

MAP Operational Guidance for Member Countries of the Pacific Association of Tax Administrators (PATA)

Section 1 PURPOSE OF GUIDANCE

The purpose of this guidance is:

- to facilitate and support resolution of Mutual Agreement Procedure (MAP) cases among Pacific Association of Tax Administrators (PATA) members; and
- to ensure consistent and timely treatment of MAP cases.

Section 2 BACKGROUND AND SCOPE

1. This guidance pertains to the manner in which the Competent Authorities of the PATA members conduct the MAP process. The guidance deals specifically with Transfer Pricing Adjustments or similar types of adjustments; however, many of the principles expressed herein will be applicable to other types of MAP cases.
2. Where a resident or citizen of a PATA member country considers that the actions of a PATA member result, or will result, in double taxation, they may present their case in writing to the Competent Authority of the country in which they are a resident or citizen. If the taxpayer's claim is justified and cannot be resolved unilaterally, the Competent Authority shall endeavour to resolve the case with the Competent Authority of the other PATA member in a timely manner. Whilst every effort will be made by the Competent Authorities to reach a resolution and work within the spirit of this guidance, it is possible that there may be cases where the MAP process provides either partial relief or no relief.
3. The acceptance and evaluation of a taxpayer's MAP request and the negotiation and coming-into-force of its resolution are done by the Competent

Authorities pursuant to the pertinent provisions of the relevant bilateral Income Tax Convention ("Convention") to ensure mutual acceptability and consistency. See Appendix A for a list of the relevant Conventions.

4. It is understood that the MAP Article contained in the applicable Convention, together with the administrative powers granted to the Competent Authorities by their respective governments, empower the Competent Authorities to reach a resolution on MAP cases. The Competent Authorities may enter into MAP negotiations and exchange taxpayer and other information under the authority of the provisions of the applicable Convention and their respective domestic law, regulations, and procedures. MAP cases will be resolved in accordance with the Related Persons/Associated Enterprises, MAP, and Exchange of Information Articles of the applicable Convention.

5. This guidance does not modify any of the rules and procedures under the domestic law, policies, or procedures of the PATA members dealing with the MAP process. If there is any inconsistency between this guidance and the domestic law, policies, or procedures of PATA members dealing with the MAP process, the Competent Authorities shall endeavour to resolve this conflict.

6. No term, procedure, or understanding contained in this guidance shall be construed as superceding the provisions of the relevant Convention between PATA members, as listed in Appendix A. If there is any inconsistency between this guidance and a Convention, the provisions of the applicable Convention or any other bilateral understanding of agreement concerning MAP, either in existence or subsequently concluded, shall prevail.

7. The principles of the 1995 *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* issued by the Organization for Economic Co-operation and Development (OECD), as amended from time to time, will be used as a guide in resolving MAP cases. See Appendix B for the Glossary of Terms used in this guidance.

8. The PATA members acknowledge that it is frequently not possible for the persons delegated as Competent Authority to deal directly with MAP cases. Therefore, it may be necessary to have other persons within the office of the Competent Authority ("analysts") perform certain functions on behalf of the Competent Authority.

9. Competent Authorities must assure taxpayers that all information submitted under the MAP process will be subject to strict non-disclosure standards, in accordance with Section 6 of this guidance.

Section 3 MAKING AND ACCEPTING A MAP REQUEST

1. A taxpayer seeking relief from double taxation is required to formally request assistance in writing from the Competent Authority of the country in which they are a resident or citizen. This is the first stage of the MAP process. Appendix C to this guidance sets out the type of information that should accompany a taxpayer's MAP request.
2. When making a request for assistance, taxpayers are strongly encouraged to ensure that the Associated Enterprise in the other country also contacts its Competent Authority. To facilitate the expeditious resolution of a MAP case, the Competent Authorities encourage the taxpayer to submit all supporting material, promptly and simultaneously, to both Competent Authorities.
3. Upon receipt of a taxpayer's MAP request, the Competent Authority must then determine whether the request is justified and whether it is possible to resolve the case without the involvement of the other Competent Authority.
4. For a request to be considered justified, the following conditions must be met:
 - the taxpayer must have reasonable grounds upon which to seek Competent Authority assistance;
 - the Competent Authority should receive timely notification in writing from a taxpayer or PATA member of a proposed Transfer Pricing Adjustment; and
 - double taxation must be more than a mere possibility.
5. The mere existence of an audit or an examination of a taxpayer's activities by a PATA member or a request from another PATA member for information about the taxpayer's activities carried on in the other country would not generally be sufficient to justify a request. It is acknowledged, however, that such actions may in time develop to a stage that would justify a Competent Authority request.
6. When a MAP request is received from a taxpayer, the PATA member should acknowledge, and where the request is justified accept, the MAP request within thirty (30) days from the date of receipt. In addition, the Competent Authority of that PATA member should advise the other Competent Authority of its decision within thirty (30) days from the date of receipt of the MAP request. Communication between Competent Authorities and with the taxpayer should be in writing and identify the Associated Enterprise(s) involved in each country, the transfer pricing issue, and the contact persons for the Competent Authority and for the taxpayer responsible for the MAP request.

