

**F. No. 500/09/2016-APA-I  
Government of India  
Ministry of Finance  
Department of Revenue  
Central Board of Direct Taxes  
Foreign Tax and Tax Research Division-I  
APA-I Section**

New Delhi, dated the 10<sup>th</sup> June, 2022

**Subject: Updated Mutual Agreement Procedure (MAP) Guidance – Regarding**

The Board has issued a guidance on MAP procedure and matters connected thereto for the benefit of taxpayers, tax practitioners, tax authorities, and Competent Authorities (CAs) of India and of treaty partners vide F.No. 500/09/2016-APA-I dated 7<sup>th</sup> August, 2020. Subsequently, stakeholders have raised queries on certain related aspects of MAP, which are not covered by existing guidance. Some partner countries have also requested for clarity on certain issues, such as consequences of the Vivad se Vishwas scheme on MAP. Considering all these inputs and suggestions for clarity, the Board has decided to update the MAP guidance as detailed below.

**A. MAP and Vivad se Vishwas Scheme**

2 Some partner jurisdictions and stakeholders have sought clarification on impact of Vivad Se Vishwas Scheme on MAP. Accordingly, clarification on the interplay between MAP and Direct Tax Vivad se Vishwas Act is added in Part B, Section II after para (e) as under:

**f) Direct Tax Vivad se Vishwas Act** – Government of India brought a new tax dispute resolution scheme under the “Direct Tax Vivad se Vishwas Act, 2020” (henceforth ‘VsV Act’), with the objective of reducing the pending income tax litigations at various appellate forums. The details in respect of eligibility and other provisions of the Act are contained in the Direct Tax Vivad se Vishwas Act, 2020 and various other circulars/clarifications issued by the Board from time to time in this regard.

Sub-section 3 of Section 5 of the VsV act states as under:

*“5(3) Every order passed under sub-section (1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.”*

In this regard, where a resident tax payer opted for VsV Scheme for settlement of a case which involves resolution of transfer pricing adjustments on international transactions with its Associated Enterprises (AEs), and the same is accepted by the tax authorities of India, the CAs of the other countries or specified territories may accept MAP applications from their taxpayers (which are AEs of the Indian taxpayer), and notify the CAs of India. The latter would allow access to MAP but shall not deviate from the result arrived under the VsV. Instead, they would request the CAs of the treaty partners to provide correlative relief.

Further, the CAs of India shall not provide access to MAP to a non-resident taxpayer which has itself opted for the VsV scheme on the same issue, because the applicant has given up its legal right to access MAP in accordance with sub-section (3) of Section 5 of the VsV Act.

#### **B. Responsibility of MAP applicant to make True and Complete Disclosure**

3 MAP operates on the basis of trust and good faith among competent authorities and taxpayers. Unlike normal audit scrutiny or appeal proceedings, in most cases, MAP is resolved by CAs through discussions based on documents submitted by the taxpayer. However, recently a couple of cases have come to the notice of CAs wherein taxpayers have either suppressed information (invoking MAP in respect of adjustments made by one treaty partner without mentioning the fact that adjustment has also been made by the other treaty partner on the same transaction) or not giving the same set of comparable to the CAs particularly in cases where both BAPA and MAP are involved.

3.1 Further, as has been clarified in the MAP guidance, where Hon'ble ITAT has passed a final order, the CAs of India shall not deviate from such order and MAP in such cases shall be closed as resolved under domestic remedy. It is of course open to the

treaty partner to provide relief from double taxation in such cases. It may be mentioned here that many of India's treaty partners do not allow appeal and MAP proceedings to be pursued simultaneously. The taxpayer in those jurisdictions can pursue appeal only after the MAP process fails or results in an outcome that is not acceptable to tax payer. On the other hand, India follows a liberal regime where the taxpayer can choose to pursue both appeal and MAP proceedings simultaneously. Therefore, if in a case Hon'ble ITAT passes any order, the taxpayer must immediately notify the CAs so that MAP proceedings are closed forthwith, and any infructuous work is avoided.

3.2 In view of the above, a new Part E is added to the MAP guidance to highlight MAP applicants' responsibilities, as under:

## **Part E**

### **Applicant's responsibilities**

#### **I. Responsibility of making true disclosure**

A taxpayer resident in India can make an application to the CA of India having jurisdiction over the case if it considers that the actions of the tax authorities of the treaty partner resulted or will result in taxation not in accordance with the relevant tax treaty. Such an application has to be made in Form No. 34F in accordance with rule 44G.

In item (k) of Form 34F, the applicant should provide all the facts of the case that can materially affect the negotiation process. For instance, if adjustments have been made to the same international transaction by Indian tax authorities as well as its treaty partner's tax authorities, the CAs of the two countries can be blind-sighted in negotiations if the applicant only mentions adjustments in one jurisdiction and leaves out the crucial fact of adjustments in the other jurisdiction.

