



**MUTUAL AGREEMENT PROCEDURE
GUIDELINES**

**INLAND REVENUE BOARD OF MALAYSIA
MUTUAL AGREEMENT PROCEDURE GUIDELINES
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PART I

PRELIMINARY

1. INTRODUCTION

The Article on Mutual Agreement Procedure (MAP) in Malaysia's Tax Treaties allows the Malaysian Competent Authority (CA) to interact with CAs of Treaty Partners with the intent to resolve taxation not in accordance with the provisions of the tax treaty. This includes international tax disputes involving double taxation and inconsistencies in the interpretation or application of the tax treaty on a mutually-agreed basis. The MAP mechanism is independent from the legal remedies available under domestic law.

The MAP Article in Malaysia's Tax Treaties also allows the Malaysian CA to negotiate Bilateral Advance Pricing Arrangement (BAPA) and Multilateral Advance Pricing Arrangement (MAPA) with CA of Treaty Partners. BAPA/MAPA offers assurance that the future set of criteria for the determination of arm's length price/profit on controlled transactions over a fixed period of time will be accepted by the tax administrations of both Malaysia and its relevant Treaty Partners. The Guidelines are applicable to BAPA/MAPA and has to be read together with the Advance Pricing Arrangement (APA) Guidelines.

2. PURPOSE OF THE GUIDELINES

The purpose of Mutual Agreement Procedure Guidelines (hereinafter referred to as the Guidelines) is to provide guidance on obtaining assistance from the Malaysian CA to persons that fall within the scope of an effective Tax Treaty that Malaysia has with its Treaty Partners. This assistance is provided to taxpayers in order to resolve taxation not in accordance with the provisions of the tax treaty.

PART II

DEFINITIONS

3. GENERAL DEFINITIONS

- 3.1. For the purposes of the Guidelines, unless the context otherwise requires:
- 3.1.1. the term “Agreement” refers to an agreement signed between CAs relating to an MAP;
 - 3.1.2. the term “Competent Authority” refers to the Competent Authority as defined under the applicable Tax Treaty;
 - 3.1.3. the term “Mutual Agreement Procedure” refers to a process through which the CA of Malaysia and a CA of a Treaty Partner consult to resolve disputes involving double taxation and the interpretation and application of the applicable Tax Treaty or to seek a BAPA/MAPA;
 - 3.1.4. the term “Office of Mutual Agreement Procedure” refers to the Department of International Taxation, Inland Revenue Board of Malaysia (IRBM);
 - 3.1.5. the term “Tax Division” refers to the Tax Division, Ministry of Finance, Malaysia;
 - 3.1.6. the term “Tax Treaty” refers to a double taxation agreement entered into between the Government of Malaysia and the Treaty Partner for the avoidance of double taxation and the prevention of fiscal evasion; and
 - 3.1.7. the term “Treaty Partner” refers to a country/party with which Malaysia has an effective Tax Treaty.
- 3.2. Any terms that are not defined in the Guidelines shall have the meaning as defined in the applicable Tax Treaty.

PART III
ADMINISTRATION AND PROCEDURE

4. WHO MAY APPLY FOR COMPETENT AUTHORITY ASSISTANCE

- 4.1. Where a Malaysian resident or in some cases a national considers that the actions of either or both Malaysia's and its Treaty Partner's tax administrations result or will result in taxation not in accordance with the provisions of the Tax Treaty, the person may request Malaysia's CA assistance under the MAP Article of an applicable Tax Treaty.
- 4.2. Subject to the applicable and enforceable Tax Treaty, where a person considers that the actions of one or both, Malaysia and its Treaty Partner, result or will result for that person in taxation not in accordance with the provisions of the Tax Treaty, that person may, irrespective of the remedies provided by the domestic law of either Contracting Jurisdictions, present the case to the CA of either Malaysia or its Treaty Partner.
- 4.3. In the case of BAPA/MAPA, an application from a Malaysian resident will only be considered for cases involving:
- a) A taxpayer who is a company assessable and chargeable to tax under the Act;
 - b) Turnover value exceeding RM100 million; and
 - c) The value of the proposed covered transaction is
 - i. for sales, if it exceeds 50% of turnover;
 - ii. for purchases, if it exceeds 50% of total purchases; or
 - iii. for other transactions, if the total value exceeds RM25 million.
 - d) All covered transactions must relate to income that is chargeable to tax, and not income which is tax exempted.
 - e) In cases involving financial assistance, the threshold under paragraph 3.1 (b) of the IRBM Transfer Pricing Guidelines shall apply.

