

Transitional considerations for resolving transfer pricing disputes under the renegotiated India – Singapore Double Taxation Avoidance Agreement

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In brief

The India-Singapore Double Taxation Avoidance Agreement (“India-Singapore DTA”) came into force on 27 May 1994. Until 27 February 2017, when the 2016 Protocol (“Third Protocol”) came into force, taxpayers on the Singapore-India economic corridor have experienced the deadlock given no access to the alternative cross border transfer pricing (“TP”) dispute resolution mechanisms. The Third Protocol, signed on 30 December 2016 addressed this, opening up new opportunities to seek TP recourse through bilateral advance pricing agreements (“APAs”) and Mutual Agreement Procedures (“MAPs”).

Different procedures and timelines under the current India and Singapore APA/ MAP programs have presented practical difficulties in identifying key fundamentals to successful resolution of TP disputes through APAs/ MAPs. In particular during this key transitional year, these differences have led to difficulties in identifying the (i) Commencement Date and Rollback periods for bilateral APAs (“BAPAs”), including conversions of unilateral APAs to BAPAs; as well as (ii) timing for MAP applications.

Misalignments and gaps in these fundamental considerations are not ideal. In line with the spirit of DTAs, we are aware that the Inland Revenue Authority of Singapore (“IRAS”) and the Central Board of Direct Taxes (“CBDT”) are having conversations on how best to address these transitional measures. This is highly applauded by taxpayers as this would give them the long awaited tax certainty on cross border TP disputes between the two territories.

In detail

Background

The signing of the Protocol (“Third Protocol”)¹ amending the Double Taxation Avoidance Agreement between India and Singapore (“India-Singapore DTA”) on 30 December 2016² opened up the channels for cross-border resolution of transfer pricing (“TP”) disputes between the two countries. Indeed, the insertion of Article 9(2) introduced the mechanism of corresponding tax adjustments in order to prevent economic double taxation, providing the legal basis for both territories to apply its domestic dispute resolution procedures³. This leads to the possibility of negotiation of BAPA and MAP between India and Singapore.

Both India⁴ and Singapore⁵ have established APA and MAP programs and with its respective processes and procedures. In this NewsAlert, we discuss these differences and what are some of the key practical considerations for taxpayers who are keen to embark on the BAPA and MAP routes now available under the India-Singapore DTA as alternative dispute resolution mechanisms.

Practical considerations in the implementation of BAPAs

The Singapore and India APA rules and prescribed procedures differ to some extent, primarily around:

- The pre-filing requirements of the BAPA application with the Competent Authorities; and
- The Rollback period provisions.

The practical implications of the above differences on the BAPA filing in India and Singapore are discussed below together with the way forward.

Commencement date to the BAPA

Singapore’s current APA procedure requires a taxpayer to submit the pre-filing materials **10 months in advance of the first day of the BAPA covered period**. As such, taxpayers who were interested in requesting a BAPA with covered period commencing 1 January 2018 would not be able to file such request as they would not be able to comply with the 10 month pre-filing condition.

In India however, pre-filings are not mandatory anymore and the Indian authorities would accept BAPA applications filed before the last day of the tax

¹ Please see our earlier NewsAlert on the signing of the Third Protocol on:

<http://www.pwc.com/us/en/taxservices/publications/insights/assets/pwc-amendments-to-the-india-singapore-tax-treaty.pdf>

² The Third Protocol took effect as of February 27, 2017.

³ The APA programme in India started in July 2012. The IRAS in Singapore first set out APA guidelines in the Singapore transfer pricing guidelines issued in February 2006 followed by supplementary guidance on APAs in October 2008.

⁴ The procedures relating to MAP proceedings are prescribed under Rule 44G to 44H of the Indian Income Tax Rules, 1962. The procedures related to APAs are prescribed under Sections 92CC and 92CD of the Indian Income-tax Act, 1961.

⁵ Detailed guidance on APA / MAP procedures in Singapore is provided under Sections 8, 9 and 10 of the Singapore TP guidelines issued in January 2017.

year prior to the first APA year e.g., 31 March, of the year before the first covered APA year. In other words, taxpayers who were interested in requesting a BAPA with covered period commencing 1 April 2018, would need to file before 31 March 2018 and as such still meet the timelines for such BAPA request in India.

Due to the short timeframe between the signatory date of the Third Protocol (i.e., 30 December 2016) and the IRAS' timing requirement, this poses a practical challenge from a timing perspective for taxpayers who may have existing disputes on India- Singapore transactions and who want to pursue their dispute resolution options between India and Singapore.

