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Does Australia's Updated MAP Guidance Meet MAP Peer Review Report Undertakings?

Michelle Markham (Bond University) · Monday, December 17th, 2018

On 30 August 2018 the OECD released the fourth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms. Included in this round was a report on Australia. The report concluded that Australia meets part of the elements of the Action 14, and in particular meets some of the requirements regarding the availability and access to mutual agreement procedure (MAP). Where Australia has deficiencies, it was reported that Australia is working on most of them.

Recently the Australian Taxation Office (ATO) announced on its website [that it had reviewed and updated its MAP guidance](#). Taxation Ruling 2000/16 was accordingly withdrawn on 21 November 2018. In accordance with its undertakings in the Peer Review report, the updated ATO guidance now covers both transfer pricing and non-transfer pricing cases.

MAP and anti-abuse provisions

The MAP Peer Review report had noted that Australia's OECD MAP profile incorrectly specifies that access to MAP will not be granted when Australia's domestic anti-abuse provisions apply, which may have caused taxpayers not to submit MAP requests for cases where Australia's domestic anti-abuse legislation applies.

The updated ATO guidance provides that taxpayers are able to request MAP for tax that results from the application of Australia's general anti-avoidance rules in Part IVA of the Income Tax Assessment Act 1936. The new guidance on the ATO website now specifically includes the multinational anti-avoidance law and the diverted profits tax rules as part of the general anti-avoidance rules, an issue that was in need of clarification. However, it also states that Part IVA is not restricted by the application of Australia's tax treaties, and thus it prevails regardless of whether the resultant tax is contrary to the provisions of a treaty.

The guidance concludes that consequently the ATO cannot resolve a case under MAP to the extent that it involves the application of Part IVA. If this is the case, why would a taxpayer proceed with a MAP request in these circumstances? While the taxpayer is unable to obtain MAP relief from Australia where Part IVA is involved, it may seek unilateral relief from the other jurisdiction concerned in the MAP negotiations, and may enter into a MAP on this limited basis.

MAP and multilateral disputes

The updated ATO guidance now refers to MAP requests involving multiple jurisdictions. Multilateral MAP negotiations can take place where the taxpayer has presented separate and concurrent MAP requests under each bilateral treaty involved, and each jurisdiction has accepted the MAP request presented to them, and where every jurisdiction involved has a treaty providing for MAP with each of the other jurisdictions.

With the [OECD's MAP Forum on Tax Administration](#) focusing on ways to use multilateral case resolution procedures to the fullest extent, as many cases potentially impact the tax bases of more than two jurisdictions, this updated guidance will facilitate the resolution of multilateral MAP controversies.

MAP and taxpayer-initiated adjustments

The updated ATO guidance clarifies that a taxpayer may request a MAP where it has initiated an adjustment in good faith. The example is given of a taxpayer lodging a self-amendment request or a request under the domestic laws of a treaty partner country to amend a tax return to adjust the price of its related party transactions, or the profits attributable to a permanent establishment, to reflect arm's length conditions.

The ATO will consider a taxpayer's self-initiated adjustment as meeting the good faith requirement if it has fulfilled all its tax obligations related to the income or profits under the domestic laws of both tax jurisdictions properly and in a timely manner, clearly reflecting a good faith effort to ensure income and profits are correctly reported.

Multi-year resolution of issues through MAP

An oblique reference to multi-year requests being available through the MAP is contained in the list of information and documentation required in the updated ATO guidance for making a MAP request. This includes the provision of all relevant facts of the case and any documentation supporting those facts, including "income years or other periods."

MAP and audit settlements

The Peer Review report acknowledged that while it has provided access to MAP in all eligible cases, Australia's practice enables access to MAP to be limited in cases where taxpayers and the tax administration have entered into an audit settlement that contains a clause not to resort to MAP.

The updated ATO guidance does not specifically deal with the interaction between audit settlements and MAP. It is understood that the ATO is still considering this issue, and that the updated ATO guidance as a whole is regarded as being in development, with positions on MAP issues due to be clarified ahead of the Stage 2 peer review of measures taken to address any shortcomings identified in the Stage 1 Peer Review.

Conclusion

Australia undertook to provide updated MAP guidance in its Peer Review report, and it has fulfilled this task. Whereas the Peer Review report referred to previous problems in accessing Australia's MAP guidance, the information is now easily accessible on the ATO website.

While most of the information sought has been provided, the updated guidance would benefit from

further clarification in places.

In relation to MAP availability in cases of the application of Australia's anti-abuse provision, it would be advisable for a comprehensive explanation to be provided, so that taxpayers are aware of their circumscribed options in relation to the application of Australia's anti-abuse provision.

The OECD has made it very clear in the Action 14 minimum standards that jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. The author has [previously referred to the potential for abuse in such situations](#), as auditors may offer taxpayers a choice between entering into an audit settlement under which penalties are not applied (a condition of which is that the taxpayer waive their rights to seek MAP assistance), or receiving a high assessment with no suspension of collection, but with access to MAP.

Taxpayers may be pressurised into accepting an audit settlement by threats of higher adjustments if a MAP resolution is sought, or simply seek to maintain a good working relationship with their home tax authorities by not proceeding with a MAP case. One problem with such audit settlements is that the treaty partner or even the home state competent authority may be unaware that a tax treaty has been improperly applied. The author recommends that the issue of whether MAP is available in cases of audit settlements in the Australian context be clarified as soon as possible.

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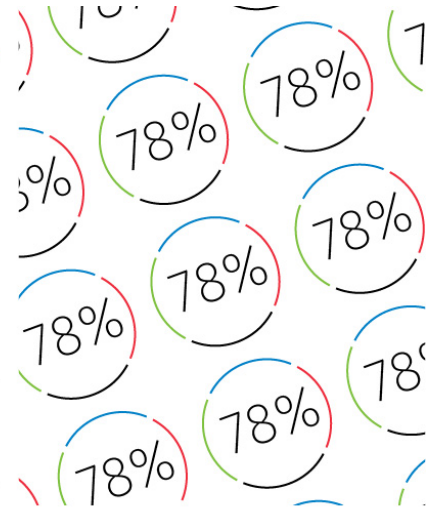
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