#### **II. Responsibility to provide up-to-date information**

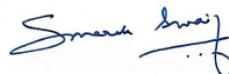
Good faith action is the hallmark of alternate dispute resolution under MAP. The applicant must keep the CAs as up-to-date as possible on all material changes in the information or documentation previously submitted as part of, or in connection with, a request, as well as new information or documentation relevant to the issues under consideration. Making all relevant documentation and information accessible to a

competent authority, in good faith, will assist in the smooth and efficient operation of the MAP process.

This guidance has dealt with the interplay of MAP with other processes such as regular tax appeals, tax settlements, and domestic dispute resolution schemes. The applicant best knows about its status in other fora. The applicant should promptly provide updated status of proceedings in other fora that could affect the MAP process.

4 The MAP guidance as issued vide F.No. 500/09/2016-APA-I dated 7<sup>th</sup> August, 2020, and as amended above, may be adhered and referred to by taxpayers, tax practitioners, tax authorities in India and CAs of India. If any element of the MAP guidance comes in conflict with the domestic legislation, rules, instructions, and circulars in India or with the DTAAs entered into by India, the provisions of such domestic legislation, rules, instructions, and circulars or the DTAAs, as the case may be, shall prevail.

5 A copy of consolidated MAP guidance i.e., MAP guidance dated 07.08.2020 as amended by this communication is placed at annexure for the benefit of stakeholders. The same has also been uploaded on the departmental website.



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Government of India

Copy to:

- (a) Chairman and members of Central Board of Direct Taxes
- (b) Pr. CCsIT/Pr. DsGIT/CCsIT/DsGIT with a request to circulate in respective regions
- (c) Joint Secretaries/Commissioners/Directors/Deputy Secretaries/Under Secretaries in CBDT
- (d) Database Cell for uploading on the IRS Officers website
- (e) Web Manager for uploading on the Departmental website



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## ANNEXURE CONSOLIDATED MAP GUIDANCE 2022

### Subject: Mutual Agreement Procedure (MAP) Guidance – Regarding

India has a large network of Double Taxation Avoidance Agreements (**‘DTAAs’ or ‘Tax Treaties’, hereinafter**) with various countries. The DTAAs, inter- alia, provide rules and mechanisms for allocation of taxing rights amongst the treaty partners; avoidance of economic and juridical double taxation; and resolution of taxation not in accordance with the treaty through the Mutual Agreement Procedure (**‘MAP’, hereinafter**).

2. Rule 44G of the Income-tax Rules, 1962 has been notified vide G.S.R.282 (E) dated 6<sup>th</sup> May, 2020. This rule substitutes the previous rules 44G and 44H, which dealt with the same issue of implementation of MAP. The rule provides, inter-alia, the processes to be followed by the competent authority(ies) (**‘CA’ or ‘CAs’ hereinafter**) of India till the resolution of the issue of taxation not in accordance with the treaty and the processes to be followed by the field authorities to implement the outcome of the MAP. The new rule is applicable w.e.f 6<sup>th</sup> May, 2020 and, accordingly, applies to all MAP cases pending with the CAs of India as on 6<sup>th</sup> May, 2020.

3. Though erstwhile rules 44G and 44H were in existence for a number of years, detailed information regarding MAP processes and guidance on issues related to such processes were not available in a comprehensive and consolidated manner. The Action 14 final report on **“Making Dispute Resolution More Effective”**, of the Base Erosion and Profit Shifting (**‘BEPS’, hereinafter**) project of the G-20 and OECD countries, had recommended that all countries that implement the BEPS package of measures must publish comprehensive MAP guidance.

4. In view of the above, the Board has decided to issue this MAP guidance for the benefit of taxpayers, tax practitioners, tax authorities, and CAs of India and of treaty partners.

5. The MAP guidance is presented in the following ~~four~~ five 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.
  - Part E: Applicant's responsibilities

## Part A

### Introduction and Basic Information

#### I. Mutual Agreement Procedure (MAP)

Mutual Agreement Procedure (MAP) is an alternate tax dispute resolution mechanism available to the taxpayers under the DTAA's for resolving disputes giving rise to double taxation or taxation not in accordance with DTAA's. MAP can help in relieving double taxation either fully or partially. Almost all DTAA's entered into by India have the MAP Article and it provides an additional dispute resolution mechanism to taxpayers in addition to those available under the domestic laws of India. A taxpayer can request for assistance under MAP regardless of the remedies provided under the Indian domestic law.

MAP enables the CAs of India to engage with the CAs of other treaty partners and is a process which facilitates discussions and negotiations between both treaty partners as they endeavour to resolve international tax disputes, which are not in accordance with the relevant DTAA's. At present, India has two CAs for MAP cases and they are senior officers in Department of Revenue, Ministry of Finance (Joint Secretary, FT & TR-I and Joint Secretary, FT & TR-II). The two CAs have been designated as such by the Finance Minister of India. The two CAs have territorial jurisdiction over the MAP cases depending upon the location of the treaty partner. The CAs of India are independent of the tax authorities who audit taxpayers and take their own decisions that are only administratively governed by an internal governance mechanism within the CBDT, Department of Revenue.