7. If this time limit cannot be achieved, the Competent Authority should so advise the taxpayer and indicate the likely timeframe. Where additional information or clarification from the taxpayer is required by the Competent Authority in order to reach a decision to accept the MAP request, the thirty (30) day time limit should commence when the additional information is received by the Competent Authority.
8. Before declining a MAP request the Competent Authorities should consult. If the Competent Authority receiving the request ultimately concludes that the MAP request will not be accepted, it should advise the taxpayer in writing, giving the reasons for such decision.

Section 4 EVALUATION AND NEGOTIATION OF A MAP CASE

1. The Competent Authority will commence its evaluation of a MAP case once it has been accepted. This is the second stage of the MAP process. The Competent Authorities will ensure that the MAP process is conducted as expeditiously as possible. Whilst the time taken to complete a MAP case may vary according to its complexity, the Competent Authorities should endeavor to complete a case within two (2) years from the date of acceptance of the taxpayer's MAP request.
2. One of the primary responsibilities of the Competent Authorities is to ensure communication and coordination between each PATA member's analysts. The Competent Authorities are committed to an informal process to expedite the MAP process. To enhance communication, analysts are encouraged to liaise with their Competent Authority counterparts to discuss or clarify specific issues throughout the MAP process. All such discussions between analysts should be properly documented.
3. To expedite the MAP process, the Competent Authorities should ensure that taxpayers provide all relevant information to both tax administrations. Where an exchange of information is necessary, the Competent Authorities will facilitate the prompt exchange of that information. The Competent Authorities do not need to exchange copies of all documents provided by the taxpayer but should arrange, amongst themselves, for an appropriate mechanism to corroborate the completeness and details of documents and information supplied by the taxpayers.
4. During the evaluation stage, the Competent Authorities should advise each other on their progress at least once every ninety (90) days. Regular reports may be provided by way of telephone, briefing notes, correspondence, teleconferencing, face-to-face meetings or any other form of communication

acceptable to the Competent Authorities. The objective of these communications is to ensure that both Competent Authorities are kept informed of a case's progress to facilitate timely resolution.

5. To achieve timely resolution and to facilitate negotiations, the Competent Authority should consider the preparation and transmission of a position paper as a matter of priority. The Competent Authority of the PATA member which made the Transfer Pricing Adjustment ("adjusting Competent Authority") should present a position paper to the other Competent Authority ("relieving Competent Authority") within one hundred and eighty (180) days of advising the relieving Competent Authority that the MAP request has been accepted.

6. If the adjusting Competent Authority is not able to provide the position paper within one hundred and eighty (180) days, the relieving Competent Authority should be advised in writing as to the reasons why the position paper cannot be so provided and the likely timeframe.

7. To expedite the MAP process, sufficient detail should be provided in the position paper to enable the relieving Competent Authority to determine whether correlative relief should be granted. The type of information and level of detail suggested for the position paper are set out in Appendix D.

8. The evaluation of the position paper by the relieving Competent Authority should also be undertaken as a matter of priority. It is expected that the relieving Competent Authority will conduct its evaluation and prepare a response (written or verbal) within one hundred and eighty (180) days from the date of receipt of the position paper. Should it be necessary, the adjusting Competent Authority will respond in a timely manner to supplementary questions from the relieving Competent Authority during the latter's evaluation period. Position papers and correspondence exchanged between the Competent Authorities shall not be provided to a taxpayer.

9. The Competent Authorities acknowledge that negotiations in respect of a MAP case may be conducted via means such as letters, facsimiles, e-mail, telephone, and face-to-face conferences. The Competent Authorities shall determine which means of communication may be taken on a case-by-case basis. Nevertheless, the Competent Authorities recognize that face-to-face conferences are often the most useful means by which to resolve a MAP case, and should conduct face-to-face conferences involving their analysts whenever possible and practical.

10. It is expected that where a face-to-face meeting is required, all relevant information will be exchanged at least four (4) weeks prior to the meeting. This will lead to more efficient and productive meetings, as the Competent Authorities

will have had sufficient time prior to the meeting to give due consideration to this information.

