



Inland Revenue Department

The Government of the Hong Kong Special Administrative Region
of the People's Republic of China

GUIDANCE ON MUTUAL AGREEMENT PROCEDURE

January 2023

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MUTUAL AGREEMENT PROCEDURE AS DISPUTE RESOLUTION MECHANISM

Overview

1. The Mutual Agreement Procedure (MAP) Article in the [double taxation agreements or arrangements](#) (DTAs) enables a taxpayer to initiate the procedure where it is considered that the actions of the competent authority of one or both of the jurisdictions concerned result or will result in taxation not in accordance with the provisions of a DTA.

2. MAP is a process which enables the competent authorities to interact with the intention to resolve disputes regarding the application of the DTA. The competent authorities are obliged to use their best endeavours to reach an agreement with a view to avoiding taxation which is not in accordance with the DTA. In the Hong Kong Special Administrative Region (Hong Kong), the competent authority is the Commissioner of Inland Revenue (the Commissioner) or the Commissioner's authorised representative. The competent authority of Hong Kong has the autonomy to enter into MAP agreements in accordance with the terms of the DTA without being dependent on the approval or the direction of the officers of the Inland Revenue Department (IRD) directly involved with the adjustment at issue and without being influenced by policy considerations.

DTA jurisdiction residents can apply for MAP

3. A MAP request can be made when a taxpayer considers that the actions of the tax administrations of one or both jurisdictions result or will result in taxation not in accordance with the DTA. For Hong Kong, the earlier DTAs require a taxpayer to make the request to the competent authority of the taxpayer's jurisdiction of residence. Some recent DTAs contain a provision which allows a taxpayer to request MAP assistance from the competent authority of either jurisdiction. The IRD does not impose any fee for MAP request.

Time limit for making MAP request

4. A MAP request should be made within the time limit from the first notification of the actions giving rise to taxation not in accordance with the provisions of the DTA. Such taxation must have occurred or is almost certain to occur. It should not be just a possibility.

5. The time limit is specified in the MAP Article of the DTA and in most cases is three years of the first notification of the action which results or is likely to result in double taxation. Failure to observe the time limit will result in the rejection of the MAP request.

6. The competent authority of Hong Kong will interpret the time limit in a way so as not to disadvantage the taxpayer. In general, the time limit will usually commence from the date on which the relevant notice of assessment or computation of loss is issued by the IRD or the equivalent notification is issued by the tax authority of the other DTA jurisdiction.

ACCESS TO MAP

Transfer pricing

7. Hong Kong provides access to MAP in cases involving transfer pricing between associated enterprises and attribution of profits to permanent establishment since each Hong Kong's DTA contains the Associated Enterprises Article and the Business Profits Article which provide for transfer pricing and profit reallocation adjustments. Sections 50AAN and 50AAO of the [Inland Revenue Ordinance \(Cap. 112\)](#) (IRO) also provide that where a person makes a MAP request under a DTA in relation to the arm's length profits of the person or the person's permanent establishment in Hong Kong, and a MAP solution (i.e. a unilateral solution, a MAP agreement or an arbitration decision) is arrived at, the person's profits should be assessed to Hong Kong tax in a way that is consistent with the MAP solution.

Tax audit settlement

8. Hong Kong will not preclude access to MAP in cases where the issues in dispute have already been resolved through an audit settlement between the taxpayer and the IRD. However, it would be difficult for the competent authorities of Hong Kong and the other DTA jurisdiction to negotiate and come to an agreement on a position that deviates from the audit settlement which has already been accepted by the taxpayer or its associated enterprise.

Bona fide taxpayer-initiated foreign self-assessment

9. Under the domestic laws of some DTA jurisdictions, a taxpayer may be permitted under appropriate circumstances to amend a previously filed tax return by adjusting the price for a controlled transaction between associated enterprises or the profits attributable to a permanent establishment, in order to reflect a result in accordance with the arm's length principle. Hong Kong will consider providing access to MAP with respect to such an adjustment provided that it is bona fide made by the taxpayer. In this regard, a taxpayer-initiated foreign adjustment would be considered bona fide where the taxpayer has spent good efforts to compute and report correctly the taxable income from a controlled transaction or the profits attributable to a permanent establishment and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the tax laws of Hong Kong and the other DTA jurisdiction.

