

Guide on Mutual Agreement Procedures

Income Tax

Guide on Mutual Agreement Procedures

Preface

This is a general guidance on the mutual agreement procedure (MAP) that allows competent authorities from the governments of contracting jurisdictions to interact with the intent to resolve international tax disputes.

It does not delve into the precise technical and legal detail that is often associated with tax, and should, therefore, not be used as a legal reference.

This guide is not an “official publication” as defined in section 1(1) of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It is also not a binding general ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the **SARS website** for details of the application procedure.

All guides, interpretation notes and forms referred to in this guide are available on the **SARS website**. Unless indicated otherwise, the latest issues of these documents should be consulted.

For more information, assistance and guidance you may –

- visit the **SARS website**;
- contact the SARS National Contact Centre –
 - if calling locally, on 0800 00 7277;
 - if calling from abroad, on +27 11 602 2093 (only between 8h00 and 16h30 South African time);
- have a virtual consultation with a SARS consultant by making an appointment via the **SARS website**;
- visit your nearest SARS branch office, preferably after making an appointment via the **SARS website**; or
- contact your own tax advisor or tax practitioner.

Legislative Policy

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Glossary

In this guide unless the context indicates otherwise –

- “**ADR**” means alternative dispute resolution;
- “**APA**” means an advance pricing arrangement;
- “**Article**” means an article in the Convention;
- “**BEPS**” means Base Erosion and Profit Shifting;
- “**competent authority**” means the Commissioner for SARS or an authorised representative of the Commissioner, and for the other contracting jurisdiction a person with a similar designation;
- “**contracting jurisdiction**” means a government of a jurisdiction that has concluded a DTA or a tax treaty that is in force;
- “**Convention**” means the OECD Model Tax Convention on Income and on Capital;
- “**DTA**” or “**tax treaty**” means an agreement for the avoidance of double taxation and the prevention of fiscal evasion of taxes on income, or in short, a double taxation agreement;
- “**FTA**” means the OECD Forum on Tax Administration;
- “**MAP**” means mutual agreement procedure;
- “**Minister**” means the South African Minister of Finance;
- “**Multilateral Instrument**” or “**MLI**” means the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS;
- “**OECD**” means the Organisation for Economic Co-operation and Development;
- “**section**” means a section of the Act;
- “**TA Act**” means the Tax Administration Act 28 of 2011;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**SARS**” means the South African Revenue Service; and
- any word or expression bears the meaning ascribed to it in a DTA or tax treaty.

1. Background

DTAs or tax treaties, as they may be referred to, are international agreements between the governments of two jurisdictions aimed at eliminating double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. Most tax treaties typically include the following broadly defined sections:¹

- A preliminary part on the scope of the tax treaty, for example, setting out the taxes on income and capital covered in the tax treaty and defining terms used.
- The main part of the tax treaty that settles the extent to which each of the contracting jurisdictions may tax income, that is determined based on the different types of income and whether the jurisdiction is a source jurisdiction or resident jurisdiction. It further determines how double taxation is to be eliminated.
- A key part on special provisions such as the MAP article, which establishes the mutual agreement procedure for eliminating double taxation and resolving conflicts of interpretation of the tax treaty.
- Finally, a part on the implementing provision such as the entry into force and termination provision of the tax treaty.
- Tax treaties concluded between South Africa and other jurisdictions generally contain Article 25 on MAP based on the Convention.² The Convention is an OECD model tax treaty, which has been developed by the OECD. Article 25 of the Convention provides that the competent authorities shall endeavour, by mutual agreement, to resolve the situation of taxpayers subjected to taxation not being in accordance with the provisions of the Convention. It also invites and authorises the competent authorities of the two jurisdictions to resolve, by mutual agreement, problems relating to the interpretation or application of the Convention and, furthermore, to consult together about the elimination of double taxation in cases not provided for in the Convention.

