

Indian Tax Administration relaxes norms for MAP and bilateral APAs

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Executive summary

The Indian Government previously had taken the position that the Mutual Agreement Procedure (MAP) for transfer pricing (TP) disputes and bilateral Advance Pricing Agreements (APAs) could not be permitted where Article 9(2) or an equivalent article was not present in the double tax avoidance agreement (DTAA) with the other country (the jurisdiction of the group entity having transactions with India).

Now, through a press release issued on 27 November 2017,¹ the Indian Government has stated that the MAP for TP disputes and the bilateral APA process would be available to taxpayers even where Article 9(2) or the equivalent is not present in the DTAA with the taxpayer's jurisdiction.

This Alert summarizes the key considerations and implications of this revised approach.

Detailed discussion

India previously had taken a view² that in the absence of a correlative adjustment clause in a DTAA [equivalent of Article 9(2) of the Organisation for Economic Co-operation and Development (OECD) / United Nations Model Convention], it would not consider a MAP for TP disputes or a bilateral APA for transactions with that DTAA partner.

The OECD Model Tax Convention on Income and Capital 2014³ recommends use of Article 25(3) [allowing MAP for double taxation or taxation not as per DTAA matters] for allowing a correlative adjustment even where Article 9(2) is not available. However, India did not agree with this mechanism. Accordingly, this approach denied access to MAP for TP disputes and bilateral APAs to taxpayers located in some of India's larger trading partners such as France, Germany and Italy.

Further, with the signing of the Multilateral Instrument (MLI) by India, it was expected that access to MAP would be available, however this would be subject to the other country notifying the DTAA with India and ratification which would be completed in 2018 or 2019.

With the 27 November press release, for the first time MAP for TP disputes and bilateral APAs are now possible with Germany, France and Italy, among other countries.

Timelines

MAP

Typically, the limitation period to invoke MAP would be prescribed in the DTAA with India, for example, the Indian DTAA with both Germany and France, respectively, prescribe a timeline of three years from the date of receipt of notice of the action which gives rise to taxation not in accordance with the DTAA. The Indian Government generally considers the start of such period from the date of receipt of the final tax audit order.

To illustrate, assuming the MAP limitation period prescribed in the DTAA is three years and the first appeal in India against the adjustment was before the alternate dispute resolution panel,* the latest coverage period/MAP filing deadline would be:

Financial year ⁴	Last date for final audit prescribed under the India law (for normal audit)	MAP filing date
2008-09	31 January 2014	31 January 2017
2009-10	31 March 2015	31 January 2018

* The timelines will be shorter if the litigation in India was before the first appellate authority (i.e., Commissioner of Income Tax, Appeals)

The above table illustrates the latest date to invoke MAP for disputes under regular tax audit. However, taxpayers may need to consider the actual date of receipt of the tax audit order to identify the MAP filing deadline.

APA

The taxpayer can cover five prospective years:

- For an ongoing transaction the period starts following the year in which the APA application is filed
- For a new transaction the period starts from the date of the transaction where the APA is filed before such date

Further, a roll back for the immediately preceding four years for similar transactions is also available, thereby obtaining certainty through the APA for a maximum period of nine years.

Implications

Generally multinational enterprises (MNEs) with a presence in India have faced TP disputes during tax audits. While India has a full-fledged appeal mechanism, it often takes several years to resolve the disputes under the traditional litigation route.

In relation to MAPs filed in other countries for tax disputes with India, there has been reasonable movement in resolving such disputes with 100+ MAPs⁵ with the US alone being resolved in 2016. Further, India introduced the APA program in 2012 and has already signed 186 APAs⁶ with fairly reasonable outcomes.

MNEs with a presence in India should identify transactions either subject to a TP dispute or which may be challenged and consider a MAP and APA (as relevant) to resolve such disputes bilaterally.

Endnotes

1. [CBDT press release dated 27 November 2017](#).
2. See EY Global Tax Alert, [Indian Government releases Advance Pricing Agreement Guidance Booklet](#), dated 28 May 2013.
3. OECD Model Tax Convention on Income and Capital, 2014 - Page 373, Para 12.
4. Financial year for tax purposes in India is 1 April to 31 March.
5. [See CBDT press release dated 17 November 2016](#).
6. [See CBDT press release dated 1 December 2017](#).

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EYG no. 06890-171Gbl

1508-1600216 NY
ED None

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