



In This Issue

- *What is a MAP based on a Tax Treaty?*
- *What triggers a MAP?*
- *Reasons for a MAP request*
- *Procedures and Information Required for processing MAP*
- *Rejection or Termination of MAP process*
- *MAP negotiations*



Guidelines for Implementation of the Mutual Agreement Procedure (MAP) – Further development in application of tax treaties

The focus of the Director General of Taxation (DGT) has been increasingly directed at tax treaty abuse and cross-border related party transactions. After issuing DGT Regulations Nos. 61 and 62 as revised by DGT Regulations Nos. 24 and 25 regarding the rules for claiming tax treaty relief and the prevention of tax treaty abuse respectively (Tax Flash No. 5/2010), in early November 2010 the DGT issued Regulation No. 48/PJ/2010 as guidance on the implementation of MAP (PER-48).

What is a MAP based on a Tax Treaty?

Most bilateral tax treaties typically include an article which establishes the mutual agreement procedures for eliminating double taxation and resolving conflicts in interpretation of the treaty. The MAP article in tax treaties allows the tax authorities of the treaty countries to interact with the intention of resolving international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a treaty. However, most MAP articles do not compel tax authorities to reach an agreement and resolve tax disputes. They are only obliged to make their best endeavours to reach an agreement.

What triggers a MAP?

Under Article 2 of the PER-48 above, the MAP is conducted as a result of:

1. a request proposed by a resident taxpayer of Indonesia;
2. a request proposed by an Indonesian citizen who has become a resident taxpayer of a tax treaty partner country as a result of non-discrimination provision in the applicable treaty ;
3. a request proposed by a treaty partner country; or
4. matters considered important by and based on the initiatives of the DGT.

Reasons for a MAP request

The request for conducting a MAP by an Indonesian resident taxpayer can be made, among other reasons, when:

- a. the Indonesian resident taxpayer is subject to or will be subject to tax as a result of conducting transfer pricing practices in relation to transactions made with a related taxpayer in a treaty partner country;
- b. the Indonesian resident taxpayer believes that there is an action by a treaty partner country which has resulted or will result in tax imposition which is not in accordance with the relevant tax treaty in relation to the existence of or income from a permanent establishment in the treaty partner country concerned;
- c. the Indonesian resident taxpayer believes that there is an action by a treaty partner country which has resulted or will result in tax imposition which is not in accordance with the relevant tax treaty regarding tax withholding in the treaty partner country; or
- d. the Indonesian resident taxpayer who is also considered a resident taxpayer of another treaty country requests a consultation to determine its status as a taxpayer of one of the treaty countries.

Based on the wording of the regulation, it is not clear whether reason (a) above will include situations where the DGT has made transfer pricing adjustments to transactions conducted by an Indonesian company with a related party in a treaty country (e.g., transactions between an Indonesian subsidiary and its foreign parent company). One of the information requirements for a MAP request by an Indonesian resident taxpayer (which we have summarized below) is to include an explanation of the adjustments made by an overseas tax authority. This implies that the only situation in which an Indonesian taxpayer may initiate the MAP process from a transfer pricing adjustment is where the value of a transaction with an overseas related party has been adjusted by the tax authorities in the foreign jurisdiction.

Common practice for transfer pricing related MAP requests in other countries is that simultaneous requests should be filed in both the country where the adjustment was made by the tax authorities and in country of the counter-party to the transaction that was adjusted.

A request to conduct a MAP can be made by an Indonesian citizen that has become a resident taxpayer of a tax treaty partner country if it has been subject or will be subject to greater tax liabilities in the other treaty country compared to the tax imposed by the treaty partner country in the case of its own citizens (a non-discrimination case in accordance with the applicable treaty).

A treaty partner country may request to conduct a MAP, in the following cases, among others:

- a. the (Indonesian) DGT issues tax assessment letters to a foreign taxpayer that has business activities or conducts operating activities through a permanent establishment in Indonesia, which are considered not to be in accordance with provisions in a relevant tax treaty;
- b. there is a Transfer pricing Adjustment in Indonesia in relation to the foreign taxpayer that conducts business or operating activities through a permanent establishment in Indonesia;
- c. a tax treaty partner country asks for Corresponding Adjustments in relation to the Transfer Pricing adjustments made by a tax authority of the treaty partner country to its resident taxpayer that has related party transactions with an Indonesian resident taxpayer;
- d. where tax is withheld by an Indonesian resident taxpayer in relation to income sourced in Indonesia which is considered not to be in accordance with provisions in a relevant tax treaty; or
- e. where the domicile country of a taxpayer that has status both as an Indonesian resident taxpayer and as a resident taxpayer of the treaty partner country (Dual Residence) must be determined.

Interestingly, the list of circumstances in which a treaty partner may request MAP does not include situations in which a foreign taxpayer has asked its tax authority to invoke MAP to provide relief from double tax that has arisen due to a transfer pricing adjustment made by the DGT on transactions with a related party in Indonesia. As mentioned above, it is also not clear whether requests of this nature can be made by the Indonesian resident taxpayer under article 2(a). As a result, PER-48 leaves taxpayers who wish to request MAP as a result of transfer pricing adjustments made by the DGT in an uncertain position.

A taxpayer's rights under Indonesia's treaties should include the ability to request MAP relief from double tax in cases where the DGT has made transfer pricing adjustments to transactions with related parties in treaty partner countries. The tax treaties take precedence over domestic regulations, so PER-48 should not restrict the ability of taxpayers in this position to request MAP. However, clarification is required on the process that should be followed. PwC is seeking clarification from the DGT on this important issue.