Article 25, in treaties that provide for MAP, is aimed at resolving disputes arising from juridical and economic double taxation, as well as inconsistencies in the interpretation or application of a treaty. International juridical double taxation refers to the imposition of income taxes in two (or more) jurisdictions on the same taxpayer in respect of the same income. An example of juridical double taxation is when a resident of one jurisdiction derives income from sources in the other jurisdiction, and both jurisdictions' domestic tax legislation would tax that income. It can also arise when each jurisdiction considers the taxpayer to be resident in that jurisdiction under domestic tax laws. Transfer pricing cases are a good example of circumstances that may lead to economic double taxation. For example, a tax administration adjusts a price charged between related parties with a resulting tax charged on the additional income in the hands of one related party, where tax has already been charged in another jurisdiction on that same income in the hands of the other related party.³

¹ Manual on Effective Mutual Agreement Procedure (MEMAP), February 2007 at 7.

² OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017).

³ Manual on Effective Mutual Agreement Procedure (MEMAP), February 2007 at 8.

With regards to the practical operation of the MAP procedure, Article 25 authorises the competent authorities to communicate with each other directly, without going through the diplomatic channels. Article 26 of the Convention applies to the exchange of information for the purposes of the provisions of this Article. The confidentiality of information exchanged for the purposes of an MAP is thus ensured. The South African DTAs and Protocols can be accessed through the path www.sars.gov.za ⇒ Legal Counsel ⇒ International Treaties & Agreements ⇒ Double Taxation Agreements & Protocols.

1.1 What is a mutual agreement procedure?

Generally, in South African DTAs, Article 25 of the Convention provides a remedy for a taxpayer that considers that the actions of one or both of the contracting jurisdictions result or will result in taxation of the taxpayer not in accordance with the provisions of the tax treaty. The taxpayer may, irrespective of the remedies provided by the domestic law of the jurisdictions, present its case in the first instance to the competent authorities of the jurisdiction of residence. The taxpayer may also present its case to both competent authorities of both jurisdictions. The taxpayer should notify both competent authorities that it submitted the MAP request to the competent authority of the applicable jurisdiction. The MAP article in the DTA empowers the competent authority to consider the taxpayer's case and to resolve the case by mutual agreement. This is a process of consultation, not litigation, between the two competent authorities. The taxpayer is not a party to this process, but is invited to participate informally, by providing all required information. If there is no DTA between South Africa and the other jurisdiction, there can be no mutual agreement procedure.

Article 25 of the Convention, in summary, consists of the following paragraphs:

- Paragraph 1 – Makes available to taxpayers a MAP when taxation is not in accordance with the Convention, without depriving them of the ordinary legal remedies available. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention (see **3.2**).
- Paragraph 2 – A MAP case that has been accepted will only move to the second, bilateral state of the MAP if it meets two requirements, namely –
 - the taxpayer's objection to the competent authority to which it has been presented appears to be justified, for example, if the taxation contrary to the provisions of the Convention is due in whole or in part to a measure taken in the jurisdictions to which the taxpayer has presented its MAP case; and
 - that competent authority is not able to arrive at a satisfactory unilateral solution.
- Paragraph 3 – Provides for competent authorities to resolve, if possible, difficulties of interpretation or application of the treaty by means of mutual agreement.
- Paragraph 4 – Determines how the competent authorities may consult each other for the resolution by mutual agreement, either of an individual case coming under the procedure defined in paragraphs 1 and 2 or of general problems relating in particular to the interpretation or application of the Convention. It authorises competent authorities to communicate with each other directly without going through the diplomatic channels.
- Paragraph 5 – Provides for an arbitration process in cases where competent authorities are unable to reach an agreement (see **7.4** on South Africa's position on MAP arbitration).

The MAP is a special procedure that complements domestic dispute resolution procedures. It follows that it can be set in motion solely in cases where tax has been charged, or is going to be charged, despite the provisions of the Convention.