A MAP request can be made by a taxpayer when it considers that the actions of the tax authorities of one or both of the 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 DTAA's may arise in some of the following circumstances:

- Transfer Pricing adjustments
- Existence of a Permanent Establishment
- Attribution of profits to a Permanent Establishment
- Characterisation or re-characterisation of an income or expense

## II. India's Tax Treaties or DTAA's

India has a large network of tax treaties, almost all of which contain a MAP Article based on the provisions of Article 25 of the UN/OECD Model Tax Convention. These tax treaties (read with section 90 or 90A of the Income-tax Act, 1961) constitute the legal basis for taxpayers to apply for a MAP and for CAs to discuss and negotiate a MAP case with the endeavour of finding a resolution to the dispute. It is important for taxpayers to refer to the text of the relevant tax treaty itself to understand the conditions for applying for MAP under that tax treaty. India's tax treaties are available at [www.incometaxindia.gov.in](http://www.incometaxindia.gov.in)

All the DTAA's entered into by India, which contain a MAP Article as mentioned above, require that a taxpayer of either treaty partner approaches the CA of its country of residence to request for a MAP if the tax authorities of the other treaty partner make an adjustment or take an action that results or will result in double taxation or taxation not in accordance with the relevant tax treaty. In most of the tax treaties of India, the time limit for making an application for MAP is three years from the first notification of the action giving rise to such taxation. In a limited number of DTAA's, the time limit is either less or more than three years. Wherever it is so, it is expected to be changed to three years as per the recommendation contained in the final report of BEPS Action 14. India would ensure this through amendments of such deficient tax treaties through the Multilateral Instrument ('MLI', **hereinafter**) that has already come into effect for India w.e.f 1<sup>st</sup> October 2019 or through bilateral negotiations with the relevant treaty partners.

## III. Making a MAP Application in India

A taxpayer resident in India can make an application to the CA of India having jurisdiction over the case (depending on the location of treaty partner) if it considers that the actions of the tax authorities of the treaty partner resulted or will result in taxation not in accordance with the relevant tax treaty. Such an application has to be made in Form No. 34F in accordance with rule 44G. The relevant provision of the rule is as follows:

*'44G (1): Where an assessee, being a resident of India, is aggrieved by any action of the tax authorities of any country or specified territory outside India for the reason that, according to him, such action is not in accordance with the terms of agreement with such other country or specified territory, he may make an application to the Competent Authority in India seeking to invoke the mutual agreement procedure, if provided in such agreement, in Form No. 34F.'*

The following information and details are required to be provided in Form No. 34F while making a MAP application to the CAs of India:

- a) Name of the Applicant;
- b) Permanent Account Number (PAN)/Aadhar Number;
- c) Circle/Ward;
- d) Assessment Year(s);
- e) Previous Year(s);
- f) Office Address& Telephone Number;
- g) Residential Address& Telephone Number (if applicable);
- h) Status;
- i) Name and Designation of Tax Authority in the other country or specified territory (Treaty Partner);
- j) Date of the notice or order giving rise to the action;
- k) Is the order/action of the Tax Authority of the Treaty Partner not in accordance with the agreement? If so, the reasons thereof; and
- l) Details of remedy sought in the other country or specified territory, if any, with documentary evidence.

Form No. 34F also requires information about the name of the country or specified territory, the action of the tax authorities of which have aggrieved the Applicant. In item (k) above, the Applicant should provide the facts of the case; the analysis of issue(s) that are sought to be resolved under the MAP; and the reasons why the action taken by the tax authorities are not in accordance with the relevant DTAA's.

In addition to the above information and details, Form No. 34F requires the following documents to be furnished at the time of making the application:

- Copy of notice or order giving rise to the action not in accordance with the relevant DTAA's;
- Any document(s) as support for considering the order/action of the tax authorities of the treaty partners to be not in accordance with the relevant DTAA's;
- Any document(s) as evidence of remedy sought in the other country or specified territory; and
- Any other document that the applicant may want to submit or the CAs of India may ask for.



If an Associated Enterprise or related party of an Indian taxpayer submits a MAP application before the CA of its country or specified territory of residence (treaty partner), in respect of any order/action of the tax authorities of India or of the tax authorities of such treaty partner, a copy of such MAP application must also be provided to the CA of India having jurisdiction over the case. The CAs of such treaty partners are expected to expeditiously intimate the CAs of India about their acceptance of a MAP application.