Interplay between Singapore and India Rollback provisions

Under Singapore's APA procedures⁶, the IRAS may accept the taxpayers' request to extend the APA⁷ to the prior years, subject to the agreement of the Competent Authority of the counterparty jurisdiction. From a Singapore perspective, the number of rollback years will generally not exceed **two** financial years immediately prior to the covered period. Nevertheless, the IRAS as a transitional position may agree to vary the number of rollback years at its discretion depending on the facts and circumstances of each APA request⁸.

In India, the rollback provision⁹ provides for a period of four years preceding the first covered year.

As such, there is currently a potential misalignment in the number of rollback years which could be requested by taxpayers in Singapore and India under the respective APA rules. Misalignment of the covered periods is not ideal as taxpayers face uncertainty on the tax treatment for these gap years.

Conversion of current unilateral APA into bilateral APAs

A number of taxpayers may have initiated unilateral APAs in the respective territories to address tax disputes on Singapore – India transactions. With the Third Protocol, it may be attractive for some taxpayers to convert existing unilateral APAs into BAPAs for added tax certainty. However, the differences in the procedures pose practical difficulties in identifying how best taxpayers should consider such conversions.

As an example, let's assume that the taxpayer is currently in the process of agreeing with the Indian Competent Authority for a unilateral APA commencing 1 January 2016 with covered period of five years, with a rollback period of four years. Given the differences in procedures, should a BAPA between India and Singapore be desirable, a number of open questions remain:

⁶ Detailed guidance on APA / MAP procedures in Singapore is provided under Sections 8, 9 and 10 of the Singapore TP guidelines issued in January 2017.

⁷ The IRAS only considers extending APA to prior years, i.e. rollback years for BAPAs and multilateral APAs.

⁸ As stated in Paragraph 8.18 of the Singapore TP guidelines issued in January 2017.

⁹ Provided subsection (9A) of section 92CC of the income tax Act, 1961 and 10F(ha) the Rules.

- What would be the Commencement Date for the BAPA? Should the taxpayer give up the current Indian process and reinitiate a bilateral process? If so, what would be the Commencement Date?
- Would the IRAS agree to a roll back period of four years? Even if the IRAS should agree, there may be back-years for which the BAPA cannot cover. How should taxpayers practically manage these gap years?

Practical implementation considerations around MAPs

Article 27(1) of the India-Singapore DTA provides that a MAP case must be “presented within three years of the date of receipt of notice of action which gives rise to the taxation not in accordance with the Agreement”.

Because of differences in procedure, clarification was needed as to period of limitation for MAPs, starting with which years could a MAP request be filed.

In India, based on Indian tax authority’s practice and PwC India’s experience, the date of order of the original Assessment would be reckoned for computation of time limitation for filing an application for assistance of Competent Authorities under MAP.

Accordingly, the period of limitation of three years kick-starts from the date of receipt of the final assessment order issued by the Assessing Officer (“AO”) either after completion of the Dispute Resolution Process (“DRP”) or the final assessment order issued by the AO, should the taxpayer opt for the Commissioner of Appeals (“CIT(A)”) route.

Based on the above the guiding principles, following are the financial years for which a MAP could be requested.

Financial Year	Due date for issuance of Final Assessment order	Whether MAP can be filed as per India – Singapore DTAA
2009-10	March 2014*	MAP can be invoked if the AO order has been received by May 2014
2010-11	March 2015*	MAP can be invoked
2011-12	March 2016*	MAP can be invoked
2012-13	December 2016	MAP can be invoked
2013-14	December 2017	MAP can be invoked

** Due date for issuance of Final Assessment order was 33 months from the end of the Assessment Year instead of 31 months*

From a logical perspective, the MAP procedure should be available as long as the time limitations above can be met. From our perspective, it would appear counter-intuitive if the MAP procedure is only available for disputes arising after the ratification of the Third Protocol (i.e., disputes arising after 27 February 2017) as this goes against the spirit of DTA.

The takeaway

Whilst the Third Protocol has opened up new opportunities for resolving cross border TP disputes between India and Singapore, the differences between the current practices and procedures in India and Singapore provide that a number of practical difficulties in a number of fundamentals around BAPAs/ MAPS between the two countries during this transition year.

More clarity around these aspects would be extremely helpful for taxpayers with ongoing disputes on their cross border transactions between India and Singapore. We understand that as part of regular dialogue between the IRAS and the CBDT, a number of these transitional measures are being taken up for discussion. A flexible approach to facilitate the APA and MAP processes for the transitional year augers well for the future of alternative dispute resolution mechanism between India and Singapore, and would enable the taxpayers to attain certainty with respect to their cross border transaction. As intended, this will foster and strengthen bilateral economic ties on the Singapore –India business corridor.

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