A MAP article provided for in a treaty then allows competent authorities from the governments of the contracting jurisdictions to interact with the intent to endeavour to resolve international tax disputes if the objection appears to be justified. The determination of whether the objection appears to be justified, requires the competent authority to which the case was presented to make a preliminary assessment of the taxpayer's request in order to determine whether the taxation in both contracting jurisdictions is consistent with the terms of the Convention. The purpose is to ensure that taxpayers entitled to the benefits of the Convention are not subject to taxation by either of the contracting jurisdictions that is not in accordance with the terms of the Convention.

If the competent authority approached by the taxpayer determines that the complaint is justified and considers that the taxation complained of is due wholly or in part to a measure taken in that jurisdiction, it must make such adjustments or allow such relief as appears to be justified. In this situation, the issue can be resolved without moving beyond the first (unilateral) stage of the MAP. However, if it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other jurisdiction, it will set in motion the second (bilateral) stage of MAP and submit the case to the competent authority of the other jurisdiction. A MAP case for this purpose is not considered to include a request for an APA (see 7.1) and does not include a "protective" MAP filing (see 7.3).

Typical examples of taxation not in accordance with a tax convention when a taxpayer may make a MAP request include the following:

- A taxpayer is considered to be a resident of two treaty countries under each jurisdiction's domestic law, and each jurisdiction claims that the taxpayer is a resident of its jurisdiction for purposes of the tax Convention, which could lead to the taxpayer being liable for tax in both countries on the same income.
- Withholding tax is levied beyond what is allowed within an applicable tax Convention by one treaty jurisdiction on a payment to a resident of the other jurisdiction.
- A taxpayer subject to tax as a resident in one jurisdiction on income, including income from carrying on a business in the other treaty jurisdiction, is taxed in terms of that other treaty on the business income earned there, despite not having a permanent establishment in that jurisdiction under the tax Convention.
- A taxpayer operating a branch in one treaty jurisdiction is subject to additional tax because of an adjustment by that treaty jurisdiction of the income allocated to the branch.
- A taxpayer is subject to additional tax in one jurisdiction because of a transfer pricing adjustment to the price of goods or services transferred to or from a related party in the other jurisdiction.

A taxpayer can also contact the competent authority for clarification as to the interpretation and application of a Convention.

A MAP article in a DTA does not compel competent authorities to actually reach an agreement and resolve a tax dispute. Competent authorities are obliged only to use their best endeavours to reach an agreement. Arbitration will only be available if the relevant treaty allows arbitration.

In seeking mutual agreement, the competent authorities must first determine their position in light of the rules of their respective taxation laws and the provisions of the Convention, which are as binding on them as much as they are binding on the taxpayer.⁴ While the status under domestic law of a mutual agreement reached pursuant to Article 25 may vary between jurisdictions, the principles of international law for the interpretation of treaties, as embodied in Articles 31 and 32 of the Vienna Convention of the Law of Treaties (1961), allow domestic courts to take account of such an agreement.⁵

The MAP is available to the taxpayer in addition to the normal legal remedies under the domestic law. Mutual agreements resolving general difficulties of interpretation or application are binding on administrations as long as the competent authorities agree not to modify or rescind the mutual agreement.⁶ If a domestic court reached a decision in the case at issue, the competent authority is bound by the decision of the domestic court (and may not provide unilateral relief).

South Africa, amongst other countries, endorsed the OECD/G20 BEPS Action Plan that identified 15 Action Items to address BEPS in a comprehensive manner.⁷ BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. Under the inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle BEPS. Recognising that the actions to counter BEPS must be complemented with actions to ensure certainty and predictability for business, one of the BEPS actions includes the *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (the Action 14 Report).

The minimum standard in the Action 14 Report consists of three core elements, namely, to ensure –

- that treaty obligations related to the MAP is fully implemented in good faith and that MAP cases are resolved in a timely manner;
- the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- that taxpayers can access the MAP when eligible.

