Overview and *Understanding*

Mutual Agreement Procedures (MAP) Processes, Indian Experience, Applications under Indo-US Treaty

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Contents

MAP - Overview

- Mutual Agreement Procedure ('MAP') is
  - an alternate mechanism
  - for the resolution of international tax and transfer pricing disputes
  - which are not in accordance with tax Treaty
- Resolution of disputes through
  - the intervention of the Competent Authorities ('CAs') of each state
  - Aim to arrive at a mutually acceptable solution (resolution not a compulsion for the CAs
- Relief through MAP possible irrespective of remedies available under domestic tax laws
- Potential of a negotiated settlement – agree to disagree

MAP – Discussion Framework

- Article 25 of the OECD Model Tax Convention 2010 and relevant tax treaties
- Manual on Effective Mutual Agreement Procedures (MEMAP) issued by OECD
- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Chapter IV - Section C)
- Section 295(2)(h) of the Income-tax Act, 1961 (‘the Act’), Rule 44G and Rule 44H of the Income-tax Rules, 1962 (‘the Rules’)

MAP – Who is Competent Authority

- Article 3: Competent Authority - Persons with the competence of the highest tax authorities

- A typical designation of a Competent Authority -
  - Minister of Finance; or
  - Secretary of the Treasury.

- Rule 44H – ‘Competent Authority of India means an officer authorized by the Central Government for the purposes of discharging the functions as such’

Article 25 – OECD Model Tax Convention

- A person considers that actions of one or both contracting states leads to or shall lead to taxation not in accordance with the Treaty
- Such person shall make an application to the Competent Authority of his country of residence to resolve the matter
- Application to be made within 3 years of being aggrieved - **PARA 1**
- The Competent Authority of such country to endeavor to resolve the matter, else shall involve the other Competent Authority
- An agreement reached would be applicable irrespective of the time limits in domestic law - **PARA 2**
- The resolution may be reached by mutual discussion of the Competent Authorities, for elimination of double taxation - **PARA 3**
- The Competent Authorities may communicate with each other in person or through representatives for reaching a conclusion - **PARA 4**

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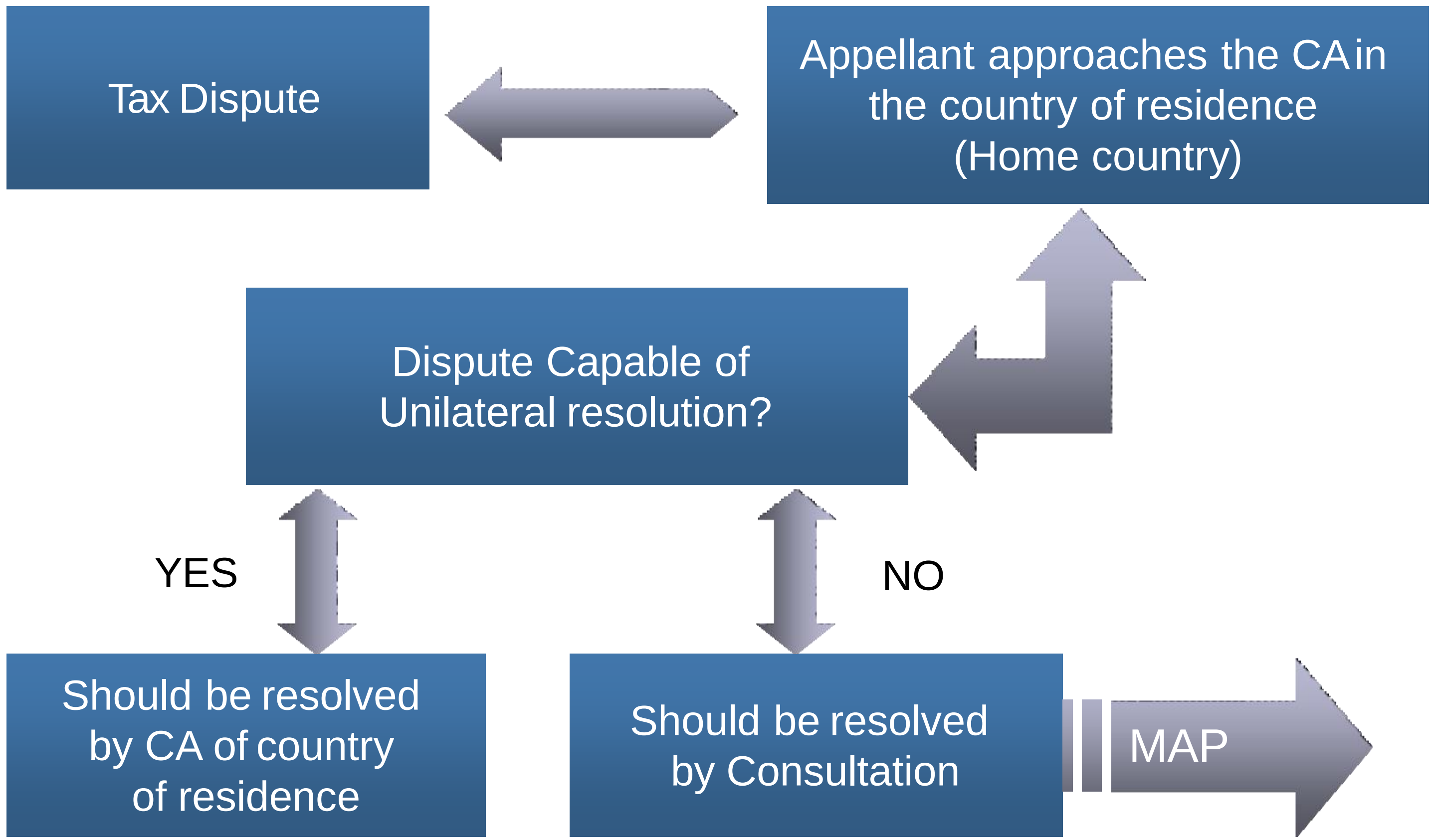
Article 9 – Issues to be considered

