

The ever-increasing level of globalisation has led to a rise in international business disputes too. The MAP, which in practice applies to cases involving double taxation in different States, is a good mode of dispute resolution mechanism provided for under Double Tax Avoidance Agreements signed by India. Read on to know all about it.



## Dispute settlement mechanism under Mutual Agreement Procedure

—K.R. Girish

India today is very much part of the global economy and a case in point is that it has concluded over 70 comprehensive Double Tax Avoidance Agreements (DTAA). If one were to take global statistics, India would be one of the few Countries, which has these many number of treaties and is a member of the elite club of nations including the UK and Netherlands, way ahead of America.

With increased level of global business, the necessity to find alternative dispute resolution mechanism has increased too. And in this regard, the Mutual Agreement Procedure (MAP) has a key role to play.

### What is MAP

MAP is a dispute resolution mechanism provided for under the DTAA and is a special procedure, which is outside the scope and purview of the domestic tax regulations. Generally, Article 25 of the DTAA provides for this framework and the OECD convention is the one primarily used as the basis for all MAP proceedings. As per the OECD Model Commentary (MC), the Article 25 institutes a

procedure for resolving difficulties arising out of application of the Treaties in a broad sense.

### MAP Framework

MAP can be invoked if the taxpayers are charged or going to be charged tax in another State not in accordance with the Treaty. This will not deprive the taxpayer from taking recourse to ordinary legal remedies available. In that sense the MAP is a special procedure available to tax payers outside the domestic law.

In order to set a MAP in process the tax payer should establish that the actions by one or both of the Contracting State shall result in taxation and that the risk of taxation is real and not merely a probability.

In practice, the procedure applies to cases where the action leads to double taxation, which is not in accordance with the convention. In order to be admissible the objections needs to be presented to the Competent Authority and should

follow the two fold requirement:

- i. It should first be presented to the Competent

**MAP is a great ADR mechanism but the time limits for settlement have made this process more undesirable from a taxpayer's perspective. By the time the dispute is resolved, it becomes un-implementable for many reasons like a conflict with the domestic tax laws.**

*The author is a member of the Institute. He can be reached at [kgirish@rsmin.com](mailto:kgirish@rsmin.com)*

Authority of the tax payer's state and it should be presented within three years of the first notification of an action i.e. assessment notice order etc.

- ii. It should be presented in a detailed manner laying out the dispute and in general most of the Countries do not have any specific form or rule.

Here it is relevant to bring into attention that India brought in the statute detailed rules w.e.f February 6, 2003 by inserting Rule 44G and 44H in the Income-Tax rules which details that the application has to be made in Form 34F and the action based on the application shall be made by the Competent Authority of India as provided in Rule 44H.

Broadly, the Form requires the taxpayer to give relevant details of the case more specifically on the dispute and the documents based on which such a claim is being made.

Rule 44H prescribes that the Competent Authority based on such an application would take up the matter with the other Country's authority and endeavour to arrive at a resolution. Please take note here that it is only best efforts put in and does not give any guarantee for conclusion. Also, there is no time limit for reaching an agreement!

When such a resolution is reached the same be communicated to the Chief Commissioner/ Director General of Income Tax in writing and the Assessing Officer shall give effect to the same within 90 days of receipt of such a resolution, if the assessee gives his acceptance to the resolution and withdraws all appeals pending on the issue which was the subject matter of adjudication under the MAP.

### Cases under MAP

Some of the common causes referred to under MAP are as follows:

- ☞ Issues relating to Permanent Establishment (PE) held out as per Article 5.
- ☞ Questions relating to attribution of profits to a PE especially on the deduction in respect of proportion of executive and general administrative expenses.
- ☞ Issues on how source based taxation would be

**Under MAP, a Competent Authority takes up the disputed matter with the other Country's authority and tries to arrive at a resolution. However, there is neither any guarantee for case's conclusion nor any time limit for reaching an agreement.**

made in cases where there is a relationship of Associate Enterprise specifically, on the excess part of interest as per Article 11 or Royalties and Fees for Technical Services as per Article 12.