The MAP application in Form No. 34F or the copy of the MAP application filed before the CAs of other countries or specified territories (treaty partners) must be submitted to the CA of India having jurisdiction over the case. There are two CAs in India. Their details are as under:

Where the treaty partner is a country or specified territory in Europe and North America (including the Caribbean) -

**Joint Secretary, FT&TR-I,  
Central Board of Direct Taxes, Department of Revenue,  
Ministry of Finance, Government of India**  
  
**Room No 803, 8th Floor,  
"C" Wing, HUDCO-Vishala Building,  
Bhikaji Cama Place, New Delhi-110066**

Where the treaty partner is a country or specified territory in any part of the world other than Europe and North America (including the Caribbean) -

**Joint Secretary, FT&TR-II,  
Central Board of Direct Taxes, Department of Revenue,  
Ministry of Finance, Government of India**  
  
**Room No 804, 8th Floor,  
"C" Wing, HUDCO-Vishala Building,  
Bhikaji Cama Place, New Delhi-110066**

#### IV. The MAP Process

Once a MAP application is accepted by the CA of India having jurisdiction over the case, she shall intimate the CA of the relevant treaty partner about such acceptance through a written communication (notification or invocation letter). In such written communication, she would also briefly indicate why she feels that the action of the tax authorities of the treaty partner results or will result in taxation not in accordance with the relevant DTAA. She would also request the CA of the treaty partner to provide her written position (position paper) on the order/action of the tax authorities of her country.

If a MAP application is found to be not acceptable by the CA of India having jurisdiction over the case, she shall write to the CA of the relevant treaty partner informing her about the reasons for which the MAP application cannot be accepted and request the latter to send her views/comments on the same (notification and bilateral consultation). Once the CAs of both treaty partners have exchanged views and come to a common understanding, the decision on the MAP application shall be communicated by the CA of India having jurisdiction over the case to the Indian taxpayer who had made the MAP application.

As has been indicated above, once a MAP application is accepted, the CAs shall exchange views. In most cases, the views shall be communicated through position papers. Once a position paper is received from the other CA, the CA of India having jurisdiction over the case would examine the same and come to a negotiating position. She may also provide her own written comments to the other CA or ask for further clarification from her. After exchange of positions and comments, both the CAs would try and negotiate a resolution to the dispute at hand. They may meet in person or negotiate remotely through teleconference, video conference, or email.

If both the CAs successfully resolve a MAP case, they would formalise a mutual agreement amongst themselves at the earliest possible. The CA of India having jurisdiction over the case would intimate the Indian taxpayer who had applied for MAP about the terms and conditions of the resolution. Acceptance or rejection of the MAP resolution is the prerogative of the Indian taxpayer but in either situation, the MAP case would be closed by both the CAs as resolved.

If both the CAs are unable to resolve a MAP case, they would close the MAP case as unresolved. The CA of India having jurisdiction over the case shall inform the Indian taxpayer about the non-resolution of the dispute.

In a reverse situation, where the MAP application has been accepted by the CAs of treaty partners, some of the processes described above would flow in the reverse direction.

In addition to the above bilateral MAP process, in appropriate cases, the CAs of India can participate in multilateral MAP discussions with more than one treaty partner. Multilateral MAP cases shall involve all the above processes (like exchange of position papers, negotiations, finalization of mutual agreements, etc.) on a multilateral basis amongst the CAs concerned. However, a multilateral MAP case shall be executed in the form of a series of parallel bilateral MAP cases. The CAs of India can agree to accept a multilateral MAP request if all the following conditions are fulfilled:

- All the participating countries or specified territories have DTAA's with each other;
- The transaction or issue in dispute has a bearing on all the treaty partners, directly or indirectly, and non-resolution of the dispute would result in taxation not in accordance with the relevant DTAA's; and
- The CAs of all the participating countries or specified territories agree to negotiating a multilateral MAP.

#### V. Timeframe for Resolving and Implementing MAP cases

India is committed to endeavour to resolve MAP cases within an average timeframe of 24 months. It may be clearly understood that the commitment is not to resolve MAP cases within that timeframe (it may not be possible for both CAs to agree on a resolution in all cases) but **endeavour** to do so. The commitment is in conformity with the minimum standards recommended in the BEPS Action 14 final report.

The period of 24 months is to be computed from the "Start Date" of a MAP case. Since, presently, most of the MAP cases before the CAs of India arise from a MAP application made by a non-resident taxpayer before the CAs of other countries or specified territories (treaty partners), the "Start Date" is determined by the other CAs in accordance with the MAP Statistics Reporting Framework.

At times, the CAs of India receive intimation of MAP cases from the CAs of the treaty partners much beyond the "Start Date". This results in delaying the endeavour to resolve such MAP cases.

India is fully committed to implement the outcomes of each and every MAP case. It is the endeavour of India to implement each MAP outcome expeditiously. The process and timeframes to implement such outcomes are contained in rule 44G of the Income-tax Rules, 1962. The rule, inter-alia, provides the following:

- How to apply for a MAP;
- Whom to apply to for a MAP;
- The role of the CAs of India in making an endeavour to resolve tax disputes under the MAP;
- Timeframes and processes after the resolution of a MAP case; and
- Role of Indian taxpayer and Indian tax authorities after the resolution of a MAP case.