11. In order to achieve a timely resolution of a MAP case, the Competent Authority staff with the authority to resolve the case should be present at the negotiations.

12. The Competent Authorities recognise that in some cases interpreters may be required to help facilitate face-to-face meetings.

13. In some instances a Competent Authority may not be able to meet the two-year timeframe to complete a case. For example, this can occur when a taxpayer does not provide supplementary information in a timely manner or the particular case is unusually complicated. In such situations, the Competent Authorities may agree to a reasonable extension of the timeframe. For cases that have exceeded, or are likely to exceed, the two-year timeframe, senior officials of the two Competent Authorities should undertake a review of the case to determine the reasons for the delay and then agree on approaches to ensure the efficient completion of the case.

14. The Competent Authorities acknowledge that 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 Competent Authorities recognize that the taxpayer is a stakeholder in the MAP process. 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 and would be limited to providing factual information.

15. It is acknowledged that field staff who were directly or indirectly involved in the Transfer Pricing Adjustment should not take part in the Competent Authority negotiations. However, with the agreement of the Competent Authorities, they may be asked to serve in a consultancy role in order to provide details of the case and the basis for any adjustments that have been made and answer factual queries that may arise.

16. When the Competent Authorities resolve a MAP case, this resolution shall be confirmed by an exchange of letters.

17. The Competent Authorities will communicate the terms of the resolution to the taxpayer as soon as possible. This communication may take place prior to the exchange of letters if mutually agreed to by the Competent Authorities.

18. 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 right to appeal.

19. A PATA member should not implement the resolution under the MAP process with a taxpayer until the exchange of letters between Competent Authorities has occurred.

20. Once letters have been exchanged and the taxpayer has accepted the resolution, a PATA member should give it effect in its jurisdiction.

Section 5 FOREIGN & DOMESTIC APPEAL RIGHTS

1. The PATA members recognize that there are fundamental differences in the domestic objection and review processes in each PATA member country. These differences may result in different approaches in how each PATA member handles the interaction of MAP and the exercise of domestic and foreign appeal rights. As a general principle, the PATA members acknowledge that the MAP provides a dispute resolution process that is in addition to that which may be available to a taxpayer under 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.

2. The exercise of domestic objection and review processes in a PATA member's country may result in there no longer being double taxation. The PATA members acknowledge that once a taxpayer's liability for the taxable periods at issue has been determined by a court, the adjusting Competent Authority will endeavor only to obtain correlative relief from the other Competent Authority and will not take any action that would otherwise reduce the taxpayer's tax liability for the taxable periods at issue as determined by a court. However, the other Competent Authority is not bound by a decision in a foreign court or administrative tribunal and may choose to unilaterally provide relief if requested by the taxpayer and to the extent deemed appropriate.

Section 6 LIMITATION ON THE USE OF TAXPAYER INFORMATION

1. The PATA members acknowledge that problems can develop if information obtained during the MAP process is misused.

2. Any information received or prepared by a PATA member 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 domestic law and Convention.

3. 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 Competent Authorities will ensure all measures are taken to protect the confidentiality of the information in accordance with Section 6.2.

Section 7 DOMESTIC PROCEDURES

Each PATA member should publish procedures for MAP cases.

Section 8 LANGUAGE

This guidance is to be published in English, French and Japanese, all texts being equally treated.

Section 9 CONTACTS

Correspondence or exchanges of information under this guidance is to be made to the addresses specified in Appendix E.

Section 10 MODIFICATIONS

This guidance may be modified at any time pursuant to consultations among all PATA members.

APPENDIX A

Conventions

The Conventions referred to in Section 2.3 of this guidance are to the following Income Tax Conventions entered into by PATA members, as amended from time to time:

- Canada and the United States of America with Respect to Taxes on Income and on Capital, which was originally signed in Washington, D.C.

on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984, March 17, 1995 and July 29, 1997.

- Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was originally signed in Canberra, Australia, on May 21, 1980, as amended by the Protocol signed on January 23, 2002.
- Canada and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was originally signed in Tokyo, Japan on May 7, 1986, as amended by the Protocol signed on February 19, 1999.
- Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was originally signed in Sydney, Australia on August 6, 1982, as amended by the Protocol signed on September 27, 2001.
- Japan and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was signed in Tokyo on March 8, 1971. Japan and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was signed in Washington D.C. on November 6, 2003.
- The Commonwealth of Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, which was originally signed in Canberra, Australia on March 20, 1969, as amended by the Protocol signed on March 20, 1969.

Information in this Appendix was last updated on February 6, 2004.