5. TYPICAL SCENARIOS REQUIRING COMPETENT AUTHORITY ASSISTANCE

A Malaysian resident may seek assistance from the Malaysian CA in case of Treaty Partner-initiated adjustments and also if the resident believes that a Malaysia-initiated adjustment results or will result in taxation not in accordance with the Tax Treaty. Examples of taxation not in accordance with a Tax Treaty that may warrant a request for assistance to the Malaysian CA include but not limited to:

5.1. Transfer Pricing

A taxpayer resident in Malaysia is subject to additional tax because of a transfer pricing adjustment to the price of goods or services transferred to or from a related party in a Treaty Partner country. A transfer pricing adjustment may also involve the adjustment of other inter-related party transactions such as cost contribution arrangement and financial arrangement or such other transactions involving transfer pricing adjustment. In any of these transfer pricing adjustments, the Malaysian taxpayer may request that the Malaysian CA reduce or withdraw the adjustment and/or that the CA of the Treaty Partner allow a corresponding adjustment to the income of the related party to prevent economic double taxation.

5.2. Resident Status

A Malaysian resident taxpayer is also considered to be a resident of a Treaty Partner under that country's domestic law, and each country asserts that the taxpayer is a resident of its jurisdiction for purposes of the Tax Treaty. If unresolved, the taxpayer could be subject to tax on the same income in both countries. A request for CA assistance would initiate discussions between the CAs regarding the proper application of the tiebreaker rules contained in the Resident Article of the Tax Treaty. The taxpayer should approach the CA of the country in which the taxpayer asserts residency.

5.3. **Withholding Tax**

A withholding tax is levied beyond what is allowed within an applicable Tax Treaty by a Treaty Partner on a payment to a Malaysian resident. The Malaysian resident taxpayer may request the Malaysian CA to address the taxation not in accordance with the Tax Treaty with the CA of the Treaty Partner.

5.4. **Permanent Establishment**

5.4.1. A permanent establishment, e.g. a branch of a Malaysian resident taxpayer in a Treaty Partner country is subject to additional tax because of an adjustment by that Treaty Partner country of the income allocated to the branch. The Malaysian resident taxpayer may request the Malaysian CA to prevent double taxation by allowing an increased foreign tax credit or exemption or by seeking the Treaty Partner CA's agreement to give relief from the adjustment.

5.4.2. A Malaysian resident taxpayer subject to tax in Malaysia on income, including income from carrying on a business in a Treaty Partner country, is taxed in the Treaty Partner country on the business income earned in the Treaty Partner country despite not having a permanent establishment in that country under the Tax Treaty. The taxpayer may request the Malaysian CA to address the issue of taxation not in accordance with the Tax Treaty with the CA of the Treaty Partner.

5.5. **Characterisation or Classification of Income**

Where there is uncertainty whether the Tax Treaty covers an item of income, or where there is uncertainty of the characterisation or classification of an item of income arising in the other jurisdiction, a taxpayer may approach the Malaysian CA for clarification.

6. TIME LIMITS FOR REQUESTING ACCESS TO MAP

- 6.1. The time limit for presenting a case for CA assistance depends upon the specific terms of the particular Tax Treaty under which the MAP is invoked. Therefore, for each case, the relevant Tax Treaty should be referred to.
- 6.2. Where the time limit for presenting a case to invoke MAP is not specified in the relevant Tax Treaty, the Malaysian CA will follow the time limit specified under the Article 25 (MAP) of the OECD Model Tax Convention on Income and on Capital which is within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the convention.
- 6.3. In a case involving adjustment of tax or income resulting from IRBM tax audit, taxpayers are encouraged to notify the Office of MAP of its intention to request for CA assistance to invoke MAP as soon as the Notice of Assessment is issued or at the same time when the taxpayer files an appeal under Section 99(1) of the Income Tax Act 1967 (the Act). Paragraph 22 of the Guidelines will further elaborate the interaction between the MAP request and domestic appeal.