The rule can be accessed in the Income-tax Rules, 1962 that is available on our website [www.incometaxindia.gov.in](http://www.incometaxindia.gov.in)

It can also be accessed at the following link:

[https://www.incometaxindia.gov.in/news/notification23\\_2020.pdf](https://www.incometaxindia.gov.in/news/notification23_2020.pdf)

## **Part B**

### **Access and Denial of Access to MAP**

#### **I. Access to MAP**

India provides wide and easy access to MAP to Indian taxpayers if they are aggrieved by an order/action of tax authorities of other countries or specified territories (treaty partners) and such orders/actions in the opinion of the taxpayer results or will result in taxation not in accordance with the relevant DTAA's. The procedure for making an application has been discussed in Part A and the details can be seen in rule 44G of the Income-tax Rules, 1962.

India also provides wide and easy access to MAP when the CAs of other countries or specified territories (treaty partners) accept a MAP application from their taxpayers and then notify the CAs of India about their acceptance. These MAP cases may arise from the order/action of tax authorities of India or of the treaty partners that in the opinion of the overseas taxpayer results or will result in taxation not in accordance with the relevant DTAA's.

India shall provide access to MAP in respect of, inter-alia, the following types of cases/situations if they result in taxation not in accordance with the relevant DTAA's:

- a) Transfer Pricing adjustments;
- b) Determination of existence of a Permanent Establishment;
- c) Attribution of profits to Permanent Establishments, whether admitted or not by the taxpayer;
- d) Characterisation or re-characterisation of an item of expense or payment as a taxable expense or payment (like Royalty or Fee for Technical Services (FTS) or Interest); and
- e) 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 the Indian tax authorities apply domestic anti-abuse provisions.

In certain situations, where obligation to deduct tax at source on the 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 and the same is disputed by the non-resident entity, MAP access will be provided to such non-resident entity anticipating an event of double taxation or taxation not in accordance with the relevant DTAA. However, such action being purely under the domestic law and the order under section 201 not being an order determining any tax on income, the MAP discussion will be taken up only after the assessment order is passed in the case of the non-resident taxpayer, and such non-resident taxpayer considers that the assessment order results or would result in taxation not in accordance with the relevant DTAA.

There are a few circumstances where India would provide access to MAP but the CAs of India would not negotiate any other outcome than what has already been achieved in such circumstances. The circumstances are the following:

- a) **Unilateral Advance Pricing Agreements** – Where an Indian or foreign taxpayer enters into a unilateral Advance Pricing Agreement ('UAPA', **hereinafter**) with the Central Board of Direct Taxes (CBDT), the CAs of the other countries or specified territories may accept MAP applications from their taxpayers in respect of such UAPAs if any decision of the tax authorities of such other countries disturbs the income declared in the returns filed in pursuance of the UAPAs, and notify the CAs of India. The latter would allow access to MAP but would not change the terms and conditions of the UAPA. Rather, they would request the CAs of the treaty partners to provide correlative relief.

In respect of UAPA applications under consideration and negotiation, actions of tax authorities in India or overseas during such pendency of UAPA applications could give rise to taxation not in accordance with the relevant DTAAs. In such situations, the CAs of India or the CAs of the other countries or specified territories may accept MAP applications from their taxpayers and notify each other. While the CAs of India would allow access to MAP, they would not process such MAP cases till the UAPA is entered into. If the UAPA is entered into, the CAs of India would not change the terms and conditions of the UAPA and would request the CAs of the treaty partners to provide correlative relief. However, if the UAPA is not entered into due to any reason, the CAs of India would start processing such MAP cases, as all other MAP cases.

- b) **Safe Harbour** – Where an Indian or foreign taxpayer applies safe harbour provisions, as applicable on its international transactions, and the return of income is accepted by the tax authorities of India, the CAs of the other countries or specified territories may accept MAP applications from their taxpayers in respect of any decision of the tax authorities of such other countries if such decision disturbs the returns filed in pursuance of such safe harbour provisions, and notify the CAs of India. The latter would allow access to MAP but would not change the ALP of the international transactions covered under the safe harbour provisions. Rather, they would request the CAs of the treaty partners to provide correlative relief.
- c) **Orders of Income Tax Appellate Tribunal** – Since MAP and domestic remedy proceedings can be availed by the taxpayers simultaneously, there could be instances where the Income Tax Appellate Tribunal ('ITAT', **hereinafter**) in India passes an order in respect of the same disputes that are also being examined under MAP. Since the ITAT is an independent statutory appellate body, which is outside the administrative jurisdiction of the Indian tax authorities; and is the highest fact-finding body on tax matters, the CAs in India shall not deviate from the orders of the ITAT for the relevant year where the dispute is decided on merits. In such cases the CA of India would request the CAs of the treaty partners to provide correlative relief, if required. Such MAP cases shall be closed as having been resolved by a domestic remedy. However, if the order of the ITAT does not resolve the disputes but only sets them aside to be adjudicated afresh, then access to MAP would be provided again after the fresh adjudication by tax authorities, if requested for by the relevant taxpayers.

