

MUTUAL AGREEMENT PROCEDURE

Guidelines issued under the provisions of Article 96(2) of the Income Tax Act.

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What is a MAP (MAP)?

A MAP is a procedure which allows the Malta Competent Authority or designated representatives of such Competent Authority to interact with their counterparts in Contracting States/Parties with the intent to resolve international tax disputes.

In the case of Malta, a MAP is possible under the provisions of a MAP article in –

- A Double Taxation Agreement;
- The Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC) - the EU Arbitration Convention;

(any of the above instruments hereinafter referred to as “Convention”) and can involve matters containing juridical double taxation cases, as well as inconsistencies in the interpretation or application of a Convention. Within this context, a MAP is possible for bilateral and multilateral disputes and may deal with requests for the multi-year resolution of recurring issues.

These Guidelines relate to a MAP under any Convention. With regard to a MAP under the EU Arbitration Convention, it is important to note that Malta applies the Recommendations found in the Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (2009/C 322/01). Consequently, and for the avoidance of doubt, should there be any conflict between these Guidelines and the said Code of Conduct, the provisions of the latter shall prevail. A copy of this Code of Conduct may be accessed at the following link: (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:EN:PDF>)

The Malta Competent Authority

Conventions are usually concluded between the governments of two (or more) jurisdictions. These jurisdictions are then referred to as the Contracting States or Contracting Parties to such a Convention.

"Competent Authority" is a term used in a Convention to identify a position, a person or a body to whom issues can be addressed within a Contracting State.

The Malta Competent Authority is the Minister responsible for finance or his authorised representative. Regulation 8 of The Cooperation with Other Jurisdictions on Tax Matters Regulations (Legal Notice 295 of 2011) specifies that an authorised representative shall be

the competent official that is identified as such and whose name and designation are published on the website of the Inland Revenue Department. The details of such authorised representative may be found at the following link:

<https://cfr.gov.mt/en/inlandrevenue/itu/Pages/Competent-Authority-Details.aspx>

The MAP article of a Convention together with the powers granted to the Malta Competent Authority by the Government of Malta, empower such Competent Authority to reach a resolution on MAP cases. The Malta Competent Authorities may enter into MAP negotiations and exchange taxpayer and other information under the authority of the provisions of the applicable Convention and the respective domestic law, regulations, and procedures.

Details of Competent Authorities of Contracting States/Parties

Country Profiles on Mutual Agreement Procedures which contain information about the Competent Authorities' contact details, domestic guidelines for MAP and other useful information for both tax authorities and taxpayers are available on the OECD website at <http://www.oecd.org/ctp/dispute/country-map-profiles.htm>

The Functions of the Malta Competent Authority

The Malta Competent Authority is charged with the responsibility to interact with its counterparts in any matters arising between Malta and other Contracting States/Parties pertaining to the interpretation or the application of a Convention, and to resolve any international tax disputes that might arise.

The Malta Competent Authority is generally committed to ensure a good faith application of a Convention. It endeavours to resolve requests from its counterparts in accordance with the provisions of the relevant Convention. It has the authority to resolve MAP cases in accordance with the terms of the applicable Convention without being dependent on the approval or the direction of personnel from the Malta tax administration that made the adjustments at issue or being influenced by considerations of the policy that Malta may like to see reflected in future amendments to the Convention.

It is pertinent to note that it is not always possible for the person delegated as Malta Competent Authority to deal directly with MAP cases. Therefore, it may be necessary to have other persons within the office of the Malta Competent Authority perform certain functions on its behalf.

MAP: How does it work?

The Malta Competent Authority acknowledges that a Convention permits a MAP for resolving difficulties arising from the interpretation or application of that Convention in the broadest sense of the term (including: (a) cases where there is a bona fide foreign-initiated self-adjustment; and (b) cases where there is an audit settlement between another tax authority

and a taxpayer¹). It basically authorises the Competent Authorities or their designated representatives to communicate with each other directly, including through joint commissions, for the purpose of resolving the matters that might be brought before them.