7. PRE-FILING MEETING

- 7.1. A written request for a pre-filing meeting prior to making a formal request for MAP shall be made and the procedures are outlined as follows:
 - 7.1.1. all requests for a pre-filing meeting should be directed to the Office of MAP;
 - 7.1.2. adequate documentation to facilitate the preliminary assessment of the case should be submitted together with the request;
 - 7.1.3. **the taxpayer shall attend and make a presentation on the issues that require competent authority assistance;** and

- 7.1.4. the taxpayer shall be informed of the outcome of the pre-filing meeting; if the outcome merits consideration for an MAP, the Office of MAP shall inform the taxpayer to submit a formal request.

8. SUBMITTING A FORMAL REQUEST

- 8.1. All formal requests for MAP, including request for BAPA/MAPA should be made in writing and addressed to:

The Competent Authority
Tax Division
Ministry of Finance
6th Floor, Centre Block
Precinct 2, Federal Administration Centre
62592 Putrajaya, Malaysia

- 8.2. Concurrently, a copy of the request should be submitted to the Office of MAP at the following address:

The Competent Authority
Department of International Taxation
Inland Revenue Board of Malaysia Headquarters
Level 12, Menara Hasil
Persiaran Rimba Permai, Cyber 8,
63600 Cyberjaya, Selangor, Malaysia

- 8.3. Regardless in which jurisdiction the taxpayer wishes to invoke its MAP, both CAs should be notified on the intention of the request.

- 8.4. A request for CA assistance should contain all relevant information which include:

- 8.4.1. the name, address and income tax reference number of the Malaysian taxpayer;

- 8.4.2. the name of the Treaty Partner tax administration involved;
- 8.4.3. the Tax Treaty Article(s) which the taxpayer asserts is not being correctly applied by Malaysia or the Treaty Partner, and the taxpayer's interpretation of the application of the article;
- 8.4.4. the name, address and, if known, the tax reference number of any related Treaty Partner taxpayer involved;
- 8.4.5. the relationship between the Malaysian taxpayer and any related Treaty Partner taxpayers involved (Taxpayers should also keep the Malaysian CA informed of any changes in these relationships that occur after the request has been filed);
- 8.4.6. the taxation years or periods involved, the amount of income and tax in dispute together with copies of the notices of assessment;
- 8.4.7. a summary of the facts and an analysis of the issues for which CA assistance is requested, including any specific issues raised by the Treaty Partner tax administration or IRBM affecting the Malaysian taxpayer and the related amounts;
- 8.4.8. a statement whether the request for CA assistance involves issues that are currently or were previously considered as part of an APA in Malaysia or in similar proceedings in the Treaty Partner country;
- 8.4.9. a statement indicating whether the taxpayer has filed a notice of objection or a notice of appeal;
- 8.4.10. if consent has not already been provided for a person to act as an authorised representative, a signed statement that the representative is authorised to act for the taxpayer in making the request;
- 8.4.11. a copy of any settlement or agreement reached with the Treaty Partner tax administration which may affect the MAP process;
- 8.4.12. in the case of BAPA/MAPA, please refer to the APA Guidelines; and

8.4.13. any other relevant facts.

8.5. The request should be signed by the taxpayer, or by its authorised representative, confirming the accuracy and completeness of the facts and information presented in the request. The taxpayer is responsible for the completeness and accuracy of the information included in the request. The Malaysian CA may deny any request where the taxpayer has failed to provide complete and accurate information or has made any misrepresentation.

9. REVIEW OF THE REQUEST

9.1. After receiving a request for MAP, the Tax Division and the Office of MAP will jointly evaluate the said request.

9.2. Where there are deficiencies in the request, the Office of MAP shall request the taxpayer to take remedial action.

9.3. The Malaysian CA will accept a request for assistance if:

9.3.1. the issue or transaction relates to a foreign country with which Malaysia has a Tax Treaty;

9.3.2. it is evident that the actions of one or both countries have resulted or will result in taxation not in accordance with the Tax Treaty;

9.3.3. the taxpayer notifies the Malaysian CA within the acceptable time after an action results in taxation not in accordance with the provisions of the applicable Tax Treaty; and

9.3.4. the issue is not one that the Malaysian and/or the Treaty Partner CA have decided, as a matter of policy, not to consider.

9.4. In the case of BAPA/MAPA request, the terms under APA Guidelines also apply.

10. ADDITIONAL DOCUMENTS

The Office of MAP may request the taxpayer to submit additional documents necessary for the purpose of the MAP.