MAP and anti-abuse provisions

10. There is no general rule denying MAP access in cases of perceived abuse. Following the incorporation of general anti-abuse rule into some recent Hong Kong's DTAs, the interpretation and application of such rule would fall within the scope of the MAP. Hong Kong will therefore admit cases into MAP where the issue for discussion is the application of the anti-abuse provisions in the DTA or whether the application of the domestic anti-avoidance provisions may conflict with the provisions of the DTA.

MAP PROCESS

Two-stage process

11. There are two stages to the MAP. The first stage involves the taxpayer and the competent authority of the DTA jurisdiction to which the MAP request is made. The second stage involves the endeavours of the competent authorities of both DTA jurisdictions to resolve the case.

12. The first stage has three steps:

- (a) the presentation of a case by the taxpayer to the competent authority of either DTA jurisdiction;
- (b) consideration by the competent authority whether the case presented is justified; and
- (c) consideration by the competent authority whether it is able to arrive at a satisfactory solution itself.

13. If the case cannot be resolved at the first stage, the competent authority has an obligation to endeavour to resolve the case by mutual agreement with the competent authority of the other DTA jurisdiction.

Stage One

Submission of a MAP request

14. In Hong Kong, a taxpayer should make a MAP request by completing Form [IR1454](#) and sending it to:

The Hong Kong Competent Authority
Tax Treaty Section
Inland Revenue Department
GPO Box 10851, Hong Kong
(Attn: Chief Assessor (Tax Treaty))

Information required for MAP request

15. The taxpayer should include the following information in support of a MAP request:

- (a) The identity of the taxpayer covered in the MAP request, including the name, address, taxpayer identification number or birth date, contact details and if more than one taxpayer is covered by the MAP request, the relationship between the taxpayers;
- (b) The basis for the request, including the DTA and the specific provision(s) thereof which are considered not correctly applied by either Hong Kong or the other DTA jurisdiction (and to indicate which jurisdiction and the contact details of the relevant person(s) in that jurisdiction (if it is not Hong Kong));
- (c) The facts of the case, including any documentation to support these facts, the taxation years or period involved and the amounts involved (in both the local currency and foreign currency);
- (d) An analysis of the issue requested to be resolved via MAP, including the taxpayer's interpretation of the application of the specific DTA provision(s) which supports its claim that the provision of the specific DTA is not correctly applied by either Hong Kong or the other DTA jurisdiction and the proposed

basis of resolving the issues. Relevant documentation (e.g. documentation required under transfer pricing legislative or published guidance, copy of tax assessment or other notification of action giving rise to the issues for MAP, etc.) should also be provided;

- (e) Whether the MAP request was also submitted to the competent authority of the other DTA jurisdiction. If yes, please state so in the MAP request and provide the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted. A copy of that submission (including all documentations filed with that submission) should also be provided unless the content of both MAP submissions are exactly the same;
- (f) Whether the MAP request was also submitted to another authority under another Instrument that provides for a mechanism to resolve treaty-related disputes. If yes, please state so in the MAP request and provide the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted. A copy of that submission (including all documentations filed with that submission) should also be provided unless the content of both MAP submissions are exactly the same;
- (g) Whether the issue involved was previously dealt with in an advance ruling, advance pricing arrangement, settlement agreement or by any tax tribunal or court. If yes, a copy of these rulings, agreements or decisions should be provided;
- (h) Whether any relief has been sought by the taxpayer under the laws of Hong Kong or the other DTA jurisdiction in respect of the issue. If such a relief is sought under the domestic laws of the other DTA jurisdiction, please provide a schedule of any

time limits in respect of the years / periods for which the relief is sought;

- (i) If applicable, the details of the taxpayer's authorized representative with a copy of the authorization letter;
- (j) A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issues presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner;
- (k) A statement agreeing that all the information and documents submitted may be provided to the competent authority of the other DTA jurisdiction for processing the MAP request.