Through the adoption of the Action 14 Report, countries have agreed to important changes in their approach to dispute resolution by implementing a minimum standard to ensure that they resolve treaty-related disputes in a timely, effective and efficient manner. Jurisdictions also committed to have their compliance with the minimum standard reviewed by their peers. The peer review and monitoring are conducted with all OECD and G20 countries and any committed jurisdictions participating in this work on an equal footing. The first peer reviews commenced in December 2016.

⁴ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 38.

⁵ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 6.2.

⁶ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 54.

⁷ About the Inclusive Framework on BEPS at www.oecd.org/ctp/beps-about.htm [Accessed 1 February 2018].

1.2 Legal basis for mutual agreement procedure

The National Executive⁸ may, under section 108(1), enter into an agreement with the government of any other jurisdiction. These agreements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of South Africa and of such other jurisdiction, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation. An agreement is further entered into for the rendering of reciprocal assistance in the administration of and the collection of taxes under the laws of South Africa and of such other jurisdiction.

Under section 108(2), approval of Parliament of an agreement, as contemplated in section 231 of the Constitution of the Republic of South Africa, 1996 (Constitution), must be obtained and the agreement will have effect as if enacted in the Act upon publication in the *Government Gazette*. Section 108(1) read with section 231 of the Constitution therefore provides that as soon as the DTA is ratified and has been published in the *Government Gazette*, its provisions are effective as if they had been incorporated into the Act. It follows that Articles in DTAs therefore become part of South Africa's domestic law.

DTAs generally contain an article on MAP. In interpreting the MAP Article, reference should be made to the Convention read with the OECD Commentaries on the concept used in the Convention⁹ and the *UN Guide to the Mutual Agreement Procedure under Tax Treaties*.¹⁰ Reference is also made in this guide to the *Manual on Effective Mutual Agreement Procedures (MEMAP)*¹¹ and the Action 14 Report,¹² which are available to both tax administrators and taxpayers on the OECD website. The Action 14 Report provides basic information on the operation of MAP under bilateral tax treaties and to identify best practices for MAP.¹³

1.3 Multilateral Instrument

The "Multilateral Instrument" or "MLI"¹⁴ is intended to transpose results from the OECD/G20 BEPS Project into more than 3 000 treaties worldwide. It will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies. It will also allow governments to strengthen their tax treaties with the other tax treaty measures developed in the OECD/G20 BEPS Project.¹⁵

⁸ The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

⁹ www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2015-full-version-9789264239081-en.htm [Accessed 1 February 2018].

¹⁰ www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf [Accessed 15 February 2018].

¹¹ www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm [Accessed 1 February 2018].

¹² www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm [Accessed 1 February 2018].

¹³ Manual on Effective Mutual Agreement Procedure (MEMAP), February 2007 at 5.

¹⁴ The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting at www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [Accessed 1 February 2018].

¹⁵ www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf [Accessed 7 February 2018].

The substance of these tax treaty-related BEPS measures was agreed upon as part of the final BEPS Package approved by the OECD's Committee on Fiscal Affairs and endorsed by G20 Leaders¹⁶ in November 2015. Recognising that bilaterally renegotiating each of the more than 3 000 worldwide tax treaties would take years, if not decades, one of the other items in the Package (Action 15) called for the development of a multilateral instrument to swiftly modify bilateral tax treaties to implement BEPS tax treaty-related measures.

On 24 November 2016, the members of the *ad hoc* Group on the Multilateral Instrument concluded the negotiations on the text of the Multilateral Instrument. Article 16 of the Multilateral Instrument contains the wording of the MAP article, that is, one of the treaty-related minimum standards that was agreed as part of the Final BEPS package. Jurisdictions can therefore, through the adoption of the Multilateral Instrument, modify the bilateral tax treaties in instances where the wording of Article 25 of the treaty is not in line with the wording of the agreed minimum standards to improve dispute resolution mechanisms under the Action 14 Report. South Africa is also a signatory and party to the Multilateral Instrument, which will take effect for South Africa's treaties once ratified.¹⁷

A party to the Multilateral Instrument may reserve the right not to apply certain specific sentences of Article 16 of the Multilateral Instrument. More information on the Multilateral Instrument can be accessed on the OECD website.¹⁸

1.4 The role of a competent authority

DTAs or treaties are usually concluded between the governments of two or more countries. These countries are then referred to as the contracting jurisdictions to such an agreement. The term "competent authority" is used in DTAs and in the Multilateral Instrument to identify a position, person or body within a contracting jurisdiction to whom issues may be addressed.