APPENDIX B

Glossary of Terms

The definitions marked with an asterisk are from the 1995 Report to the OECD Committee on Fiscal Affairs, "*Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*".

Arm's Length Principle *

The international standard that OECD members have agreed should be used for determining transfer prices for tax purposes. It is set forth in Article 9 of the 'OECD Model Tax Convention on Income and on Capital' (the OECD Model Tax Convention) as follows:

[where] conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would but, for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Associated Enterprises *

Two enterprises are associated with respect to each other if one of the enterprises meets the conditions of Article 9, subparagraphs 1(a) or 1(b) of the OECD Model Tax Convention with respect to the other enterprise, i.e.:

- a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
- b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State.*

Transfer Pricing Adjustment

An adjustment by a PATA member to increase (decrease) the profit of an enterprise which is subject to tax in that country to correct understatements (overstatements) of profit arising from international dealings between Associated Enterprises being undertaken not in accordance with the Arm's Length Principle, i.e., an adjustment made in accordance with Article 9(1) of the OECD Model Tax Convention.

APPENDIX C

MAP Request

It is suggested that the following items be contained in a taxpayer's MAP request. However, the PATA member should refer a taxpayer to domestic procedures to ensure that all information required is provided.

- a) Name, address, nature of business and identification number of the taxpayer subject to the adjustment;
- b) Name, address and taxpayer identification number of the Associated Enterprises;
- c) Date of the taxpayer's MAP request;
- d) Statement of the relevant authority under an Article of the applicable Convention for the MAP request;
- e) Whether the taxpayer has applied, or will apply, for domestic objection and review processes and if these processes are, or will be, held in abeyance;
- f) Declaration by the taxpayer as to whether or not the years are open under the statutes of adjustment in both of the PATA member countries and expiry dates, if appropriate;
- g) Statement as to whether the adjusting Competent Authority is bound either by a court decision or through a closing agreement with the taxpayer;
- h) Years subject to the adjustment;
- i) Description of each transaction subject to adjustment;
- j) Amount of the adjustment in each year;
- k) Basis for the adjustment;
- l) Arguments or objections made by the taxpayer with respect to the assessing position;
- m) Statement as to whether the MAP request involves issues that are currently or were previously considered as part of an APA request;
- n) Contact person for the taxpayer; and
- o) Authorization for a representative to act on behalf of the taxpayer.

APPENDIX D

Position Paper

It is suggested that the following items be contained in a PATA member's position paper.

- a) Name, address, nature of business and identification number of the taxpayer subject to the adjustment;
- b) Name, address and taxpayer identification number of the Associated Enterprises and the basis for determining the association;
- c) Date of the taxpayer's MAP request;
- d) Statement of the exact nature of the adjustment and the relevant authority under domestic law pursuant to which the adjustment is made;

- e) Statement of the relevant authority under an Article of the applicable Convention for the MAP case;
- f) Years subject to the adjustment;
- g) Description of each transaction subject to adjustment;
- h) Identification of the relevant functions, assets, and risks of the taxpayer(s) in the PATA country(ies);
- i) Amount of the adjustment in each year;
- j) Basis for the adjustment, including an explanation of the appropriateness of the chosen TPM by demonstrating how the adjustment produces results consistent with the Arm's Length Principle;
- k) Process of calculating the amount of the adjustment and use of supporting data. Such items may include, as relevant and appropriate, economic data or economic reports relied upon, explanatory narratives, and taxpayer documents or records (e.g., identification of comparable transactions and comparability adjustments performed);
- l) Arguments or objections made by the taxpayer with respect to the assessing position;
- m) Statement indicating the amount of relief sought;
- n) Contact person for the case; and
- o) Notification of the obligation to maintain confidentiality of the paper under the applicable Convention.

APPENDIX E

Communication

Communication or exchange of information under this guidance is to be made to the following addresses:

Mr. Paul Duffus
First Assistant Commissioner
International Strategy and Operations
Competent Authority
Australian Taxation Office
PO Box 900, Civic Square
Canberra ACT 2608
Australia

Mr. Jim Gauvreau
Director
Competent Authority Services Division
International Tax Directorate

Canada Customs and Revenue Agency
5th Floor, Canada Building
344 Slater St.
Ottawa, Ontario
Canada, K1A 0L5

Mr. Takeo Shikado
Deputy Commissioner
National Tax Agency
Ministry of Finance
1-1 Kasumigaseki 3-chome
Chiyoda-ku, Tokyo 100-8978, Japan

Mr. Robert H. Green
Director, International
Internal Revenue Service
Department of the Treasury
1111 Constitution Avenue N.W.
Washington, D.C. 20224
U.S.A.

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