

## MAP for transfer pricing dispute resolution An alternative or a complement to litigation

Domestic taxpayers can now propose mutual agreement procedure (MAP) to the director general of tax (DGT) regarding the transfer pricing (TP) adjustments imposed or likely to be imposed by the DGT, that they believe to result in double taxation. Long kept in the dark, the route has been made clear with the issuance of PMK 172/2023 regarding the application of the arm's length principles on affiliated transactions in late last year (PMK 172). Upon receiving the proposal, the DGT is bound to proceed with a further MAP proposal to the competent authority (CA) of the relevant double tax agreement (DTA) partner if the case qualifies for MAP. This is one thing missing in the previous MAP regulation (PMK 49/22019) replaced by PMK 172.

MAP is a procedure embedded in most DTAs under which the contracting states to a DTA endeavor, pursuant to a complaint filed by their residents against the action of either state's tax administration that would result in taxation not in accordance with the DTA provisions, to resolve the problem through their respective CA. TP adjustment-induced double taxation is not the only such problems, but stands out as the most contentious one. Under PMK 172, MAP is not only an alternative to the remedies available under domestic tax law (objection, appeal, and case review request), but also a complement to them. This means you can pursue MAP irrespective of whether you are contesting the same case in an objection, an appeal, and/or a case review request (CRR).

As far as TP adjustment is concerned, a MAP proposal should be submitted to the DGT through the international tax directorate. Timeline barely matters: you have three years of the DGT's action date to submit the proposal. The action includes, among others, the DGT's steps to impose an unassailable TP adjustment in a tax audit. Hence, you can submit a MAP proposal as early as during a tax audit. Alternatively, you can do it later, after the issuance of the tax assessment letter or the decision objection letter, or at any stage during the litigation process pertinent to the tax assessment letter which includes the disputed TP adjustment.

Once received, the DGT has to respond your proposal in writing in no later than a month, with a statement whether your proposal is accepted or dismissed – depending on whether or not your case qualifies for MAP and your proposal satisfies the relevant requirements. These should not be a big deal as the requirements are virtually of an administrative nature and TP adjustment-induced double taxation does lie within the MAP area. If no written response is issued within a month, your proposal is deemed as being accepted and the DGT is bound to further propose a MAP proposal to the CA of the relevant DTA partner.

By submitting the MAP proposal to the DTA partner, the DGT puts the MAP on your case in motion. Subject to the DTA partner's acceptance, the next phase would be a string of negotiations between the DGT in its capacity as the Indonesian CA and the CA of the DTA partner, which may continue for a maximum of 24 months. This can be extended for up to 24 months on the condition that an initial agreement has been obtained between the DGT and the DTA partner before the end of the first 24-month regarding the existence of the affiliated transactions and the approach to take to determine the arm's length character of the transfer prices for the transactions.

The negotiations are to be conducted by the DGT communicating directly with the DTA partner either by way of face-to-face meetings, telephone discussions, video calls, etc. During this phase, you may be asked by the DGT or the DTA partner to provide relevant supporting documents to substantiate your case and/or called upon to discuss your case with the DGT. Site visits to your premises and a special audit by the DGT may also be in the cards.

### Mutual Agreement is reached on time

Suppose the DGT can finally reach a Mutual Agreement (MA) with the DTA partner on time. This could be an outright cancellation of the (proposed) TP adjustment or a reduction of it. If so, the DGT is bound to notify you of the outcome no later than 14 days of the MA date. You will also be asked to provide the DGT with the following documents:

- A statement letter, in no more than 14 days, that you do not pursue any remedy to resolve the TP dispute other than the MAP; or
- A statement letter, in no more than eight months, that you have cancelled or modified the on-going appeal or CRR which includes the disputed TP adjustment covered in the MAP pursuant to the MA with the Tax Court or the Supreme Court's Approval Letter attached to it.

The delivery of the statement letter to the DGT on time is key to the implementation of the MA missing of which risks the MA falling apart. Once the statement letter is received, the DGT will proceed to notify to the DTA partner CA that the MA can be implemented. Subsequently, in no more than a month, the DGT will issue to you a Mutual Agreement Decision Letter (MADL) which, by law, serves as the basis for tax refund or tax collection relating to the tax year or tax period to which the disputed TP adjustment belongs.

How the MADL will take effect will depend, as shown below, on when it is issued vis-à-vis the corresponding tax assessment letter and whether there is any domestic tax law-provided remedy being pursued to resolve the TP dispute. A few examples are as follows:

- *The MADL is taken into account in the tax assessment letter.* This will apply if the MADL is issued, for instance, during a tax audit. Unless the MADL cancels the entire proposed TP adjustment, the arrangement will call for the taxpayer to officially make a disclosure of the incorrect tax calculation in its tax return pursuant to the issuance of the MADL. This appears equivalent to accepting a certain amount of the (proposed) TP adjustment raised in a tax audit.

- *The MADL is taken into account in the “revised” tax assessment letter.* This will apply if the MADL is issued after the issuance of a tax assessment letter which the taxpayer does not contest in an objection or a request for reduction or cancellation of incorrect tax assessment letter. “Revised” in this case is to mean the DGT recalculates the amount of tax due covered in the tax assessment letter. Please note that filing an objection letter or a request for reduction or cancellation of incorrect tax assessment letter which includes the TP disputed adjustment but subsequently falling apart because of formality reasons is equivalent, in this regard, to not filing any.
- *The MADL is taken into account in the “revised” tax objection decision letter.* This will apply if the MADL is issued after the issuance of an objection decision letter which the taxpayer does not contest in an appeal. “Revised” in this case is to mean the DGT recalculates the amount of tax due covered in the tax objection decision letter. Please note that filing an appeal pertinent to the TP disputed adjustment but subsequently falling apart because of formality reasons is equivalent, in this regard, to not filing any.
- *The MADL is taken into account in the execution letter of the appeal or CRR verdict.* Suppose a tax assessment letter containing DGT various adjustments, including a TP adjustment, has been issued to a taxpayer. Suppose further that the taxpayer is contesting the DGT adjustments covered in the tax assessment letter in a tax appeal or a CRR, and at the same time pursuing MAP on the TP adjustment. In such a situation, if the appeal verdict or the CRR verdict comes first before the issuance of the MADL dealing with the TP adjustment, then the DGT will take into account the MADL in the execution letter of the appeal verdict or the CRR verdict

## MAP ends without an agreement

Please note that MAP may end up with an outcome not as you have expected: the DGT may finally agree to disagree with the DTA partner. This is due in part to the very nature of the MAP itself which, in the case of Indonesian DTAs, rule out resorting to an arbitrage. The DTAs do urge the contracting states, under the MAP provisions, to follow up their residents’ complaint about the double taxation resulting from the action of the tax administrations and endeavor to resolve the problem, but this does not extend to guaranteeing the very resolution.

Time matters, too. If nothing is agreed up to the end of the specified time span (2X24 months), the MAP will come to an end. The passage of the statute of limitation will automatically halt the on-going MAP. The reading of an appeal verdict containing the case dealt with in the MAP does not necessarily stop the MAP. But it is apparently not worth continuing it because the DGT will lock its position in accordance with the appeal verdict. Moreover, MAP is completely not available for tax years or tax periods over which the taxpayer has joined a tax amnesty program governed by the Indonesian tax law.

Please contact us to get more insight.

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