The role of the competent authority includes the exchange of information and providing assistance in collection of taxes based on the following exchange instruments: DTAs, Tax Information Exchange Agreements (TIEAs) and multilateral treaties. The competent authority is further charged with the responsibility to interact with its counterparts in any matters arising between the different contracting jurisdictions pertaining to the interpretation or the application of a DTA, and to resolve any international tax disputes that might arise. A competent authority is generally committed to ensure a good faith application of DTAs. The competent authority endeavours to resolve requests from its counterparts in accordance with the provisions of a particular DTA's Article on MAP.

The competent authority in South Africa is the Commissioner for SARS and MAP duties have been delegated to designated representatives. These designated representatives have the authority to endeavour to resolve MAP cases and are committed to timely implementation of agreements reached, based on the objective and consistent application of treaty provisions to the specific facts and circumstances of a taxpayer's case. In resolving a MAP case, the designated representatives do not require the approval or direction of the tax administrative personnel who made the adjustments at issue to resolve the MAP case, and they are not influenced by considerations of the policy that the jurisdiction would like to see adopted and reflected in future amendments to treaties. The designated representatives may, however,

¹⁶ www.oecd.org/ctp/BEPSActionPlan.pdf [Accessed 1 February 2018].

¹⁷ www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf [Accessed 16 February 2018].

¹⁸ www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm [Accessed 1 February 2018].

consult with the tax administration personnel in order to obtain an understanding of the issues at hand. See 4.6 for the contact details of the designated representatives for MAP.

1.5 South Africa mutual agreement procedure profile and website

Jurisdictions' MAP profiles can be found on a shared public platform on the OECD website,¹⁹ which provides the competent authority or duly authorised representatives contact details, links to domestic MAP guidance and other useful jurisdiction-specific information regarding the MAP process. The MAP profile is updated by the revenue authorities from time-to-time.

The competent authority also notifies the treaty partners of administrative or statutory processes and expressly addresses the effects of those processes with respect to the MAP in its public guidance and provides a link to such guidance on its MAP profile.

Further information regarding South Africa's MAP process can be accessed through the path www.sars.gov.za ⇒ Legal Counsel ⇒ International Treaties & Agreements ⇒ Double Taxation Agreements & Protocols ⇒ Mutual Agreement Procedure (MAP).

2. In what instances would a mutual agreement procedure apply?

2.1 Taxation not in accordance with the Convention

Article 25(1) and (2) of the Convention provides for the elimination in a particular case of taxation that is not in accordance with the Convention. Examples include –

- cases where lack of information as to the taxpayer's actual situation has led to the misapplication of the Convention, especially regarding the determination of residency (Article 4);
- the existence of a permanent establishment (Article 5);
- attribution cases (Articles 7 and 9);
- the temporary nature of the services performed by an employee (Article 15); and
- pension and annuities (Article 17) (see 7.5).

Taxpayers may request MAP assistance in these instances of taxation contrary to a Convention, which in most cases involve juridical double taxation.

2.1.1 Dual residence

The most common occurrences of taxation of individuals not in accordance with the Convention are cases of dual residency, namely, where an individual is considered a resident for tax purposes of two countries, under their respective domestic laws. This can happen because the domestic laws of the two countries may apply different tests for determining residency. As part of its object of avoiding double taxation, a DTA will only allow one of these countries to treat that person as a resident for purposes of the DTA, and it therefore sets forth criteria to determine which of the two countries the person has the greater connection with. That country will then be treated as the only jurisdiction of residence when applying the DTA.²⁰

¹⁹ www.oecd.org/ctp/dispute/country-map-profiles.htm [Accessed 1 February 2018].

