Mutual Agreement Procedure Guideline

2021

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1. Mutual Agreement Procedure

Mutual Agreement Procedure ("MAP") is governed by the provisions of the OECD Model Tax Convention under Article 25 and the UN Model Tax Convention under Article 25. It is a procedure that allows designated representatives from the contracting states to engage in resolving international tax disputes which involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of an Avoidance of Double Taxation Agreement ("DTA") (or an Avoidance of Double Taxation Convention, as the case may be).

MAP is carried out directly between the competent authorities of both Contracting States and the competent authorities should endeavor to resolve any difficulties or doubts arising as to the interpretation or application of the respective DTA but they are not obliged to achieve a result in eliminating double taxation.

The purpose of this guideline is to provide guidance on MAP, which can be initiated when the actions of one or both Contracting States have resulted or will result in taxation not in accordance with the provisions of the respective DTA.

2. Objective of MAP

To avoid or resolve any potential disputes, or problems of double taxation caused by the actions of one or both of the Contracting States which result or will result in taxation not in accordance with the provisions of the respective DTA.

3. Persons eligible to request the initiation of a MAP

A taxpayer who is a resident of Thailand, as defined by the DTA, is eligible to request a MAP to the Thai competent authority in accordance with the MAP Article when he considers that the action of one or both Contracting States result or will result in taxation not in accordance with the respective DTA provisions. Therefore, the Revenue Department will only accept a MAP request submitted by the Thai resident.

4. Competent authority

In the case of Thailand, the Director - General of the Revenue Department is the authorized competent authority of the Minister of Finance.

5. Initiating a MAP

A taxpayer may request the initiation of the procedure, to present its position on the case, and to make comments on the relevant facts and legal issues relating to the procedure itself and to the outcome thereof, in writing. The Revenue Department then initiates a MAP with the competent authority of the Contracting State in which the respective DTA is in effect. The request to initiate a MAP may be made irrespective of the legal remedies available under the national laws of the States. The examples of circumstances that a taxpayer may make a MAP request are as follows:

5.1 The taxpayer is deemed to be a resident of both States according to the respective DTA.

5.2 The taxpayer disagrees with the tax authorities on the existence of a permanent establishment or on the characterization of certain items of income for the purposes of the application of the double tax treaty.

5.3 The taxpayer disagrees with the tax authorities on the interpretation and application of provisions or principles of the double tax treaty.

5.4 Transfer pricing adjustments between associated enterprises of different States, has occurred or will occur.

5.5 Adjustments of profits attributable to a permanent establishment situated in a State of an enterprise of the other State have occurred or will occur.

Note: Item 5.1 – 5.5 are examples of circumstances taxpayer may make a MAP request. Taxpayer may submit MAP request according to the respective DTA.

Taxpayers may submit MAP requests that span multiple tax years where the relevant facts and circumstances are the same. However, note that only year(s) that fall within the relevant time limits will be considered by the Competent Authority.

If a taxpayer would like to avoid any potential disputes, or problems of double taxation caused by transfer pricing assessment, the taxpayer may apply for Bilateral Advance Pricing Arrangement (Bilateral APA). A taxpayer can find the APA guideline at https://www.rd.go.th/fileadmin/download/GUIDANCE-ON-APA-PROCESS-EN.pdf.

6. Form and content of the taxpayer's request

The request to initiate a MAP must be submitted by the taxpayer in writing and in Thai language. There is no specific template or form for the submission of the request. The request should be accompanied by all relevant documents and information on the case.

The request shall contain the following information:

• Identification and contact details of the person that submits the request (name, address, tax number);

• Identification of other persons concerned by the request;

• Power of attorney, if lodged by an authorized person;

• The other country/countries concerned;

• Detailed information about the facts and circumstances of the case (including the amount of tax covered by the request in THB and the other foreign currency; details about the relationships between the taxpayer submitting the request and the other persons directly involved; annual financial statements for the fiscal periods to which it refers, where applicable);

• The periods for which double taxation or taxation not in accordance with the provisions of a respective DTA has occurred;

• Detailed information of the actions whereby double taxation or taxation not in accordance with the provisions of the respective DTA occurs or will occur, if any. Examples of such documents are tax assessment report and unilateral ruling;

• The analysis and the supporting reasons for which the person considers that one or both of the Contracting States' actions result or would result in taxation which is not in accordance with the provisions of the respective DTA;

• Detailed information on any action taken to avoid double taxation in Thailand or in the other State (correspondence with the tax authorities, objections, etc.);

• Detailed information on any remedy sought in Thailand or in the other State, if used;

• Information on whether a request for a MAP was also submitted to the competent authority of the other State;

• Statement confirming the accuracy and completeness of all information and documents in the MAP request and that the taxpayer will assist the competent authority by providing any other information or documents requested by the competent authority. The taxpayer has to clarify all facts and circumstances relevant to the case, provide evidence, if necessary, and provide all relevant data required for the conduct of the MAP;

• Where applicable, evidence that the matter in question, in connection with which the request for the initiation of the MAP has been made, has been addressed in an advance tax ruling, advance pricing arrangement or judgment as well as copies of the relevant decisions;

• Any other information that would help resolve the case;

• If possible, copies of the information and documentation submitted should also be supplied in electronic format.

For the purpose of resolving a MAP case, the taxpayer may have to provide some of the above documents in English, if necessary.