11. NOTIFICATION OF NON-COMMENCEMENT

The Office of MAP shall notify the taxpayer when a request for MAP is not to be initiated with the CA of the Treaty Partner and provide reasons for the rejection of the taxpayer's request.

12. COMPETENT AUTHORITY PROPOSAL

12.1. Upon acceptance of the MAP request, the Malaysian CA shall endeavor to resolve the case via unilateral agreement with the taxpayer if the objection in the MAP request appears to be justified.

12.2. If the Malaysian CA is not itself able to arrive at a satisfactory solution, the case will be resolved by mutual agreement with the CA of the other Contracting Jurisdiction via bilateral agreement.

12.3. If a bilateral MAP is to be initiated, a proposal will be conveyed by the Tax Division to the CA of the Treaty Partner.

13. COMMENCEMENT OF NEGOTIATIONS

The Office of MAP shall notify the taxpayer with regard to the commencement of MAP negotiations.

14. ROLE OF TAXPAYER IN MAP PROCESS

MAP negotiations between the Malaysian CA and the CA of the Treaty Partners are a government-to-government process in which there is generally no direct taxpayer involvement. Therefore, taxpayer involvement in the MAP is limited to presenting its

views and assisting in the fact-finding without participating in the negotiation process. However, taxpayers may be invited to make a presentation before the CAs, where appropriate, to ensure a common understanding of the facts of a particular case.

15. RESPONSIBILITIES OF TAXPAYER

15.1. Taxpayers are expected to cooperate fully with the Malaysian CA by providing information and documents when requested.

15.2. Once a MAP request has been accepted, the taxpayer is responsible for supplying the Malaysian CA with complete and accurate information required to resolve the case. The onus is on the taxpayer to keep the Malaysian CA informed of all material changes in the information or documentation previously submitted as part of, or in connection with, the request, as well as new information or documentation that becomes known or is created after the request is filed and which is relevant to the issues under consideration. Without proper information and documentation, CAs may be unable to resolve disputes expeditiously and the risk of unrelieved double taxation increases. Where a request also involves a related Treaty Partner taxpayer making a request to the CA of the Treaty Partner Country, the taxpayers should ensure that the same information is provided to both CAs at the same time. The taxpayer should make certain that the information provided to both CAs is consistent and free of conflicts.

15.3. A taxpayer's failure to cooperate with the Malaysian CA during any part of the MAP process may have direct consequences on whether relief can be provided under the MAP. Specifically, the Malaysian CA may request additional information beyond that which was requested during an audit, and may also request information that was requested but not provided during an audit. It is to the taxpayer's benefit to be fully cooperative and transparent to ensure an efficient MAP process. The timely provision of requested information

is essential to enable the CAs to reach an equitable and expeditious conclusion.

15.4. Where the failure to provide the requested information within a reasonable time hinders the Malaysian CA's to perform its duties in an efficient and effective manner, it may lead to a denial of CA assistance or the Malaysian CA being unable to reach a mutual agreement with the CA of a Treaty Partner.

16. TAXPAYER UPDATE

The Office of MAP shall, update the taxpayer on the progress and status of the MAP to an extent that the update does not interfere with the MAP process.

17. CONFIRMATION BY TAXPAYER BEFORE AGREEMENT

17.1. Where it is recognised that an Agreement will be reached with the CA of the Treaty Partner, the Office of MAP shall inform the taxpayer of the contents of the proposed Agreement in writing. The taxpayer shall confirm in writing his acceptance within 30 days from the notification date.

17.2. The CA of Malaysia shall reach an Agreement with the CA of the Treaty Partner after confirmation of the taxpayer's acceptance of the proposed Agreement.

17.3. MAP Agreements are not considered precedents for either the taxpayer or the IRBM in regard to (re)assessments relating to subsequent years or for MAP negotiations on the same issues. This is because the CAs have negotiated an Agreement that takes into account the facts of the particular taxpayer, as well as differences in the provisions of the tax law in each country and effects of the economic indicators on the particular transactions at the relevant time. (Re)assessments of subsequent years should be based on the particular circumstances, facts and documentary evidence existing for those years.