16. If the relevant information is not in English or Chinese, the taxpayer is required to provide the English translation. Under section 50AAB(2) of the IRO, the competent authority of Hong Kong may ask the taxpayer to provide further information in support of its MAP request if necessary. In any event, the taxpayer will not be denied access to MAP in Hong Kong on the grounds that insufficient information is provided. However, if the taxpayer fails to provide the required information despite repeated requests, the competent authority of Hong Kong may consider the objection raised in the request as not justified, after consulting the competent authority of the other DTA jurisdiction.

17. Where a taxpayer makes a MAP request to the competent authority of a DTA jurisdiction in anticipation of Hong Kong providing relief, a copy of the request should be provided at the same time to the competent authority of Hong Kong. The provision of a copy at this time may:

- (a) assist in the resolution of the case in the quickest possible time by enabling the competent authority of Hong Kong to

undertake a preliminary review of the case;

- (b) ensure that the competent authorities of Hong Kong and the other DTA jurisdiction are satisfied that the request has been made within the time limit specified in the DTA; and
- (c) ensure that the requirements for making the request to the competent authority of the other DTA jurisdiction have been satisfied.

18. Upon receipt of a MAP request, the competent authority of Hong Kong will notify the competent authority of the other DTA jurisdiction and exchange information relevant to the request.

Determining whether the MAP request is justified

19. The competent authority to whom MAP request is made must consider whether the case is justified (e.g. whether the taxpayer has reasonable grounds upon which to seek the competent authority's consideration). The action complained of must be directed specifically at the taxpayer.

20. The competent authority of Hong Kong could be expected to consider a case as being justified where the taxpayer has received written notification from either the IRD or the tax authority of the other DTA jurisdiction of the actual or proposed taxation. This notification should include the details of adjustment, the amount involved and the basis of calculation.

21. Actions that the competent authority of Hong Kong is unlikely to consider sufficient to justify a case include:

- (a) the mere existence of an audit or an examination of the affairs of the taxpayer or its associated non-resident enterprise;
- (b) requests from the competent authority of Hong Kong or the

other DTA jurisdiction for an exchange of information about the dealings between the taxpayer and the associated non-resident enterprise;

- (c) discussions between the taxpayer and the tax authority of the other DTA jurisdiction about the amount and source of profits considered attributable to the permanent establishment under the Business Profits Article;
- (d) discussions between the associated non-resident enterprise and the tax authority of the other DTA jurisdiction concerning non-arm's length dealings between the taxpayer and the associated non-resident enterprise; or
- (e) interpretation of tax laws, public advice or guidance issued by the IRD or the tax authority of the other DTA jurisdiction which is of a general nature, even if the taxpayer believes that such interpretation, advice or guidance will apply to it and if applied, may result in taxation not in accordance with the DTA.

22. In cases where the competent authority of Hong Kong considers that the taxpayer's MAP request is not justified, the competent authority of Hong Kong will write to the competent authority of the other DTA jurisdiction setting out the reasons why the competent authority of Hong Kong believes that the request is not justified and invites the competent authority of the other DTA jurisdiction to provide its views before making a decision on whether to accept or reject the request. The taxpayer will be informed if its request is eventually rejected.

Unilateral solution

23. If the MAP request is considered justified and the issue involved can be resolved on a unilateral basis, the competent authority of Hong Kong may grant relief, under the provisions of the DTA, without the need to enter into

bilateral discussion with the competent authority of the other DTA jurisdiction. However, if the case cannot be resolved unilaterally at the first stage, such as when the taxation not in accordance with the DTA is due wholly or partly to an action in the other DTA jurisdiction, the competent authority of Hong Kong will try to resolve the case by mutual agreement with the competent authority of the other DTA jurisdiction under stage two.