7. Place and time limit for submitting the request

The request to initiate the MAP must be submitted in Thai to the Revenue Department of Thailand, addressing the Director - General.

The address is as follows:

The Revenue Department

90 Soi Phaholyothin 7, Phaholyothin Road, Phayathai, Bangkok 10400

The request must be submitted to the Revenue Department within time limit (as specified in the respective DTA) from the first notification of the action resulting in taxation that is not in accordance with the provisions of the respective DTA. The time limit, however, starts from the moment the Revenue Department or the foreign administration has materialized its taxation intention[1].

8. Eligibility of the request to initiate a MAP

The competent authority verifies whether the request is eligible and the taxpayer's objections are justified before initiating a MAP.

The request made by the taxpayer is eligible when all of the following requirements are met.

(1) the request has been made by an authorized person;

(2) the request has been submitted to the relevant competent authority;

(3) the request has been submitted within the time limit stated in the respective DTA;

[1] Taxation intention includes a tax notice, tax or audit report, or any other notices in accordance with its legislation and has informed the taxpayer thereof under the procedure provided for in its law.

(4) the request has been submitted for (a) fiscal period(s) for which the respective DTA was in force.

The taxpayer’s objection is justified when all of the following requirements are met.

(1) the taxpayer has provided the adequate information to allow the competent authority to assess whether taxation in one or both states is contrary to the provisions of the respective DTA;

(2) the taxpayer’s request concerns matters relating to the application or interpretation of the provisions of the respective DTA;

(3) the taxpayer has managed to justify his position based on the evidence presented that taxation not in accordance with the provisions of the respective DTA has occurred or will occur.

9. Processing a MAP

9.1 MAP initiated by the competent authority of Thailand

The competent authority initiates a MAP when all of the following conditions are met:

(1) the request made by the taxpayer is eligible;

(2) the objection of the taxpayer is justified;

(3) the competent authority cannot unilaterally remove taxation that is not in accordance with the respective DTA.

The Revenue Department conducts a MAP directly with the competent authority of the Contracting State concerned and the correspondence between the competent authorities of both countries is confidential and not shared with the taxpayer.

9.2 MAP initiated by the competent authority of the Contracting State

The Revenue Department examines the request to initiate the procedure to verify if the requirements for its initiation have been met. After this verification, the Revenue Department informs the competent authority of the Contracting State of Thailand’s position on the matter in writing, as soon as possible.

The dispute between the two Contracting States may be handled either by means of correspondence or through (a) meeting(s) between representatives of the competent authorities of the two Contracting States. During the procedure, both Contracting States defend their positions with a view to reach an agreement on the dispute.

For the purpose of resolving a MAP case, all information collected by the competent authorities is subject to the rules on confidentiality as laid down in the provisions on exchange of information provided for in the respective DTA.

10. Implementation of the agreement reached under a MAP

A MAP is completed in writing, by means of an exchange of a final confirmation of the agreement reached by the Revenue Department and the Contracting State concerned.

The competent authority informs the taxpayer of the outcome of the procedure and the actions to take, as soon as it is completed.

The taxpayer must state in writing that he accepts the agreement reached and its implementation and that he has terminated all initiated legal procedures and that he will refrain from taking any subsequent legal action for the agreement to be implemented.

If the competent authorities cannot reach an agreement, the procedure will not be successful. In such a case, the taxpayer concerned will be informed that no agreement has been reached.

11. A MAP and domestic procedure

The taxpayer can submit a MAP request irrespective of the domestic remedies provided by the internal legislations of both Contracting States. The submission of such request does not preclude the opportunity for the person to benefit from any other legal remedies, e.g. appeal against acts and actions of the tax administrations, which the two Contracting States domestic laws provide in order to ensure protection against unlawful income taxation.

In Thailand's case, the above applies only to the administrative appeal of acts and actions of the Revenue Department. In Thailand, court decisions are binding and the Revenue Department cannot reach an agreement with the tax administration of the Contracting State on taxation that is not in accordance with the decision if the court decisions have already entered into force, even where such taxation is more favorable to the taxpayer.

The fact that the court has ruled on the case to which the application relates, does not itself prevent the initiation of a MAP. However, for the above reasons, the Thai competent authority cannot hold a different position and apply an agreement, which deviates from the Thai court decision that has entered into force.

The payment of outstanding taxes, applicable surcharges or penalties by a taxpayer whose MAP request is under consideration of Competent Authorities, will still be subject to the provisions of the Revenue Code.

12. Contact point

International Tax Division (ITD)

Address: The Revenue Department of Thailand, 3rd floor,

90 Soi Phaholyothin 7, Phaholyothin Road, Phayathai, Phayathai, Bangkok 10400 Thailand

Tel. +662-272-9821

Email: MAPThailand@rd.go.th

13. The importance of cooperation from taxpayer

The success of the MAP process depends on co-operation from taxpayers. Taxpayers should therefore:

(1) Act in good faith throughout the process;

(2) Comply with all the requirements pertaining to the MAP application process.

(3) Provide access to all relevant documentation.

(4) Be forthcoming in providing complete and reliable information and good quality analysis relating to the MAP applications;

(5) Adhere to all the stipulated timelines when providing any clarification, information and analysis that may be requested by the Revenue Department and the relevant foreign competent authorities;

(6) Update the Revenue Department on all information that they have provided to or received from the relevant foreign competent authorities on a timely basis; and

(7) Provide the same set of information to the Revenue Department and the relevant foreign competent authorities.