17.4. A taxpayer cannot accept the terms of an agreement for only some issues or taxation years involved, since the original request by the taxpayer would have

asked for assistance in respect of all issues and taxation years involved and the CAs would have considered all issues and years in the negotiations.

17.5. If a taxpayer is not satisfied with the agreement negotiated by the CA, the taxpayer may reject it. If this occurs, the CAs will consider the case closed and advise the taxpayer accordingly.

18. NOTIFICATION OF AN AGREEMENT

18.1. Where Agreement has been reached in MAP, the Office of MAP shall notify the taxpayer in writing of the date and contents of the said Agreement.

18.2. Likewise, where the MAP has not reached an Agreement, the Office of MAP shall also notify the taxpayer.

18.3. The Office of MAP and the relevant Department of IRBM shall take the necessary action to put into effect the results as required by the Agreement, in accordance with the applicable Tax Treaty.

19. IMPLEMENTATION

19.1. Once the MAP agreement has been reached and accepted by the taxpayer, the implementation will be made within three months after the determination of the case.

20. TERMINATION

20.1. The Malaysian CA reserves the right to propose to the CA of the Treaty Partner that MAP process may be terminated under the following circumstances:

20.1.1. when the subject for MAP is not within the scope of MAP under the applicable Tax Treaty;

20.1.2. when the application for MAP or the attachments contains incorrect information;

20.1.3. when the taxpayer does not provide the documents necessary for MAP;

20.1.4. when retrieval of documents necessary for MAP is not possible due to lapse of time;

20.1.5. when the taxpayer does not accept the proposed agreement reached by the CAs;

20.1.6. when it is recognised that the continuation of MAP will not reach any agreement; and

20.1.7. any other reasons not aforementioned.

20.2. Where the CA of the Treaty Partner has accepted the proposal from the Malaysian CA described in paragraph 20.1 to terminate the MAP, the Office of MAP shall notify the taxpayer that MAP has been terminated.

20.3. Likewise, where the Malaysian CA has accepted a proposal from the CA of the Treaty Partner to terminate the MAP, the Office of MAP shall notify the taxpayer that MAP has been terminated.

21. WITHDRAWAL OF A REQUEST

21.1. A taxpayer can withdraw its request for MAP at any time before an MAP Agreement has been reached.

21.2. Withdrawal of a request for MAP shall be made in writing, stating reasons, to the Tax Division with a copy of the request presented at the same time to the Office of MAP.

21.3. After receiving the written confirmation for a withdrawal, the Tax Division shall notify the CA of the Treaty Partner of the termination of MAP by the taxpayer.

PART IV SUPPLEMENTAL

22. INTERACTION BETWEEN MAP AND DOMESTIC APPEAL PROCESS

22.1. Presenting a case to the Malaysian CA to invoke MAP will not deprive a person from its right for appeal under Section 99(1) of the Income Tax Act 1967. The usual procedures for appeal under the Income Tax Act 1967 shall apply.

22.2. The taxpayer must inform the relevant branch in writing that an MAP request has been made. Section 102(1A) of the Act will be applied where no appeal shall be forwarded to the Special Commissioners of Income Tax (SCIT) until the determination of the MAP. If the taxpayer does not agree to the outcome of the MAP, the taxpayer may, within thirty days from the determination of MAP, request to the DG in writing to forward such appeal to the SCIT.

22.3. MAP application is not eligible for the situations below:

- i. for appeal cases where a SCIT/court decision has been made;
- ii. a composite assessment was raised under Section 96A of the Act; or
- iii. for cases with elements of tax evasion or tax avoidance.

23. CONFIDENTIALITY OF TAXPAYER'S INFORMATION

23.1. All information obtained or generated during the MAP process is protected by the confidentiality provisions of the Income Tax Act 1967 and the provisions of the applicable Tax Treaty.

23.2. The Malaysian CA is committed to ensuring confidentiality regarding taxpayer information under the Tax Treaty and the respective laws.

24. COLLECTIONS

A request for CA assistance does not suspend the requirement to pay the tax liability or collection action by the IRBM.

25. FURTHER INFORMATION

For more information and enquiries, please contact:

The Office of MAP

Department of International Taxation

Inland Revenue Board of Malaysia Headquarters

Level 12, Menara Hasil,

Persiaran Rimba Permai, Cyber 8

63600 Cyberjaya, Selangor, Malaysia

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