

## Nigeria issues guidelines on Mutual Agreement Procedure

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### Executive summary

Nigeria's Federal Inland Revenue Service (FIRS), pursuant to its powers under Section 8 (1) (t) of the *FIRS Establishment Act No. 13 2007*, issued detailed guidance (the Guidelines) on the Mutual Agreement Procedure (MAP) in Nigeria and Certificate of Residency Forms for taxpayers who intend to take advantage of the MAP.

The Guidelines, which were released on 21 February 2019, represent a significant step towards implementing the recommendations of the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 14 (Making Dispute Resolution Mechanisms More Effective).

The MAP is a means through which competent authorities (CAs) interact with each other to resolve international taxation disputes in instances where there are inconsistencies regarding the interpretations or application of the various Double Tax Treaties (Treaties) between Nigeria and its treaty partners.

Furthermore, MAP may also be employed by a CA to review requests for corresponding adjustments aimed at reducing the incidence of double taxation arising from transfer pricing adjustments effected by the other CA in respect of transactions between associated companies of a multinational enterprises (MNE) group within the scope of the Treaties.

The Guidelines provide guidance to taxpayers (Nigerian resident companies or individuals) on the procedures for obtaining assistance from the Nigerian CA. Accordingly, taxpayers and permanent establishments (PEs) that fall within the scope of the Treaties can now apply for the MAP through the CA in Nigeria. However, due to the limited treaty network of Nigeria, its benefits are accessible to only a limited number of taxpayers. Nevertheless, there are still several treaties yet to be ratified which should present additional opportunities for MNE groups operating in Nigeria to resolve international tax disputes.

This Alert summarizes the key highlights of the Guidelines.

## Detailed discussion

### Eligibility for MAP

A Nigerian resident (taxpayer) or a person resident in a Treaty Country may apply for MAP, where it considers that the actions of either or both Nigeria and its Treaty Country's tax authorities, has resulted, or will result in taxation not in accordance with the provisions of the Treaty.

Some actions that may require MAP are listed below:

- i. Transfer Pricing (TP) adjustments
- ii. Dual residence status
- iii. Imposition of withholding tax at a rate higher than what is allowed by the Treaty
- iv. Attribution of profits to a PE
- v. Uncertainty in characterization or classification of income arising in the other jurisdiction, or lack of clear understanding of a given treaty provision

### Time limits for requesting access to MAP

The time limit for presenting a case for the CA's assistance depends on the timeline contained in the relevant Treaty. However, where the time limit for presenting a case is not specified in the Treaty, the CAs will agree on the applicable time limit. Nonetheless, the case, including cases of adjustments made during a FIRS tax audit, must be presented to the Nigerian CA no later than three years after Notice of Assessment is received.

### MAP request process

Taxpayers seeking a MAP should first carry out a pre-filing consultation with the FIRS either in form of a meeting or through written correspondences. The request should be

accompanied by documents providing a summary of the taxation, facts that led to the taxation and reasons for the MAP request. Upon review by the authorized CA, the taxpayer will be notified to submit a formal request.

All formal requests for MAP should be made in writing, addressed to the executive chairman (delegated competent authority) of the FIRS and copied to the director of tax policy and advisory department. For specific MAP cases involving transfer pricing, the request should be copied to the Director, International Tax Department of the FIRS.

The Nigerian CA may deny any request where the taxpayer has failed to provide complete and accurate information.

### Interaction between MAP and the domestic appeal process

Presenting a case to the Nigerian CA will not deprive a person from its right of appeal under relevant Nigerian tax laws. The usual procedures for appeal under the Nigerian tax laws shall apply. However, while the domestic legal remedies are still available, the Nigerian CA will require that the taxpayer agrees to the suspension of these remedies if the MAP request is accepted. Where the taxpayer is not satisfied with a MAP ruling, legal remedy may be sought thereafter.

Similarly, when an Administrative panel has taken a decision on a tax matter, it does not hinder the taxpayer from pursuing a MAP. However, if a court decision has been made concerning a tax matter, the decision becomes final and binding, hence the taxpayer can no longer invoke a MAP.

### Confidentiality of taxpayers information

All information obtained during the MAP process is protected by the confidentiality provisions under the relevant tax laws and the applicable treaty. However, MAP rulings of a general nature may be published.

### Tax collection during MAP

A MAP request does not affect the requirement to pay the tax liability or collection action by the tax authority.

### Implementation of a MAP decision

If a mutual agreement has been reached on a case, the taxpayer shall make a request for refund of taxes or reassessment of tax to reflect the decision of the MAP within three months of the decision but not later than six years after the MAP decision.

On application by a taxpayer, the FIRS shall reassess the taxpayer's return with a view of reflecting or giving effect to the MAP decision.

## Implications

The release of the Guidelines clearly demonstrates the willingness of Nigeria to align with the recommendations under the OECD BEPS Action 14. However, unlike the requirement to defer collection actions pending the conclusion of MAP, it appears an application for MAP in Nigeria will not suspend payment or collection of tax in disputes.

The MAP is expected, among other benefits, to be a quicker and less demanding alternative to the domestic litigation process in resolving international tax disputes given the limited inputs required of taxpayers.

It is not apparent from the Guidelines that a foreign company can request MAP from the CA of Nigeria. However, based on requirements to provide the Nigerian taxpayer's identification number in the certificate of residence form for use by foreign residents, it would appear the MAP request is restricted only to PEs. Accordingly, this reduces the scope of Action 14 which allows taxpayers, whether foreign or local, to apply to either a CA or both CAs of the Treaty Countries.

Ordinarily, issues on transfer pricing are not explicitly addressed in the Treaties. However, the MAP in Nigeria specifically accommodates corresponding adjustments resulting from transfer pricing cases as one of the actions that may require MAP. The scope of the MAP is limited to only treaty countries.

Notwithstanding the time limit of three years after receipt of notices of assessment to apply for MAP, the six-year statute of limitations should not affect the MAP request if the issues to be resolved relate to years covered in the assessment notices.

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