
- 3) The actions taken by the Indonesian taxpayer or Director General of Taxation which are deemed to be not in accordance with the Double Taxation Avoidance Agreement.

In a case where the MAP application is in relation to transfer pricing, the DGT will examine the availability of corresponding adjustment provision in the relevant tax treaty as a consideration for whether the MAP application can be processed.

Process of MAP

The regulation points out that the process of MAP is performed by the MAP Implementation Team. This team is commissioned to examine the MAP application, request supporting documents and additional information, visit the taxpayer's site, prepare a position paper, and perform other actions.

The DGT will also initiate consultation with the tax authority of the treaty partner country, which could be in the form of direct meeting, electronic communication, or correspondence. The consultations should be conducted and completed within 3 years after the first consultation, but could be extended through an agreement made by the DGT and the tax authority of the treaty partner country.

Rejection or termination of MAP implementation

The regulation provides a list of reasons for the termination of the MAP process. The reasons listed, among others, are:

- 1) Incomplete documents;
- 2) Missing information;
- 3) There is a strong indication that a Mutual Agreement would not be obtained;
- 4) The Indonesian taxpayer retracts the MAP application;
- 5) The draft of mutual agreement was disapproved;
- 6) The appeal decision is pronounced before the mutual agreement is concluded.

Draft Mutual Agreement

The DGT and the tax authority in the treaty partner country will prepare a draft mutual agreement. The Indonesian taxpayer will then be asked for confirmation of the draft agreement. Once the draft has been agreed by all parties, the DGT will issue a DGT Decision on the mutual agreement.

Confidentiality

The regulation states clearly that the documents submitted by the taxpayers for the purpose of requesting MAP implementation will be treated with the utmost confidentiality in accordance with the provisions of the law.

Further questions on how an MAP could be an alternative dispute resolution for your transfer pricing case, or any other questions concerning the subjects or issues contained in this newsletter, should be directed to your usual contact in our firm, or any of the following individuals:

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