- Whether corresponding / correlative adjustments are mandatory?
  - The right to carry the corresponding adjustment in the other country primarily arises from Article 9(2) of the OECD Model
  - If the countries have inserted the provisions of Article 9(2) in the double tax Treaty, then those countries can make a corresponding adjustment subject to acceptance of the principle and quantum
- Is Article 9(2) independent of Article 9(1) or does Article 9(1) define the scope of Article 9(2)?
  - Adjustment to a deemed international transaction as per Indian Transfer Pricing regulations – whether Article 9(2) will apply?
- Whether MAP procedure applicable if the relevant DTAA does not include Article 9(2)?

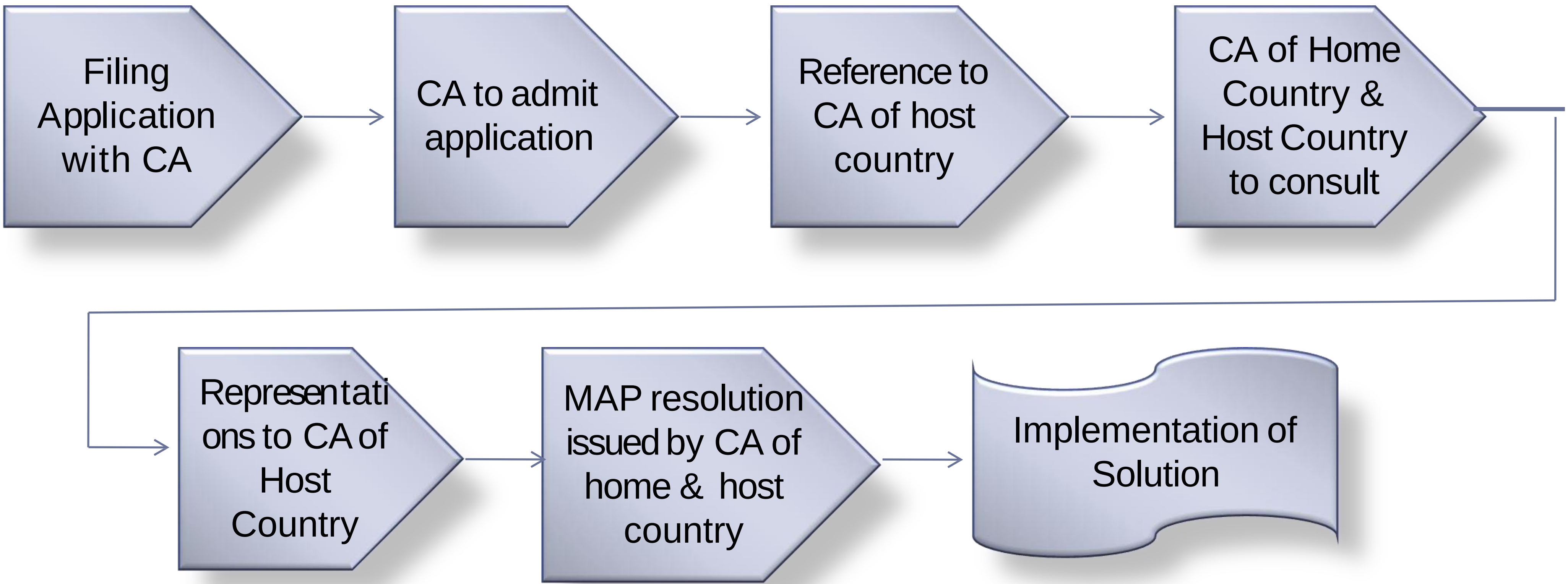
MAP – Treaty Model Differences

- UN and OECD MC are similar except that:
  - UN model additionally commits the CA to jointly or unilaterally develop procedures for implementing MAP
- US Model differs from the UN / OECD in the following ways:
  - Any agreement reached between the CAs to be implemented notwithstanding any time limits as well as procedural limitations,
  - Time period of 3 years not prescribed for taxpayer to present the case, and
  - Even for the cases involving issues related to Art. 24(1), MAP can be initiated with CA of the country of which he is resident.
  - For CA initiated MAP, US model illustrates the matters that could be included in such MAPs.
- Competent Authority (CA)
  - **India:** Officer Authorised by Central Government – Rule 44G / 44H
  - **Other Countries:** Ministry of Finance or Apex tax authority or Tax Commissioners or Directors as their representatives

Mechanics of MAP



Steps in MAP Process



Categories of disputes

- Broad categories of disputes that could be resolved under MAP:

Case / Taxpayer Specific Disputes

- Includes specific cases of taxation not accordance with Treaty.
- Scope only limited to Treaty and not domestic tax laws.

General interpretive or application related

- Includes issues relating to interpretation or application of terms under treaties
- General in nature and are initiated suo-moto by CA.

Eliminations of double taxation not provided in Treaty

- Elimination of double taxation in cases not provided in Treaty.
- Eg. Determination of residential status for dual tax residency cases not resolved under tier breaker rules (individuals + corporates

…. Categories of disputes

- Common disputes currently resolved under MAP in India:
  - Existence of Permanent Establishment (PE)
  - Attribution of income, expenses, deductions, credits, etc. to PE
  - E-Commerce transactions
  - Categorisation of income [eg. royalty / FTC Vs. Business Income]
  - Common meaning of terms
- Application of domestic laws to penalties, fines, interest inconsistent with Treaty
- Transfer Pricing issues

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Practical issues under MAP

Some practical issues faced in India:

- Success of MAP as alternate dispute resolution
- Repetitive procedures for subsequent years
- Time limit under domestic tax law provisions for tax officer to give effect to MAP order
- Time limit for filing of MAP application under certain treaties
- MAP resolution limited to the determination of principle issues, leaves income computation to tax officers
- Availability of tax credit in respect of taxes under a MAP settlement
- Issues resolved under MAP contradictory to subsequent decision of court
- Stay of demand – only possible where MAP negotiation US or UK or Denmark