- ☞ Cases relating to taxpayer's residence situation where the convention has not

been properly applied such as determination of residence under Article 4 or short stay exemption under Article 15.

In addition to the above, situations where MAP would get invoked, Article 25 also provides for machinery to enable Competent Authorities to discuss with one another on matters relating to transfer pricing adjustments. Specifically, where the Treaties provide for adjustment under Article 9(2), then MAP process gives the mechanism to arrive at corresponding adjustment in the other Country thereby avoiding jurisdictional double taxation i.e. (tax suffered in both jurisdictions) due to different legal principles adopted.

### Non-applicability of MAP

The revenue authorities may refuse to consider the application for MAP on specific situations and these situations can be:

- ☞ Tax payer not providing sufficient information
- ☞ The resolution which has been sought and the interpretation proposed contradicts with that of the national revenue author-

- ities
- ☞ Clear contravention of domestic laws
- ☞ Time limit for application has elapsed
- ☞ Taxpayer is guilty of tax evasion or fraud

In practice, the acceptance of application under a MAP by itself is an onerous task as the Competent Authority of the resident Country has to be convinced that the position taken is valid and needs to be taken up



with his counterpart for resolution.

### Practical issues

The first issue to confront an aggrieved taxpayer is the acceptance of

the MAP application itself.

- a) As mentioned in a MAP process, it shall be the endeavour of the two Competent Authorities to seek a resolution but there is no guarantee that such a resolution would in fact, be achieved. Also, in the whole process, the taxpayer or his/her authorized representative cannot be present as it is an interaction between two authorities more of a bureaucratic process.
- b) The Competent Authorities in general do not have more than 2/3 meetings in a year and there is no time limit fixed for the resolution. So it can be a very slow moving process. Some of the technical issues which arise on MAP are discussed here:
  - i The first issue that arises is that whether the domestic appeal process and MAP are mutually exclusive?

In this regard we have a judicial precedence given in the case of the celebrated judgment on international tax in the case of Vishakhapatnam Port Trust (144 ITR 146) wherein the Court held that MAP is available in addition to and not in substitution to the domestic remedies.

If one were to look into the rules given in 44H also, it refers to withdrawal of tax appeals only in respect of issues, which have been the subject matter of adjudication under a MAP.

- ii The other issue is whether the MAP irreversible in the sense is the taxpayer bound by the resolution?

In general, unless the taxpayer has given his clear acceptance to the resolution, the MAP process is not binding on the taxpayer. Now, with the rules having been framed under the domestic tax laws, there is a requirement that the taxpayer has to give his acceptance for the resolution reached.

- iii What happens to the tax demands when a MAP

process is invoked by taxpayer?

In general, when a MAP process is invoked and the application is accepted by the Competent Authority, the tax administration would be instructed to defer or give stay of the tax demand for the respective years. However, there could be situations such as the one under the India-UK Treaty where the Competent Authority of both the Countries have agreed to suspend the tax collection on acceptance of the application on the taxpayer giving a bank guarantee to the amount of demand kept in abeyance. (Reference Instn No. 3/2004 dated March 19, 2004). The ideal situation would be to provide for such procedure by way of a PROTOCOL.

### The future outlook

Even though MAP is a great alternate dispute resolution mechanism, the time limits for settlement have made this process more undesirable from a taxpayer's perspective. Also, by the time the resolution is reached it becomes not implementable for various reasons such as conflict with limitation provision as provided under the domestic tax laws.

The future would be to look at alternatives to MAP such as:

- Advisory opinion from a impartial independent third



- party of great standing
- Arbitration proceedings as per the policy statement on "Arbitration in International Tax Matters" brought out by the European Union.

Unless the MAP process is made more transparent and settlement mechanism reached within reasonable time frames, this process would not bring in the derived benefit intended towards the taxpayer. ■