²⁰ Manual on Effective Mutual Agreement Procedure (MEMAP), February 2007 at 9.

The same may apply to multinational companies, in cases that it may be found that they are simultaneously resident in two countries under the domestic laws of both countries. An example is when the places of incorporation and effective management differ, or where two countries are claiming effective management. Under South African domestic law, a person other than an individual is a tax resident of South Africa if it is incorporated, established or formed in South Africa or its place of effective management is in South Africa. For information on the South African domestic law interpretation of place of effective management, refer to Interpretation Note 6 (Issue 2) “Resident: Place of Effective Management (Companies)”, available on the **SARS website**. Two approaches to determine residence are found in DTAs and are discussed below.

(a) Place of effective management

Multiple facts need to be taken into account, often involving multiple locations, and from those facts and locations it is necessary, for DTA purposes, to determine a single dominant place of effective management. The determination looks at where the key management and commercial decisions are regularly and predominantly made. Although the determination of the place of management is not based on a snapshot requiring an assessment at a particular moment in time, when a company changes its place of effective management the change in residence occurs on a particular date and is not in relation to a year of assessment.

(b) Mutual agreement

Where the tiebreaker is by mutual agreement under a DTA, a taxpayer that is claimed as a tax resident of both South Africa and the other contracting jurisdiction must obtain residency certificates from both jurisdictions and submit them to the jurisdiction that it considers to be its jurisdiction of residence, together with its application for a MAP to be initiated. For the procedure to obtain a residency certificate in South Africa, refer to the *External Guide: Request of Certificate of Residence*.²¹ Both South Africa and the other jurisdiction must claim the individual or company under their domestic laws as tax resident before a MAP can be considered. It is recommended that a legal opinion be requested in either jurisdiction if taxpayers are uncertain whether they are treated as resident under the domestic law of either contracting jurisdiction. Full information should be provided to the relevant competent authority in order to determine which jurisdiction can claim the individual or company as the sole resident for the purpose of allowing treaty benefits.

Definitive rules cannot be laid down in determining the place of effective management and all relevant facts and circumstances must be examined on a case-by-case basis. Although it is not possible to provide a detailed list of all the factors that must be considered paragraph 24(1) of the OECD Commentary on Article 4(3) lists the following various factors that competent authorities should take into account, amongst others:

- Where the meetings of the person’s board of directors or equivalent body are usually held.
- Where the chief executive officer and other senior executives usually carry on their activities.
- Where the senior day-to-day management of the person is carried on.
- Where the person’s headquarters are located.

²¹ www.sars.gov.za/wp-content/uploads/Ops/Guides/IT-AE-38-G01-Request-for-a-Certificate-of-Residence-External-Guide.pdf [Accessed 1 February 2018].

- Which jurisdiction's laws govern the legal status of the person.
- Where its accounting records are kept.
- Whether determining that the legal person is a resident of one of the contracting jurisdictions but not of the other for the purpose of the Convention would carry the risk of an improper use of the provisions of the Convention.

South Africa will consider the above and other factors that may be relevant. Dual residence of persons is dealt with on a case-by-case basis.

2.1.2 Withholding taxes withheld not in accordance with the relevant double taxation agreement

The MAP is also applicable in the absence of any double taxation contrary to the Convention, once the taxation in dispute is in direct contravention of a rule in the Convention. An example would include when one jurisdiction taxes a particular class of income in respect of which the Convention gives an exclusive right to tax to the other jurisdiction.

In these instances the South African resident should enquire with the withholding agent in the other jurisdiction the reason for such withholding and whether there are any relevant application forms for a refund for incorrectly imposing withholding taxes. In some instances jurisdictions may have directive forms that must be stamped by the other tax authority to ensure that withholding tax is not imposed in the future. Such cases would only become a MAP if the withholding agent or foreign tax authority, as relevant, refuses to refund the withholding taxes deducted. The South African resident can submit a MAP request providing all information as set out in **4.3**.