Access to MAP is provided with regard to any of the following subjects:

- transfer pricing adjustments;
- attribution of profits of a permanent establishment;
- dual residence of individuals and persons other than individuals;
- withholding tax levied beyond what is permitted by the applicable Convention;
- whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty; and
- any other case in which a person considers that the taxation is not in accordance with the applicable Convention.

Making a Request for MAP

The taxpayer must first raise the issue formally (by requesting assistance in writing) with the relevant Contracting State/Party according to that Convention. The request needs to be sent to the relevant Competent Authority as provided in the said Convention. Separate MAP requests need to be submitted for each taxpayer and/or under each Convention in cases where multiple requests are concerned.

When making a request for assistance, taxpayers are strongly encouraged to ensure that the person concerned in the other Contracting State/Party also contacts its Competent Authority. To facilitate the expeditious resolution of a MAP case, the taxpayer is encouraged to submit all supporting material, promptly and simultaneously, to both Competent Authorities.

The request must be presented by the taxpayer within the period specified in the relevant Convention. It is important to note that this period may differ depending on the Convention. Where the Convention does not specify a period during which the request is to be presented, taxpayers are to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular Convention.

¹ See “Appeal Rights” section below on applicable restrictions relating to derogation from certain assessments.

Minimum Requirements for a MAP Request for Assistance

It is suggested that the following items be contained in a taxpayer's MAP request.

Requests need to comply with specific minimum information requirements in order for the Competent Authority of Malta to be able to process the particular request. The minimum information requirements for a MAP Request depend on what type of MAP Request is involved.

Section A – General

1. Date of Taxpayer's MAP Request.
2. Details of the Taxpayer subject to the adjustment -
 - a. Full names and surname;
 - b. Physical address;
 - c. Contact details;
 - d. Income tax reference number of the Malta resident person;
 - e. Nature of business.
3. If a representative is acting for the taxpayer, a signed statement from the taxpayer that the representative is authorised to act for the taxpayer in making the MAP Request.
4. In the case of withholding tax, the following additional information:
 - a. full names and surname of the person who withheld the tax;
 - b. physical address of the person who withheld the tax;
 - c. contact details of the person who withheld the tax;
 - d. if known, the taxpayer reference number of the person who withheld the tax or was instructed to withhold the tax in the other jurisdiction;
5. The contact details of the foreign tax administration and/or branch office involved.
6. Tax assessment years/periods involved.
7. Summary of the facts.
8. Analysis of the issues for which the Malta Competent Authority assistance is requested.
9. Applicable Article(s) of the relevant Convention and the taxpayer's conclusion based on the facts.
10. A statement indicating whether the taxpayer has –
 - a. raised the matter with the other Contracting State/Party, if applicable;
 - b. filed a notice of objection or submitted a refund claim; or
 - c. submitted any comparable document, in any of the relevant jurisdictions;

11. An identification of the domestic and Convention time limits in the relevant jurisdictions in respect of the years for which relief is sought.
12. Any copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the other tax administration.
13. Any other facts that the taxpayer may consider relevant.
14. Supporting documentation should include—
 - a. a schedule of the related amounts;
 - b. all receipts of tax withheld;
 - c. all relevant correspondence or dates, and name(s) of person(s) with whom telephonic communication/meetings with the revenue authority took place.

Section B – Transfer Pricing MAP Requests

(This information is in addition to the required minimum information requirements listed in Section A.)

1. Details of the Associated Enterprises -
 - a. Full names and surname of the person;
 - b. Physical address of the person;
 - c. Contact details;
 - d. If known, reference number of the person.
2. Details regarding the adjustment (or proposed adjustment) in addition to the facts provided in Section A-
 - a. calculations setting out the adjustment or proposed adjustment (translated in both currencies where applicable);
 - b. an indication of any specific issues raised by the foreign Competent Authority, other than those listed in paragraphs 10 to 12 of Section A.
3. In addition to those listed in paragraph 10 of Section A, statements indicating the following-
 - a. Whether the taxpayer has –
 - i. filed a refund claim; or
 - ii. entered into a settlement agreement, in either of the jurisdictions related to the relief sought;
 - b. Whether the taxpayer has made a prior request to the Competent Authority of either Contracting State/Party on the same or a similar matter;
 - c. Whether the MAP Request involves issues that are currently or were previously considered by the tax authorities of either Contracting Stat/Party as part of –
 - i. an advance pricing arrangement;
 - ii. a ruling; or
 - iii. similar mechanism;