Stage Two

Duty to negotiate and endeavour for resolution

24. Stage two commences with the competent authority that has been presented with the case approaching the other competent authority. In this stage, both competent authorities have the duty to negotiate and to use their best endeavours to resolve the case. However, this does not mean that the competent authorities will resolve every case or necessarily relieve all taxation not in line with the DTA.

25. In all instances and as part of the negotiations, the competent authorities will seek to establish a mutual understanding of the relevant principles embodied in the DTA, the facts of the case and how those principles are to be applied so as to relieve any taxation not in accordance with the DTA.

26. For example, if Hong Kong makes the primary transfer pricing or profit reallocation adjustment, the competent authority of Hong Kong will try to demonstrate that the adjustment results in taxation in accordance with the DTA and the other DTA jurisdiction should relieve any resultant double taxation. The competent authority of Hong Kong will also seek to comprehend fully the position of the competent authority of the other DTA jurisdiction and explore opportunities to reach an agreement.

Competent authority communications

27. Communications between the competent authorities will usually be

through an exchange of position papers. Information provided by the taxpayer to the competent authority of Hong Kong will be taken into account in the preparation of the Hong Kong's position papers.

28. Where a case involves significant issues upon which agreement cannot be reached through the exchange of position papers, the competent authorities may meet for negotiations. The taxpayer does not have a right to be present at such negotiations. However, where both competent authorities agree, the taxpayer may personally present its case to the competent authorities jointly or be called upon to make any clarification. Where the competent authority of the other DTA jurisdiction does not agree to a joint presentation, the taxpayer will still be given an opportunity to provide input to the competent authority of Hong Kong for consideration.

29. The competent authority of Hong Kong will endeavour to ensure that communications are undertaken on a timely basis to facilitate resolution of the case as quickly as possible. The taxpayer will be kept informed of the progress by the competent authority.

30. Exchange of information between competent authorities is undertaken under the Exchange of Information Article of the relevant DTA and will be subject to the secrecy provisions of that Article.

Competent authority agreement reached and accepted

31. An agreement reached by both competent authorities may result in the IRD:

- (a) restoring the taxpayer's original tax position by withdrawing the adjustment which led to the MAP request;
- (b) making a correlative adjustment or providing a tax credit to relieve any double taxation; or

- (c) amending the taxpayer's assessment or tax payable as per the agreement.

32. Where a competent authority agreement is reached, the competent authority of Hong Kong will write to notify the taxpayer and advise the taxpayer on the next course of action within one month. The agreement will not be implemented unless the taxpayer accepts the agreement as the final resolution by giving a written notice to the competent authority of Hong Kong. If the taxpayer accepts the agreement, the competent authority of Hong Kong will proceed to conclude the case, implement the agreement and provide the relief as appropriate. In most cases, where the implementation of the competent authority agreement only requires the deduction of taxable income or the increase of losses carried-forward, no further action by the taxpayer is necessary for the agreement to be implemented.

No competent authority agreement reached or accepted

33. If the competent authorities are unable to reach an agreement or the taxpayer does not accept such an agreement, subject to any referral of the issue for arbitration under the DTA, the competent authority of Hong Kong will close the case without implementing any agreement. The taxpayer may continue to seek remedy under the IRO or the domestic laws of the other DTA jurisdiction if still applicable.

Arbitration

34. Some Hong Kong's DTAs provide access to arbitration for an issue unresolved via MAP. Where the competent authorities are unable to reach an agreement to resolve the issue via MAP within the time limit prescribed under the MAP Article and no decision on the issue has been rendered by a court or administrative tribunal of Hong Kong or the other DTA jurisdiction, the taxpayer may request the competent authority to refer the unresolved issues for arbitration if it is provided under the relevant DTA.

35. Subject to the acceptance by the taxpayer, the mutual agreement that implements the arbitration decision shall be binding on Hong Kong and the other DTA jurisdiction. If the taxpayer rejects the outcome of the arbitration, it may continue to seek remedy under the IRO or the domestic laws of the other DTA jurisdiction if still applicable. In such a case, Hong Kong would consider that the efforts of the competent authorities to resolve the case via MAP have been exhausted.