## II. Denial of Access to MAP

The CAs of India can deny access to MAP in some situations or in certain particular cases. Such situations and particular cases are as follows:

- a) **Delayed MAP Applications** - If the taxpayers make a MAP application to the CAs of India or to the CAs of the treaty partners after the expiry of the time period specified in the Article relating to MAP (corresponding to Article 25(1) second sentence of the OECD Model Tax Convention) of the relevant DTAA, the CAs of India would not provide access to MAP. This time period in most treaties is within three years from the first notification of the order/action of tax authorities that results or will result in taxation not in accordance with the relevant DTAA. India is committed to providing this 3-year time period and almost all the DTAs entered into by India has this time period. There are very few DTAs where this minimum time period is missing, and efforts are on to amend those DTAs to provide for the same.
- b) **Taxpayer's Objection Not Justified** – If the CAs of India come to a conclusion that the objection raised by the taxpayer on the action taken by tax authorities is not justified, they can deny access to MAP. However, before taking a decision to deny access to MAP in such situations, the CA of India having jurisdiction over the case would discuss the matter with the taxpayer and the CA of the treaty partner. However, such consultation shall not be interpreted as consultation as to how to resolve the case.
- c) **Incomplete MAP Applications/Documents/Information** – When an Indian taxpayer makes a MAP application in India in Form No. 34F, it is expected to be complete in all respects. If the CAs of India point out some errors or defects in the application or ask for additional information/documents, the Indian taxpayer should remedy the errors/defects and should provide the information/documents within a reasonable time period. There is no prescribed time period in rule 44G for the Indian taxpayer to comply with such additional requirements. Hence, the CAs of India are expected to provide adequate time to the taxpayer to remedy the errors/defects and provide the information/documents. Normally, a time period of 30 days for remedying the errors/defects and 90 days for providing the additional information/documents should be provided by the CAs of India to facilitate the process, which can be extended by the CAs depending on the facts and circumstances of the case.

In respect of MAP applications accepted by the CAs of treaty partners and subsequently notified to the CAs of India and accepted by the latter, rule 44G provides that the CAs of India can call for information/documents from the Indian taxpayers or their representatives. The rule does not prescribe any time limit upon the taxpayers or their representatives to furnish such information/documents. Hence, the CAs of India are expected to provide adequate time to the taxpayers or their representatives to provide the information/documents. Normally a time period of 90 days for providing the additional information/documents should be provided by the CAs of India to facilitate the process, which can be extended by the CAs depending on the facts and circumstances of the case.

- d) **Income-tax Settlement Commission** – Sections 245A to 245L in Chapter XIX-A of the Income-tax Act, 1961 provide for the constitution of a commission called the Income-tax Settlement Commission (**'ITSC', hereinafter**) for the settlement of cases. The ITSC is an independent statutory dispute resolution body. The process of settlement of disputes by ITSC is independent from the audit and examination functions of tax authorities. It is a voluntary process and a taxpayer has to apply for a settlement of its disputes. Once the application is accepted, the ITSC examines all aspects of the dispute and comes out with a settlement order. If the ITSC issues a settlement order, the same is binding on both the taxpayer and the tax authorities. The CAs of India shall not provide access to MAP to an Indian taxpayer who has already obtained a settlement order from the ITSC and such order covers the issues that are sought to be included in the MAP application. Similarly, the CAs of India shall not admit a case under MAP where the CAs of the treaty partners have accepted a MAP application by a taxpayer of their country or specified territory who (or its associated enterprise in India) has already obtained a settlement order from the ITSC and such order covers the issues that have been included in the MAP application accepted by the CAs of the treaty partners.

The CAs of India shall also not provide access to MAP to an Indian taxpayer or admit a case under MAP where the CAs of the treaty partners have accepted a MAP application by a taxpayer of their country or specified territory, if either of such taxpayer's settlement application has been admitted by the ITSC and the settlement matter is under examination by the ITSC. However, if the ITSC refuses to issue a settlement order, or issues an order without making a settlement, or the proceedings before the ITSC abate, and then the tax authorities take action which in the opinion of the taxpayer results or will result in taxation not in accordance with the relevant DTAAs, the CAs of India shall provide access to MAP to an Indian taxpayer or admit a case under MAP where the CAs of the treaty partners have accepted a MAP application by a taxpayer



of their country or specified territory.

- e) **Authority for Advance Rulings** - Sections 245N to 245V in Chapter XIX-B of the Income-tax Act, 1961 provide for the constitution of an authority called the Authority for Advance Rulings ('AAR', **hereinafter**) for giving advance rulings on questions/issues brought before it by a taxpayer. The AAR is an independent statutory dispute prevention body. The process of giving advance rulings by AAR is independent from the audit and examination functions of tax authorities. It is a voluntary process and a taxpayer has to apply for obtaining a ruling. Once the application is admitted, the AAR examines all aspects of the question(s)/issue(s) brought before it and pronounces its advance ruling on such question(s)/issue(s). If the AAR pronounces an advance ruling, the same is binding on both the taxpayer and the tax authorities. The CAs of India shall not provide access to MAP to an Indian taxpayer who has already obtained an advance ruling from the AAR and such advance ruling covers the issues that are sought to be included in the MAP application. Similarly, the CAs of India shall refuse to admit a case under MAP where the CAs of the treaty partners have accepted a MAP application by a taxpayer of their country or specified territory who (or its associated enterprise in India or the relevant party to the transaction on which the advance ruling is sought) has already obtained an advance ruling from the AAR and such advance ruling covers the issues that have been included in the MAP application accepted by the CAs of the treaty partners.

