

Survey on MAP vs a local tax trial - which takes precedence?

1 Facts and Background

- A GTC member intends to ask a tax court to postpone its decision until outstanding MAP applications will be finalised.
- There is no specific legal provision in that country that allows the MAP outcome to supersede the tax court ruling.
- In the local law, a determination by a tax court and a subsequent appeal is finality on the tax dispute.
- There is no provision that states that a MAP after the court judgment can override the court judgment.
- The GTC member intends to ask the court not to rule in the dispute pending the MAP application.

2 Position of other countries

Belgium

On 23 May 2018, the Belgian Public Federal Service (SPF) published a document on the frequent answers and questions regarding the Mutual Agreement Procedure (MAP) and the Advance Pricing Agreement (APA) procedure.

The above-mentioned document indicated that a taxpayer is still able to initiate a MAP when a domestic court procedure is lost.

On 7 March 2018, the tax administration published an extensive Circular Letter 2018/C/27 (the circular letter) on the rules for the settlement of disputes under tax treaties. The Circular provides that a MAP and a domestic court procedure could be initiated simultaneously.

Netherlands

On 29 September 2008, the State Secretary for Finance published Decree IFZ 2008/248M on mutual agreement procedures.

The Decree provides for the possibility of an early MAP. If that possibility is used, a taxpayer can request the tax inspector to postpone his decision in an appeal raised during the MAP period. In addition, the Decree provides taxpayers the possibility that if they are not satisfied with the MAP outcome, to invoke postponed domestic appeal possibilities.

USA

Competent Authority Requests can be made while domestic disputes remain live. If the case is with IRS Appeals, the Taxpayer can transfer jurisdiction to the Advance Pricing and Mutual Agreement (APMA) office at any time, or can request simultaneous consideration by Appeals and the APMA office.

Canada

The Canadian Competent Authority's (CCA) current policy is that when a MAP request has been made and notices of objection have been filed on the same transfer pricing issue, which is the normal process in a transfer pricing dispute, the taxpayer must request that the notices of objection be held in abeyance pending resolution of the MAP procedure. This is in accordance with the principle of

avoidance of duplication of efforts by the two Canada Revenue Agency (CRA) dispute resolution teams. Therefore, if a MAP settlement is reached and the Canadian taxpayer agrees to the terms and conditions of the MAP settlement, it is generally understood that CRA Appeals will not revisit the matter.

Vice-versa, if a taxpayer chooses to first proceed to CRA Appeals, and if the taxpayer concurs with the final CRA Appeals decision, it is the policy of the CCA that it "will only present [the case] to the other competent authority and will not negotiate the issue a second time. The same policy applies to Canadian court decisions.

On March 10, 2017, the Tax Court of Canada (TCC) delivered its decision in *Sifto Canada Corp. v. The Queen* regarding the legal effect of a transfer pricing settlement reached under the Mutual Agreement Procedure Article (MAP Article) of the Canada – United States Tax Convention (the Treaty).

The TCC concluded that the terms of the Sifto-CCA Agreement were "binding on the Minister and the Appellant as a settlement agreement". After analyzing the Treaty, the Vienna Convention and the Canada-United States Tax Convention Act (CUSTCA), the latter of which specifically gives the Treaty the force of law in Canada, the TCC concluded that the "Minister has breached Canada's obligations under the Convention by failing to give continuing effect to MAP agreements reached with the United States under paragraph (2) of Article XXVI of the Convention".

In addition, Justice Owens concluded that the Sifto-CCA Agreement was an agreement otherwise described in subsection 115.1(1)¹ of the Income Tax Act of Canada (ITA) and therefore all determinations made in accordance with the terms and conditions of that agreement were deemed to be in accordance with the ITA.

South Korea

Based on the recent revision of the Adjustment of International Taxes Act (AITA), a Korean court decision might no longer nullify a MAP.

More specifically, Article 27(4) of the AITA previously stated that a Korean court decision would prevail over a MAP, while also rendering the MAP void in the event the Korean court decision would contradict the terms settled under the MAP.

In the light of the recent 2020 tax amendments to the AITA, such provision was removed.

France

In France, an ongoing MAP does not preclude the taxpayer to initiate a court procedure. The Courts will go on with their procedure notwithstanding the existence of a MAP in process. Normally, if an agreement is reached before the Court has given its decision, the case before the Court should be dismissed by the taxpayer if he wants the MAP to be applied.

If a definitive position is handed down by a Court, in theory a MAP remains possible afterwards. This is because in France international treaties (and the MAP derives from international tax treaties) are superior to domestic laws.² In their interaction with other States' tax authorities, French tax

¹Section 115.1 (1) of the ITA (Canada): Notwithstanding any other provision of this Act, where the Minister and another person have, under a provision contained in a tax convention or agreement with another country that has the force of law in Canada, entered into an agreement with respect to the taxation of the other person, all determinations made in accordance with the terms and conditions of the agreement shall be deemed to be in accordance with this Act.

² Art. 55 of the French Constitution: "Treaties or agreements regularly ratified or approved have, from their publication, an authority superior to that of laws, subject, for each agreement or treaty, of its application by the other party." Source:

authorities will have to keep in mind the decision of the Court, but as a general principle, the situation of the taxpayer cannot be worsened.

Poland

In Poland it is possible to suspend the MAP procedure at the taxpayer's request due to the pending court dispute. However, in such a situation, the Court's judgment will be binding on the MAP governing body within MAP proceedings.

India

In India a MAP and an administrative appeals process can run simultaneously. The taxpayer has even the option of rejecting or accepting the MAP resolution. Once a taxpayer accepts the MAP resolution he has to withdraw his appeal from the Court or Tribunal as the case may be, as per Rule 44H.

The Indian Finance Minister made a formal announcement for introduction of a dispute settlement scheme in the budget proposal on February 1, 2020. This was followed up by an introduction of a distinct Bill, to be enacted as a standalone legislation, namely the Direct Tax Vivad se Vishwas Bill 2020. The Bill, originally, covered within its scope all matters in appeal at various appellate forums.

This is an important development which must be closely examined by tax payers facing disputes with the Income tax department. It must be noted that the intent of the Government is to steer clear of disputes to the extent possible and therefore, it would like to close as many disputes as can be covered within the scheme.

Considering that the disputes may take abysmally long to achieve finality in judicial forums, with interest clock ticking and vivid exposure to penalty proceedings (including criminal prosecution, which is no longer rare), it may be expedient to revisit all disputes with a fresh lens.

3 Major questions to be addressed

- What is the date of the beginning of the MAP? When was the request made?
- What is the date of the beginning of the proceedings in front of the Tax Court?
- What is the status of a MAP in the relevant jurisdiction in the absence of an APA regime? Is such process being used to block audits and/or to get an approval in the absence of an APA regime?
- How is the communication between the tax authority department dealing with MAPs and the audit department organized?