

Client Alert

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Malaysia Issues Updated Mutual Agreement Procedure ("**MAP**") Guidelines

Background

On 11 January 2018, the Malaysian Inland Revenue Board ("**IRB**") published an updated and amended MAP Guidelines dated 19 December 2017. The updated version replaces the previous version issued by the IRB dated 5 December 2014.

The double tax agreements ("**DTA**") entered into by Malaysia with other Contracting States contain provisions which allow a taxpayer to present an MAP case to its relevant competent authority ("**CA**") if the taxpayer considers that the actions of one or both of the Contracting States results in taxation which is not in agreement with the DTA. The MAP Guidelines are intended to provide guidance to taxpayers on the process and procedures to initiate an MAP request with the Malaysian CA to resolve treaty-related disputes.

The amendments in the updated MAP Guidelines are for the purposes of incorporating the minimum standards set out in the OECD BEPS Action 14 final report ("**Final Report**"). As a member of the BEPS Inclusive Framework, Malaysia has committed to the implementation of the minimum standards set out under the Final Report. This Client Alert highlights the key changes in the recently updated MAP Guidelines.

Summary of Key Changes

Independent from domestic law remedies

The MAP Guidelines clarify that a taxpayer may present a case to the CA for treaty-related disputes, irrespective of the other legal remedies that may be available under domestic law.

Procedure of the Malaysian CA for MAP requests

The IRB clarifies that the Malaysian CA will first attempt to resolve any MAP requests locally by way of a unilateral agreement with the taxpayer, if appropriate. However, if the matter cannot be resolved by the Malaysian CA, it will then commence discussions with the CA of the other jurisdiction.

Timelines for the MAP Process

The minimum standards under the Final Report are aimed at ensuring the timely, effective and efficient resolution of treaty-related disputes. To this end, the updated MAP Guidelines provides additional clarity on some of the timelines relating to the MAP process, as follows:

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(a) Acceptance of MAP agreement by taxpayer

If the Malaysian CA has reached an agreement with the other CA in relation to the tax position of the taxpayer, the Malaysian CA will proceed to notify the taxpayer of the agreement. The taxpayer is required to confirm its acceptance of the MAP agreement within 30 days of the notification.

(b) Implementation of MAP agreement

Once an MAP agreement has been accepted by the taxpayer, the implementation of the agreement will be made within 3 months from the determination of the case.

Limitation on access to MAP

In line with the Final Report's recommendation that clarification should be provided if there are administrative or statutory processes under domestic laws which may affect the availability of the MAP process, the updated MAP Guidelines specifically clarifies that the MAP process will not be available in the following instances:

- (a) appeals in instances where a decision by the Malaysian courts or the Special Commissioners of Income Tax has already been made;
- (b) a composite assessment has been raised pursuant to a mutual agreement reached between the IRB and the taxpayer under Section 96A of the Income Tax Act 1967; or
- (c) cases involving elements of tax evasion or tax avoidance.

Comments

Traditionally, there has been some reluctance by Malaysian taxpayers to consider MAP as a dispute resolution option due to the lengthy process, and also uncertainty as to the commitment of the Malaysian CA to the MAP process.

One of the recommendations in the Final Report was for countries to commit to a timely resolution of MAP cases, and in particular, to endeavor to resolve MAP cases within a time frame of 24 months. Unfortunately, the updated MAP Guidelines in Malaysia does not provide an express commitment to the implementation of this recommended time frame.

Separately, the Final Report also put forward an optional recommendation for the implementation of mandatory binding arbitration to resolve tax treaty disputes. At current time, Malaysia has not committed to the implementation of such arbitration.



Nevertheless, the release of the updated MAP Guidelines is still a reassuring gesture as to Malaysia's commitment to enhancing the dispute resolution mechanisms available for taxpayers, in line with Malaysia's obligations under the BEPS project. The further clarity on the MAP process provided in the updated MAP Guidelines will hopefully translate into a more effective and efficient remedy for taxpayers to resolve cross-border and treaty related tax disputes.

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