4. A copy of any other relevant Competent Authority Request and the associated documents filed, or to be filed with the Competent Authority of the other Contracting State/Party;
5. In addition to those listed in paragraph 14 of Section A, supporting documents should include the following-
 - a. copies of the relevant related party agreements;
 - b. copies of the Malta and foreign related parties' transfer pricing policies or documentation, whether at a group level or at a company level -
 - i. Copies of the financial statements of both related parties;
 - ii. Copies of the tax return disclosure of the Malta taxpayer involved.

Where applicable, translated copies of supporting documents can be supplied with those in the foreign language to assist the Malta Competent Authority in its processing of the MAP Request.

Considerations by the Competent Authority upon receiving a MAP Request

Upon receipt of a taxpayer's MAP request, the Malta Competent Authority will determine whether the request is justified and whether it is possible to resolve the case without the involvement of the other Competent Authority.

Generally, for a request to be considered justified, the following conditions must be met:

- the taxpayer must have reasonable grounds upon which to seek assistance from the Malta Competent Authority;
- the Malta Competent Authority should receive timely notification in writing from a taxpayer or the other Contracting State/Party of a proposed adjustment; and
- in the case of double taxation, this must be more than a mere possibility.

The mere existence of an audit or an examination of a taxpayer's activities in the other Contracting State/Party or a request from another Contracting State/Party for information about the taxpayer's activities carried on in the other Contracting State/Party would not generally be sufficient to justify a request.

Where the taxpayer has provided the required information listed in these guidelines, the Malta Competent Authority shall not refuse a MAP Request on the argument that insufficient information was provided.

When a MAP request is received from a taxpayer, the Malta Competent Authority will acknowledge receipt of such request. Where the request is justified, the Malta Competent Authority will endeavour to –

- accept the MAP request within thirty (30) days from the date of receipt;
- advise the other Competent Authority of its decision within thirty (30) days from the date of receipt of the MAP request.

Where these time limits cannot be achieved, the Malta Competent Authority shall advise the taxpayer and indicate the likely timeframe. Where additional information or clarification from the taxpayer is required by the Malta Competent Authority in order to reach a decision as to whether it can accept the MAP request, the thirty (30) day time limit will commence when the additional information is received by the Competent Authority.

Before declining a MAP request the Malta Competent Authority will consult with the other Competent Authority. If the Malta Competent Authority receiving the request ultimately concludes that the MAP request will not be accepted, it will advise the taxpayer in writing, giving the reasons for such decision.

Appeal Rights

As a general principle, the Malta Competent Authority acknowledges that a MAP provides a dispute resolution process that is in addition to that which may be available to a taxpayer under Maltese domestic law, and that the consideration of a MAP request may be conditional upon the taxpayer having put in abeyance, exhausted, or rescinded its domestic objection, review and appeal rights.

Within this context, a taxpayer may request MAP assistance irrespective of the remedies provided by Malta's domestic law. However, it is important to note that where the request for a MAP was prompted by action taken by the Commissioner for Revenue under the Income Tax Acts, the Malta Competent Authority cannot derogate in the MAP from an assessment that has become final and conclusive in accordance with the provisions of Article 38 of the Income Tax Management Act. Such cases involve instances where –

- no valid objection or appeal has been lodged within the time limit provided by the Income Tax Management Act against an assessment as regards the amount of the chargeable income assessed;
- the amount of the chargeable income has been agreed to under article 33(4) of the Income Tax Management Act;
- an appeal has been withdrawn or discontinued;
- the amount of the chargeable income has been determined on objection or appeal.