TIMEFRAME FOR RESOLUTION

Target time for resolving a MAP case

36. The competent authority of Hong Kong aims to resolve a MAP case (including the implementation of any MAP solution) within 24 months from receiving the complete request. While the competent authority of Hong Kong works to achieve timely resolution of the MAP case, the complexity of issues involved in each case will determine the actual time needed to resolve the case. In any event, the competent authority of Hong Kong will try to resolve any MAP case as quickly as possible.

No time limit for implementing MAP solution

37. Specific provisions in a DTA dealing with time limits for implementation of competent authority agreement or arbitration decision take precedence over the normal domestic law time limits that would otherwise apply to the provision of relief from double taxation. For Hong Kong, most of its DTAs include provisions in the MAP Article which state that any agreement reached via MAP or implementation of an arbitration decision shall be implemented notwithstanding any time limits in the domestic laws of Hong Kong and the other DTA jurisdiction. Section 50AAB(6) of the IRO also provides that a MAP solution shall be implemented notwithstanding any time limits under the IRO, whether by way of discharge or repayment of tax, allowance of tax credit or making of an assessment. A taxpayer can rest assured

that, by presenting a case to the competent authority or referring any issue for arbitration under a DTA, the mere expiration of domestic time limits does not preclude the granting of relief.

38. Where the MAP solution leads to additional tax to be paid by the taxpayer, the IRD's normal practice is to require tax payment to be made within about 6 weeks after the date of issue of the assessment. However, if the MAP solution results in a refund of the tax due or paid by the taxpayer, it is the IRD's pledge to issue the refund within 10 working days after the date of issue of the revised assessment.

MAP AND DOMESTIC REMEDIAL PROCESS

Interaction between MAP and objection process under the IRO

Concurrent avenues to MAP and objection

39. The MAP Articles in Hong Kong's DTAs provide taxpayers with an avenue for review in addition to the rights:

- (a) to object to an assessment under section 64(1) of the IRO; and
- (b) to dispute the amount of a tax credit under section 50(9A) of the IRO.

40. A taxpayer can request MAP regardless of the remedies provided under the IRO. The Commissioner will consider concurrently a case presented to him or her under the MAP Article and an objection lodged by the taxpayer under the IRO.

Objection undetermined when competent authority agreement reached

41. Where the taxpayer accepts the competent authority agreement reached

for an issue covered by his MAP request and his objection lodged for the issue remains undetermined, the taxpayer's acceptance of the competent authority agreement will be regarded as a settlement agreement between the taxpayer and the Commissioner under section 64(3) of the IRO. However, if the assessment objected by the taxpayer involves a number of issues, the settlement agreement will be limited to those issues resolved mutually by the competent authorities. The taxpayer may still seek remedy under the IRO in relation to the issues unresolved through the MAP.

42. If the taxpayer does not accept the competent authority agreement, the competent authority of Hong Kong will close the case without implementing any agreement. The Commissioner will proceed to determine the taxpayer's objection under section 64(4) of the IRO.

Objection determined before competent authority agreement reached

43. Where the Commissioner determines to wholly allow the taxpayer's objection, competent authority's consideration via the MAP will cease since there will no longer be taxation that is not in accordance with the DTA.

44. If the competent authorities have not agreed on an appropriate solution by the time the Commissioner determines the objection, the taxpayer has a right to appeal to Board of Review under section 66 of the IRO if dissatisfied with the determination.

45. Once a decision of the Board of Review or an order of the courts has been made, the Commissioner will abide by that decision or order. The subsequent endeavours of the competent authority of Hong Kong under a DTA will be limited to demonstrating to the competent authority of the other DTA jurisdiction that the taxation, consistent with the Board's decision or the court's order, is in line with the DTA and that relief should be provided by the other DTA jurisdiction.

Interaction between MAP and domestic remedial process in the other DTA jurisdiction

46. Whether a MAP request can progress while a taxpayer's objection, review and appeal rights are ongoing in the other DTA jurisdiction depends on whether the competent authority of that jurisdiction agrees to proceed with MAP negotiations concurrently.

