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## PwC's Transfer Pricing Series

### Five things taxpayers need to know about Nigeria's MAP guidelines

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In February 2019, the Federal Inland Revenue Service (FIRS) issued the Guidelines on Mutual Agreement Procedure (MAP) in Nigeria (the MAP Guidelines). The Guidelines provide guidance on how taxpayers can request for and obtain assistance from the FIRS in resolving international tax disputes that have resulted in, or may result in, double taxation; or more broadly, taxation that is not in line with a Double Tax Treaty (DTA) that is in force.

In this article I highlight 5 key points you need to know about Nigeria's MAP Guidelines.

#### What is a MAP?

Countries that have considerable volumes of trade with other countries usually sign DTAs with one another. The purpose of the DTAs is to ensure that (double) taxation does not become an impediment to cross border trade. DTAs achieve this by including provisions which specify among other things: which jurisdiction has the right to tax certain types of income and how a taxpayer will get relief from double taxation if it occurs.

DTAs anticipate that in certain circumstance taxpayers may be exposed to taxation that is not intended under the DTA (e.g. the taxation of the same income twice i.e. double taxation) as a result of differences or difficulty in the interpretation or application of provisions of DTAs by the treaty partners. As such, they include MAP provisions which aim to ensure that these issues can be resolved.

MAP provisions provide a dispute resolution mechanism which enables taxpayers approach either of the treaty partners to seek redress where they believe they are not being taxed in accordance with the provisions of the relevant DTA. The process involves both treaty partners deliberating the facts of the case and ultimately negotiating the terms of settlement of the dispute. A typical successful outcome would be a downward revision of the tax assessed by one of the treaty partners.

The OECD estimates that almost 60% of the MAP cases closed in 2017 did not result in double taxation. This suggests that the MAP is a very helpful tool in resolving double taxation issues.

#### What issues can the MAP be applied to?

Broadly speaking, any instance of taxation that is inconsistent with the provisions of the DTA can be put through the MAP.

Nigeria's MAP guidelines give examples of scenarios for which a MAP can be initiated. These include where there are disputes relating to:

- a) transfer pricing (TP) adjustments;
- b) existence of a permanent establishment (PE);
- c) levy of withholding taxes beyond what is permitted by the applicable DTA;
- d) the characterisation or classification of income arising from the other jurisdiction; or
- e) dual residency status.

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#### How should MAP applications be made?

Each country that is a signatory to a DTA typically identifies a person that will be responsible for implementing the provisions of the DTA (including the MAP provisions). This person is known as the competent authority (CA). The CA for Nigeria is the Minister of Finance. Nigeria's MAP Guidelines however delegate this responsibility to the Chairman of the FIRS. The Chairman may authorise an official of the FIRS to act in this capacity.

The MAP Guidelines provide that although the timeframe for presenting a case for the CA's assistance depends on the specific terms of the DTA invoked, taxpayers are expected to present their case within 3 years of receipt of the notice of assessment which they intend to object to.

The process of initiating the MAP starts with the aggrieved taxpayer (Nigerian or non-resident) making a pre-filing consultation with the FIRS. This could be in writing or in form of a meeting where the taxpayer makes a presentation of the facts of the case and reason(s) for wanting to initiate the MAP.

Where the outcome of the pre-filing consultation is positive, the taxpayer would be invited to submit a detailed written request for the CA's consideration. The CA would only accept a request for assistance where (a) the issue relates to a foreign country with which Nigeria has an in-force DTA; (b) there is evidence that the actions of one or both countries will result in taxation that is not in accordance with the DTA; (c) the taxpayer notifies the CA within the acceptable timeframe; (d) the issue is not one that either CA has decided not to consider as a matter of policy.

The MAP negotiations would commence once Nigeria's CA notifies the taxpayer that it is satisfied that the case merits a MAP. This would be the case where Nigeria's CA is unable to resolve the issue on its own. Because the negotiations are between CAs (of Nigeria and the other jurisdiction), the taxpayer's role in the MAP will be limited to making presentations to the CAs on its views and facts of the case, where necessary.

#### Decision from MAP

All through the negotiation process Nigeria's CA will provide updates to the taxpayer, including when an agreement has been reached. This will be in writing and the taxpayer may opt to accept the outcome or seek legal remedy outside of the MAP. The outcome of the MAP becomes binding once it has been accepted and a request for refund of taxes or reassessment of tax to reflect the decision of the MAP must be filed by the taxpayer within 3 months of the decision, but not later than 6 years after the MAP decision.

The Guidelines provide that Nigeria's CA may terminate the MAP in certain circumstances. Likewise, the taxpayer may withdraw the request for MAP at any time before an agreement has been reached between

the CAs.

The Guidelines also provide that the mere fact that a taxpayer has initiated a MAP does not affect the requirement for the relevant tax authority to collect tax or for a taxpayer to pay a liability.

#### Can a taxpayer initiate a MAP and seek remedies under domestic law?

Taxpayers are permitted to seek redress simultaneously from the MAP and the usual appeal procedures available under domestic law (e.g. the Tax Appeal Tribunal etc.).

However, the Guidelines provide that taxpayers would be required to suspend remedies available under domestic law where the CA accepts a request for MAP. Further, where taxpayers are not satisfied with the outcome of the MAP they may seek further legal remedy. This option may not be available when a court (this does not include administrative panels) has made a decision on the case, as the decision would become final and binding and the taxpayer would be unable to invoke a MAP.

#### Implications on taxpayers and final thoughts

The issuance of the Guidelines is laudable as it provides taxpayers an additional avenue for resolving international tax disputes. Taxpayers are encouraged to take advantage of the MAP to resolve pending issues.

For Nigeria's CA, a number of issues still need to be considered to ensure that taxpayers benefit from the MAP. One of such issues is the level of resources dedicated to MAP. Most MAP negotiations are known to span between 17 and 30 months on average. It will be imperative for Nigeria's CA to bear this in mind in deploying resources.

It would be useful if Nigeria's CA maintains the mindset that the goal of the MAP is to eliminate double taxation and not to defend assessments issued to taxpayers or to increase revenue collection.

Another issue for consideration is the expansion of Nigeria's DTA network to cater for taxpayers who may have disputes with tax authorities outside of the current 14 jurisdiction with which Nigeria has in-force DTAs. For instance, of Nigeria's top trade partners, Nigeria only has 5 in-force DTAs with the top 10, and 8 with the top 20 trade partners.

Finally, Nigeria could consider introducing arbitration as a complementary dispute resolution mechanism to MAP. This entails an independent arbitrator intervening when the CAs are unable to reach an agreement during the MAP. This would ensure that disputes are effectively resolved without being prolonged. Nigeria has a chance to introduce arbitration to its current and future DTAs through the Multilateral Instrument (MLI) which amends DTAs. This could be done before Nigeria deposits its final MLI position with the OECD.

## Tax Academy

May 2019 session

**Topic:** Investing and doing business in Nigeria: Key tax considerations, exchange control and regulatory issues.

**Date:** Tuesday 14 May

**Time:** 9:00am-1:00pm



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