India – Guidance on MAP

Key features of detailed guidance on MAP issued by India's CBDT

- Part A - Introduction and basic information:
  - MAP application to be filed within 3 years from the first notification of the action giving rise to taxation, not in accordance with the relevant tax treaty
  - CAs shall endeavor to complete the MAP case within 24 months
- Part B – Access and denial of access to MAP
  - <u>Access of MAP</u> is available when a taxpayer faces issues due to transfer pricing adjustments, determination of existence of a PE and attribution of profits thereof, re-characterization of income or expenses, domestic anti-abuse provisions invoked by Indian tax authorities, etc. CAs in India would provide access to MAP and request CAs of treaty partners to furnish correlative relief when some outcome has been agreed in the situations below:
  - Where the taxpayer has entered into a UAPA with CBDT
  - Where the taxpayer has applied safe harbour provisions and return of income is accepted by the tax authorities; and
  - Where the Income-Tax Appellate Tribunal in India has passed an order regarding the same issues/years that are also being examined under MAP

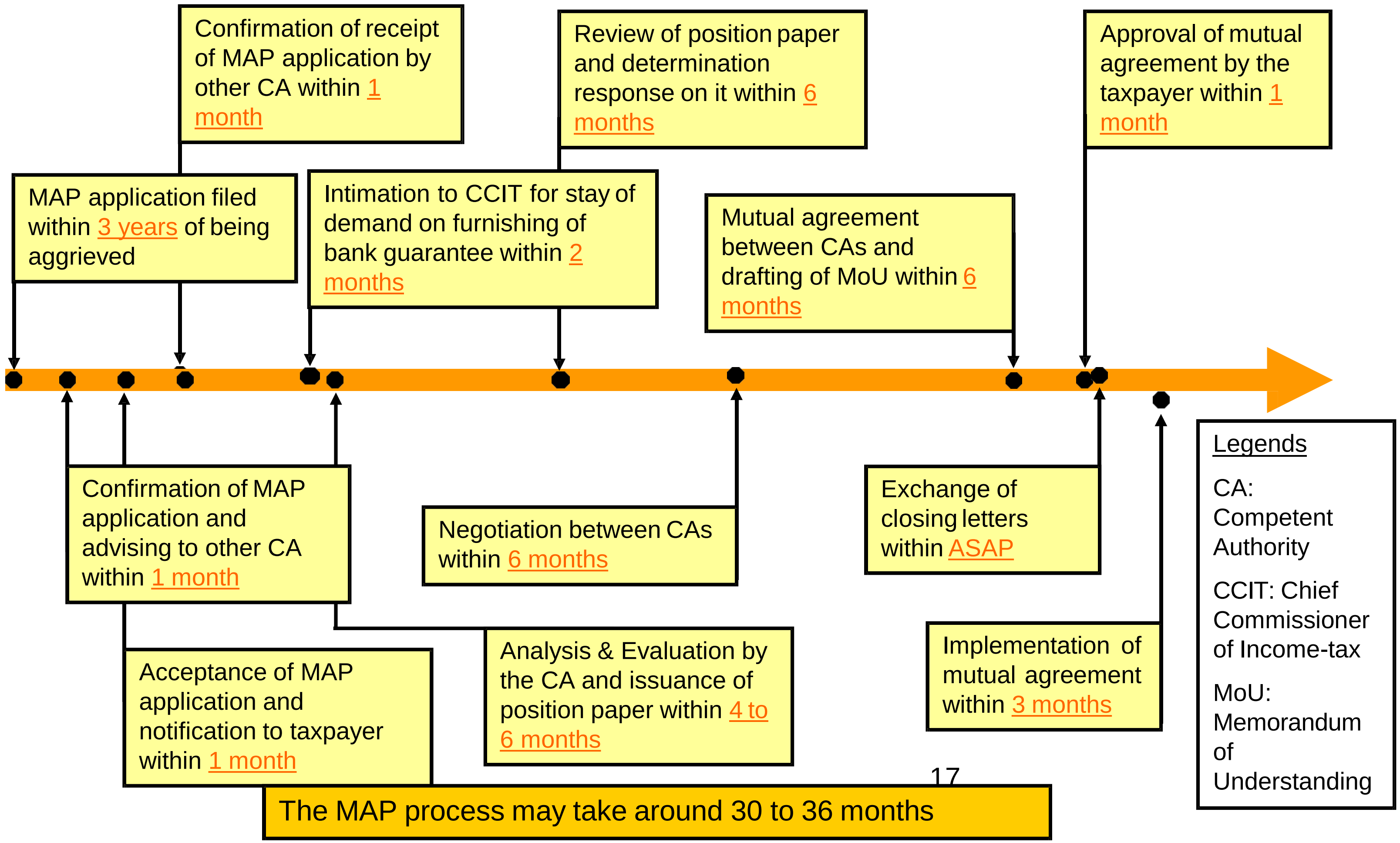
India – Guidance on MAP

- Part B – Access and denial of access to MAP
  - <u>Denial of access to MAP:</u>
  - If CAs in India conclude that the objection raised by the taxpayer on the action taken by the tax authorities is not justified.
  - In the case of incomplete MAP application/documents/information.
  - If income-tax settlement commission has passed a settlement order or if the Authority of Advance Ruling has ruled on the same issues under a MAP application.
  - In respect of issues that are purely governed by India’s domestic law
- Part C – Guidelines on procedural technical
  - MAP resolution cannot reduce the returned income. However, in respect of MAP cases involving adjustments made by tax authorities of a treaty partner, CAs in India may go below the returned income of the Indian taxpayer so as to implement the MAP resolution

India – Guidance on MAP

- Part C – Guidelines on procedural technical
  - CAs in India may resolve recurring issues based on the same principles, as adopted in a prior MAP resolution, if a separate application is filed for each year
  - Under MAP, CAs in India cannot consider consequential issues such as disputes relating to interest and penalties, as these will continue to be administered under the domestic laws
  - CAs in India are now required to cover the secondary adjustments in the MAP resolution
- Part D – Guidelines on implementation of MAP
  - The intimation of acceptance of MAP resolution by the taxpayer to be made in 30 days.