47. The successful exercise of objection, review and appeal rights in the other DTA jurisdiction may give rise to the result that there is no longer any taxation which is contrary to the DTA. Under these circumstances, it would be inappropriate for the taxpayer to obtain any correlative relief in Hong Kong.

48. Depending on the circumstances of each case, the Commissioner may consider providing correlative adjustment on the condition that:

- (a) the taxpayer and any non-resident associated enterprise have exhausted or rescinded objection, review and appeal rights in the other DTA jurisdiction; or
- (b) the taxpayer and any non-resident associated enterprise agree to advise the Commissioner should their objection, review and appeal rights be exercised in the other DTA jurisdiction.

49. In relation to the situation outlined under paragraph 48(b), the issue of any revised assessment or the provision of a credit for foreign taxes paid will be deferred until such time as the objection, review and appeal rights in the other DTA jurisdiction have lapsed or are subsequently rescinded or exhausted.

MISCELLANEOUS MATTERS

Multilateral and multi-year application

50. The competent authority of Hong Kong seeks to handle MAP cases in the most effective manner. While the MAP Articles of Hong Kong's DTAs require the competent authorities to consult with each other bilaterally, the competent authorities of each jurisdiction can be part of what are, in practice, multilateral MAP negotiations where:

- (a) every jurisdiction involved has a DTA providing for MAP with each other;
- (b) the taxpayer has presented separate and concurrent MAP requests under each relevant DTA; and
- (c) each jurisdiction has accepted the MAP request.

In such cases, the competent authority of Hong Kong will seek to process the bilateral cases in a co-ordinated manner and make use of exchange of information powers where this will help resolve the cases efficiently.

51. To avoid duplicative MAP requests and permit a more efficient use of competent authority resources, the competent authority of Hong Kong will allow a taxpayer to request a multiyear resolution via MAP with respect to a recurring issue, provided that for each of the relevant years, the facts and circumstances of the issue are the same and the MAP request is presented within the time limit specified in the MAP Article of the DTA. Where more than one MAP request for the same issue over a number of years are received, the competent authority of Hong Kong will also seek to deal with all the requests in a co-ordinated manner.

Payment of tax during MAP process

52. Hong Kong does not require tax to be paid as a condition for access to MAP. A taxpayer who has presented a MAP request may apply to hold over the Hong Kong tax payable under section 71 of the IRO if a valid objection has been lodged under section 64 of the IRO. Each request to hold over the payment of tax will be decided on its merits. For details, please refer to [Departmental Interpretation and Practice Notes No. 6](#).

Penalties

53. If the Commissioner considers it appropriate to do so having regard to a MAP solution, he or she may adjust any additional tax imposed under Part 14 (which is in the nature of administrative penalty directly connected to tax liability) unless the Board of Review or the court has delivered a decision, opinion, determination or direction in respect of the assessment of the additional tax. Such adjustment does not apply to criminal penalties or other non-tax based administrative penalties.

Advance pricing arrangement

54. To minimise the need for MAP and reduce the risk of being subject to double taxation as a result of transfer pricing or profit reallocation adjustments, Hong Kong has implemented an advance pricing arrangement (APA) programme which allows to determine in advance an appropriate set of criteria for the determination of the transfer pricing for the controlled transactions on a bilateral or multilateral basis. APAs concluded bilaterally or multilaterally with DTA jurisdictions provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes. The IRD may consider roll-back of an APA to prior years subject to the time limits for amending tax assessment under the IRO or the relevant DTA, where the facts and circumstances in the prior years are the same as those for the APA. The statutory provisions governing the making of APA are provided under Division 4 of Part 8AA of and Schedule 17H

to the IRO. The administrative guidance on the APA program can be found in [Departmental Interpretation and Practice Notes No. 48](#).

MAP Profile

55. More information about the application of MAP in Hong Kong can be found in the [Hong Kong's MAP Profile](#) published on the OECD's website.

Contact information

56. For any enquiries relating to this guidance, please contact the IRD at (852) 2594 5402 or taxtt@ird.gov.hk.