Where a foreign taxpayer and related party in Indonesia are contemplating submitting a MAP request, they will also need to consider the MAP guidelines and requirements in the foreign jurisdiction.

Procedures and Information Required for processing MAP

A request for a MAP must be completed by supporting documents and submitted to the DGT within a certain period as stated by the prevailing tax treaty. Most tax treaties state that the period is within three years of the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty. Under PER-48, the said time limit is calculated after an Indonesian taxpayer has been charged or will be charged tax which is not in accordance with the provisions of the tax treaty.

An Indonesian resident taxpayer requesting a MAP from the DGT through its Tax Service Office must provide certain information or explanations, regarding, amongst other matters:

- Actions taken by a resident taxpayer or the tax authority of a tax treaty partner country, which are considered not to be in accordance with the tax treaty provisions.
- For Transfer Pricing cases, the name, address, type of business, and the taxpayer identification number of the related foreign taxpayer involved.
- Whether the Indonesian resident taxpayer has submitted or will be submitting a request for revision, an objection letter, an appeal to the tax court, or a request for reduction or cancellation on matters requested for MAP.
- Provisions in the tax treaty that are considered by the Indonesian resident taxpayer as not properly implemented and the opinion of Indonesian resident taxpayer in regard to the implementation of the provisions.
- Transactions to which the tax authority of the tax treaty partner country has made an adjustment, including information on the substance of the transaction, their value and basis of the adjustment.
- The Indonesian resident taxpayer's opinion on the adjustment made by the tax authority of the tax treaty partner country.

Rejection or Termination of MAP process

Should the Indonesian taxpayer have filed an objection or an appeal on matters relevant to MAP and the objection or appeal has not been withdrawn, the DGT may reject the request to conduct a MAP or end the MAP process.

The interaction of MAP and domestic procedures is different in each country. It is common practice in other jurisdictions for the tax authorities to allow domestic procedures to be suspended until MAP discussions have been completed. The DGT has not discussed this option in PER-48. The position taken by the DGT in PER-48 means that, in practice, most Indonesian taxpayers will need to choose either MAP or the domestic Objection and Appeal process (due to the time limitations for filing MAP requests, Objection requests, and Appeal requests).

The DGT terminates the MAP process if:

- a. the Indonesian resident taxpayer or the Indonesian citizen that has been a resident taxpayer in the partner country that makes the request for MAP processing :
 - 1) submits a cancellation of the MAP request to the DGT;
 - 2) does not agree with the content of the mutual agreement draft;
 - 3) does not meet all the requirements for information or documents as required by the DGT;
 - 4) gives false information to the DGT; or
- b. the Indonesian resident taxpayer making the request for MAP processing submits an objection letter to the DGT or an appeal to the tax court.

MAP negotiations

The negotiation process between the DGT and the treaty partner tax authority is not discussed in detail in PER-48. The regulation does mention that the DGT may hold consultation meetings with the other tax authority to discuss the MAP request. The DGT will form a team of tax officers for each case to represent the DGT in the negotiations. In transfer pricing cases, the DGT team may include tax officers with specialized transfer pricing experience.

After the negotiations are completed, the tax authorities will prepare a draft mutual agreement which will be presented to the taxpayers. The mutual agreement will only be binding if the taxpayers accept the draft. This is consistent with common practice in MAP cases in other countries.

(Notes : Guidelines of the MAP process that results from a request from a treaty partner country or that is initiated by the DGT are laid down in PER-48 but not summarized further in this publication).

Your PwC Indonesia contacts

Ali Mardi

ali.mardi@id.pwc.com

Ali Widodo

ali.widodo@id.pwc.com

Anthony J. Anderson

anthony.j.anderson@id.pwc.com

Anton Manik

anton.a.manik@id.pwc.com

Antonius Sanyojaya

antonius.sanyojaya@id.pwc.com

Ay-Tjhing Phan

ay.tjhing.phan@id.pwc.com

Engeline Siagian

engeline.siagian@id.pwc.com

Hendra Lie

hendra.lie@id.pwc.com

Irene Atmawijaya

irene.atmawijaya@id.pwc.com

Ita Budhi

ita.budhi@id.pwc.com

Jim McMillan

jim.f.mcmillan@id.pwc.com

Laksmi Djuwita

laksmi.djuwita@id.pwc.com

Mardianto

mardianto.mardianto@id.pwc.com

Margie Margaret

margie.margaret@id.pwc.com

Nazly Siregar

nazly.siregar@id.pwc.com

Paul Raman

paul.raman@id.pwc.com

Parluhutan Simbolon

parluhutan.simbolon@id.pwc.com

Ray Headifen

ray.headifen@id.pwc.com

Suyanti Halim

suyanti.halim@id.pwc.com

Tim Watson

tim.robert.watson@id.pwc.com

Triadi Mukti

triadi.mukti@id.pwc.com

www.pwc.com/id

If you would like to be removed from this mailing list, please reply and write UNSUBSCRIBE in the subject line, or send an email to maria.purwaningsih@id.pwc.com.

© 2010 PT Prima Wahana Caraka. All rights reserved. In this document, "PwC" refers to PT Prima Wahana Caraka, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity.

DISCLAIMER: This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, KAP Tanudiredja, Wibisana & Rekan, PT Prima Wahana Caraka, or PT PricewaterhouseCoopers FAS, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.