  - The tax office to make the MAP resolution effective within one month from the end of month in which it receives the letter from the Indian CA

MAP - Timelines



MAP – Indian Statutory Regime

- Rule 44G – for residents
  - Residents aggrieved by action of any Foreign Country resulting in taxation not in accordance with tax convention to apply to CA in Form. No. 34F
- Rule 44H – for non-residents
  - CA in India to examine reference received from CA outside India
  - CA in India to endeavor for resolution and communicate to CCIT or DGIT
  - AO to give effect to MAP within 90 days of receipt of the same by CCIT or DGIT, subject to conditions fulfilled.
  - Tax, interest or penalty to be adjusted as per MAP in accordance with the provision of the Income tax Act 1961 irrespective of time barring of proceedings
- Visakhapatnam Port Trust (144 ITR 146) (A.P.)
  - MAP available in addition to and not in substitution of the domestic remedies

Post mutual agreement

- Decision of a Competent Authority is generally case specific and not a precedent for
  - the taxpayer for subsequent years; or
  - other taxpayers on same issues.
- Decision of the MAP process is communicated to the taxpayer by a letter
- The decision of the MAP process is then implemented vide Rule 44G & 44H
- The Assessing Officer gives effect of the decision of the MAP, after receiving instructions from the CCIT / DGIT (within 90 days of receiving instructions)
- If taxpayer is aggrieved by decision of the Competent Authority, he may reject the decision and go ahead with the remedies under the domestic law

MAP - Arbitration

- Current MAP structure - CAs not required to resolve MAP cases, only endeavor to agree
- Where CAs are unable to reach a viable solution, MAP as a whole fails
- Newly added paragraph 5 to Article 25 of the OECD Model Convention provided for an arbitration mechanism to supplement MAP
  - Where a person has presented a case to the CA under Article 25(1) and the CAs are unable to reach an agreement under Article 25(2) within 2 years from the presentation of the case to the other CA
  - Any unresolved issues shall be submitted to arbitration if the person so requests
  - Recourse not automatic

….. MAP - Arbitration

- Issues not resolved by CAs themselves
- Taxpayer’s choice to request for arbitration
- Arbitration can be invoked only for actual cases [not for probabilities]
- Results of arbitration are binding on CAs only if accepted by taxpayer
- Consensus on suspension of collection of tax during MAP process
- No arbitration if domestic court in either CS rules on the same issue
- CS need to agree bilateral on mechanics of Arbitration process

Thank you

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