The CAs of India shall also not provide access to MAP to an Indian taxpayer or admit a case under MAP where the CAs of the treaty partners have accepted a MAP application by a taxpayer of their country or specified territory, if either of such taxpayer's application (or that of the relevant party to the transaction on which the advance ruling is sought) has been admitted by the AAR and the question(s)/issue(s) specified in the application is under examination by the AAR.

- f) **Direct Tax Vivad Se Vishwas Act** – Government of India brought a new tax dispute resolution scheme under the "Direct Tax Vivad se Vishwas Act, 2020" (henceforth 'VsV Act'), with the objective of reducing the pending income tax litigations at various appellate forums. The details in respect of eligibility and other provisions of the Act are contained in the Direct Tax Vivad se Vishwas Act, 2020 and various other circulars/ clarifications issued by the Board from time to time in this regard.

Sub-section 3 of Section 5 of the VsV act states as under:

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*“5(3) Every order passed under sub-section (1), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.”*

In this regard, where a resident tax payer opted for VsV Scheme for settlement of a case which involves resolution of transfer pricing adjustments on international transactions with its Associated Enterprises (AEs), and the same is accepted by the tax authorities of India, the CAs of the other countries or specified territories may accept MAP applications from their taxpayers (which are AEs of the Indian taxpayer), and notify the CAs of India. The latter would allow access to MAP but shall not deviate from the result arrived under the VsV. Instead, they would request the CAs of the treaty partners to provide correlative relief.

Further, the CAs of India shall not provide access to MAP to a non-resident taxpayer which has itself opted for the VsV scheme on the same issue, because the applicant has given up its legal right to access MAP in accordance with sub-section 3 of Section 5 of the VsV Act.

In addition to the situations and particular cases at (a) to (f) above, it is clarified **that no MAP access shall be provided in respect of issues that are purely governed by India's domestic law** and arise due to the implementation of India's domestic legal provisions.

## Part C

### Technical Issues

#### I. Downward Adjustment

The CAs of India can negotiate a MAP case with their counterparts and withdraw all or part of the adjustments made by tax authorities in India. However, the CAs of India cannot go below the returned income, as the same is expressly prohibited in Indian domestic law. In respect of transfer pricing cases, a plain reading of the provisions of

sub-section (3) of section 92 of the Income-tax Act, 1961 makes it clear that if the application of the arm's length price of an international transaction results in reducing the income chargeable to tax or increasing the loss, as computed on the basis of books of account maintained, then the provisions of the said section 92 shall not apply. The CAs of India have to adhere to this provision while negotiating transfer pricing MAP cases involving adjustments made by Indian tax authorities.

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 in full measure in accordance with treaty obligations.

## **II. Resolution of Recurring Issues**

The CAs of India may resolve recurring issues on the same principles, as adopted in a prior MAP resolution. However, they cannot resolve such recurring issues in advance of an order/action by the tax authorities in India. In other words, they do not have the power to prevent the tax authorities from making an order that is not in conformity with prior MAP resolutions in case of the same taxpayer and on the same issues.

## **III. Interest and Penalties**

In most of the disputes on the quantum of income, that are resolved under MAP, there are consequential issues of interest and penalty. The CAs of India do not have the mandate to consider such consequential issues and negotiate disputes arising from such issues. These are to be administered under the domestic laws. However, where the amount of interest and penalties are linked to the quantum of income, such interest and penalties shall be varied in the same proportion as the variation in the quantum of income due to a MAP resolution, in accordance with the domestic law. It may be noted that there are provisions of fees/penalty under Indian Income-tax Act which are not connected to the quantum of income and, accordingly, those would not be affected by the resolution under MAP.

## **IV. Secondary Adjustments**

India has a provision to make secondary adjustments in respect of cases where the primary transfer pricing adjustment has been made in financial year 2016- 17 or thereafter. Thus, the CAs of India would be obligated to make such secondary adjustments part of the MAP resolution in respect of cases pertaining to financial year 2016-17 or thereafter.

## **V. Bilateral & Multilateral APAs**

India has a well-established APA Program that includes unilateral, bilateral and

multilateral APAs. In respect of issues for which a bilateral or multilateral APA application has already been filed and accepted, MAP applications on the same issues for the same years should not be made by the taxpayers. If such MAP applications are made either before the CAs of India or the CAs of treaty partners, the CAs of India shall consult with their counterparts and not admit such MAP applications. However, if a bilateral or multilateral APA application fails to result in an Agreement for any reason, then a MAP application on the same issue and for the same years can be made either before the CAs of India or the CAs of treaty partners and the same may be accepted by the CAs of India if it satisfies all conditions of a MAP application.