Commencing and Conducting the MAP

If the Malta Competent Authority cannot itself resolve the matter, but is in agreement with the taxpayer's request for a MAP, it will take up the matter with the Competent Authority of the other Contracting State/Party under the relevant Convention.

Whilst the time taken to complete a MAP case may vary according to its complexity, the Malta Competent Authority will endeavour to conduct the MAP process as expeditiously as possible and to complete the case within twenty-four (24) months from the date of acceptance of the taxpayer's MAP request.

During the evaluation stage, the Malta Competent Authority will endeavour to advise its counterpart on progress at least once every ninety (90) days. Communication may be by way of telephone, briefing notes, correspondence, teleconferencing, face-to-face meetings or any other form acceptable to both Competent Authorities.

To achieve timely resolution and to facilitate negotiations, the Malta Competent Authority will consider the preparation and transmission of a position paper as a matter of priority and within one hundred and eighty (180) days of advising the other Competent Authority that the MAP request has been accepted. Where circumstances are such that it is not possible to provide the position paper within one hundred and eighty (180) days, the Malta Competent Authority will advise the other Competent Authority in writing as to the reasons why the position paper cannot be so provided and the likely timeframe.

The negotiation of a MAP case is a government-to-government process. While a taxpayer does not have a legal or other right to attend negotiations between the Competent Authorities or to observe the negotiations, the Malta Competent Authority recognises that the taxpayer is a stakeholder in the MAP process and therefore, in exceptional cases, a presentation by the taxpayer may be helpful in the resolution of the case. Any such presentation would occur pursuant to a mutual agreement of the Competent Authorities involved and would be limited to providing factual information.

Concluding the MAP

When the Competent Authorities resolve a MAP case, the Malta Competent Authority will communicate the terms of the resolution to the taxpayer as soon as possible.

If the terms and conditions of the resolution are not satisfactory to the taxpayer, the taxpayer may withdraw from the MAP process and pursue any available right to appeal.

The Commissioner for Revenue shall not implement the resolution under the MAP process with a taxpayer until an exchange of letters between Competent Authorities has occurred. Once letters have been exchanged and the taxpayer has accepted the resolution, the Commissioner for Revenue shall give effect to the resolution in Malta without delay by (depending on the case):

- (a) informing the taxpayer with immediate effect in order for the latter to submit the required Adjustment Form for the implementation of the MAP agreement; or
- (b) by issuing a formal assessment that implements the MAP agreement (it is estimated that this process will take around 3 months from the agreement between the Competent Authorities and acceptance by the taxpayer).

Where the Malta Competent Authority and its counterpart agree that it is appropriate, agreements reached through a MAP process on difficulties or doubts arising as to the interpretation or application of a Convention may be published on the website of the Commissioner for Revenue.

Suspension of Collection of Tax During a MAP

The Commissioner for Revenue shall apply the provisions of article 41 of the Income Tax Management Act where a taxpayer has requested a MAP and has submitted a notice of objection or appeal against the relevant assessment. As a consequence, that part of the tax assessed that is in dispute may be kept in abeyance.

Consideration of Interest During a MAP

The Commissioner for Revenue shall apply the provisions of article 44(2B)(c) of the Income Tax Management Act that provide that no interest shall run on any tax payable in circumstances where a person has taken action under a MAP in terms of a Convention for the period between the date when the said action under the MAP is initiated and the date when the issue is concluded under the said procedure.

Limitation on the Use of Taxpayer Information

The Commissioner for Revenue and the Malta Competent Authority acknowledge that problems can develop if information obtained during the MAP process is misused. Any information received or prepared in connection with the MAP process, including information furnished by a taxpayer, an Associated Enterprise, or another Competent Authority, will be subject to the restrictions on disclosure of taxpayer information provided for in the applicable Maltese law and the relevant Convention.

For greater certainty, if the MAP process requires the review of sensitive or confidential information (such as a trade secret) that, if disclosed, could harm a taxpayer's competitive position, the Malta Competent Authority will ensure all measures are taken to protect the confidentiality of the information.