#### **VI. Suspension of Collection of Taxes during the Pendency of MAP**

With a limited number of treaty partners, India has entered into a Memorandum of Understanding (MoU), under the ambit of the MAP Article, that provides for keeping the collection of taxes in a case under suspension during the pendency of MAP in that case. The taxes whose collection can be suspended are those that have arisen from the dispute that is under discussion in MAP. Taxpayers have to adhere to the terms and conditions mentioned in the MoU to be able to get the collection of taxes suspended.

In respect of MAP cases with countries where no such MoU exists in the DTAAs, the domestic law of India (including Instructions/Circulars issued by CBDT) shall govern the procedures related to suspension of collection of taxes or stay of demand.

#### **VII. Adjustment of taxes paid in pursuance of demand raised by an order under Section 201 of the Income-tax Act**

Payment of taxes (excluding interest) made as a result of demand arising out of an order passed under section 201 of the Income-tax Act on the Indian taxpayer (payer entity) may be allowed to be adjusted against the tax liability of the non-resident taxpayer (payee entity) in the event of resolution of MAP in the case of such non-resident taxpayer for the relevant issues and relevant years.

## Part D

### Implementation of MAP Outcomes

#### **I. Implementation of MAP**

India is committed to implementing MAP outcomes in each and every case. There are no legal or administrative impediments to implementing MAP outcomes. The only exception to this general rule is MAP cases in which an order of the ITAT (for the same assessment year that has been resolved under MAP) comes to the knowledge of the CAs of India after the MAP has been resolved or is pronounced after the MAP has been resolved but not yet implemented.

In respect of the above cases/situations, the MAP outcomes cannot be implemented and the CAs of India would inform their counterparts about the outcomes of the ITAT order and request them to provide correlative relief for the adjustments sustained by the ITAT, if any.

#### **II. Timelines**

The new rule 44G, which has been discussed earlier, provides clear timelines for the taxpayer and the tax authorities in India to implement a MAP that has been resolved by the CAs of both treaty partners. The taxpayer has been provided a time period of 30 days (from the date of receipt of a communication from the CAs of India) to convey its acceptance of the MAP resolution and to submit evidence of withdrawal of domestic appeals. Conveying of acceptance of the MAP resolution within this time period is mandatory and failure to do so may render the MAP resolution unimplementable. Similarly, the Assessing Officer has been provided a time period of one month (from the end of the month in which he receives the letter of the CA of India having jurisdiction over the case providing details of the resolution) for giving effect to the MAP resolution. These timelines are expected to quicken the MAP implementation process and make it more efficient and effective.

While intimating the Pr. CCIT concerned about the details of resolution agreed under the MAP, the CAs of India shall mark a copy of their letter to the Assessing Officer, her controlling officer, the CIT/PCIT and CCIT concerned, and to the taxpayer to ensure expeditious implementation.

#### **III. Information to CAs of India**

The Assessing Officer, in addition to sending a copy of the order giving effect to the MAP resolution to the CA of India having jurisdiction over the case, must also provide

information regarding the amount/date of payment of taxes by the taxpayer or amount/date of issue of refund to the taxpayer (as the case may be), withdrawal of appeals filed by the tax authorities, and any other relevant details.

## **Part E**

### **Applicant's responsibilities**

#### **I. Responsibility of making true disclosure**

A taxpayer resident in India can make an application to the CA of India having jurisdiction over the case if it considers that the actions of the tax authorities of the treaty partner resulted or will result in taxation not in accordance with the relevant tax treaty. Such an application has to be made in Form No. 34F in accordance with rule 44G.

In item (k) of Form 34F, the applicant should provide all the facts of the case that can materially affect the negotiation process. For instance, if adjustments have been made to the same international transaction by Indian tax authorities as well as its treaty partner's tax authorities, the CAs of the two countries can be blind-sighted in negotiations if the applicant only mentions adjustments in one jurisdiction and leaves out the crucial fact of adjustments in the other jurisdiction.

#### **II. Responsibility to provide up-to-date information**

Good faith action is the hallmark of alternate dispute resolution under MAP. The applicant must keep the CAs 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. Making all relevant documentation and information accessible to a competent authority, in good faith, will assist in the smooth and efficient operation of the MAP process.

This guidance has dealt with the interplay of MAP with other processes such as regular tax appeals, tax settlements, and domestic dispute resolution schemes. The applicant best knows about its status in other fora. The applicant should promptly provide updated status of proceedings in other fora that could affect the MAP process.

The MAP guidance, as above, may be adhered and referred to by taxpayers, tax practitioners, tax authorities in India and CAs of India. If any element of the MAP guidance comes in conflict with the domestic legislation, rules, instructions, and circulars in India or with the DTAAs entered into by India, the provisions of such domestic legislation, rules, instructions, and circulars or the DTAAs, as the case may be, shall prevail.