2.1.3 Transfer pricing mutual agreement procedure cases

Different positions taken by two or more administrations, on what constitutes arm's length conditions for a transaction between associated enterprises, can lead to economic double taxation. As indicated in **2.1**, Article 25 enables competent authorities to consult with each other with the view to resolve taxation not in accordance with the Convention. This also applies in the context of transfer pricing problems relating to economic double taxation. South Africa provides access to MAP in transfer pricing cases in particular. DTA provisions such as Article 9(2) or, in the absence of Article 9(2), provisions of domestic law enable contracting jurisdictions to provide for a corresponding adjustment with the aim of avoiding double taxation.

A MAP case is a transfer pricing MAP case where the taxpayer's MAP request relates to –

- the attribution of profits to a permanent establishment (Article 7 of the Convention), including the determination of whether a permanent establishment exist in a contracting jurisdiction (Article 5 of the Convention); or
- the determination of profits between associated enterprises (paragraph 1 of Article 9 of the Convention) and the corresponding adjustments to be made in pursuance of paragraph 2 of the same Article both as concerns assessing whether they are well founded and for determining the amount.

A transfer pricing MAP case does not include a request for an APA (see **7.1**).

In determining if taxation of relevant transactions will satisfy the arm's length principle, and thus result in taxation in accordance with the provisions of a DTA, South Africa will be guided by the OECD Transfer Pricing Guidelines,²² the Commentary to the Convention and the United Nations Practical Manual on Transfer Pricing for Developing Countries, 2017.²³

2.2. Difficulties or doubts arising as to the interpretation or application of the Convention

The first sentence of Article 25(3) authorises the competent authorities to try to resolve by mutual agreement “any difficulties or doubts arising as to the interpretation or application of the Convention”. Under this provision, issues that require clarification or interpretation can be discussed and agreed upon between contracting jurisdictions.²⁴

Under this provision the competent authorities can, in particular –

- where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;
- where the laws of a jurisdiction have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes; and
- determine whether, and if so under what conditions, interest may be treated as dividends under the thin capitalisation rules in the jurisdiction of the borrower and give rise to relief for double taxation in the jurisdiction of residence of the lender in the same way as for dividends.²⁵

3. Circumstances in which a mutual agreement procedure request may be accepted or denied

3.1 No action by one or both of the jurisdictions results or will result in taxation not accordance with the Convention

Tax authorities will consider accepting or denying a MAP request received based on the taxpayer's submission. It is therefore important that the taxpayer or its authorised representative ensures that all information listed in 4.3 and any other information it deems relevant is submitted to SARS. A MAP can be requested if the taxpayer is of the view that an “actions of one or both of the contracting states” will result in taxation not in accordance with the Convention. The MAP request, however, must establish that this taxation appears as a risk which is not merely possible but probable.²⁶ The view must be reasonable and must be based on facts. Because South Africa will admit a case to MAP before the first notification (see 3.2.1), it may be that at that time it is not certain that a transfer pricing adjustment will be made or the amount of profits that will be subject to double taxation cannot be determined or that double taxation will arise. In these circumstances South Africa may decide to defer the

²² www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm [Accessed 1 February 2018].

²³ www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf [Accessed 1 February 2018].

²⁴ Manual on Effective Mutual Agreement Procedure (MEMAP), February 2007.

²⁵ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 52.

²⁶ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 14.

MAP until it becomes clear that the case will result in double taxation. It will generally become clear that the case will result in double taxation when the domestic objection of the taxpayer against an adjustment made has been disallowed.

3.2 Time limits for requesting a mutual agreement procedure

A MAP request will be denied by the competent authority of South Africa, if the MAP request is not submitted within the time limits provided for in the DTA or in terms of the domestic tax law, if applicable.

3.2.1 Time limitation in double taxation agreements

Most DTAs contain a time limit in which a MAP request should be submitted, and will depend on the specific terms of the particular DTA. In every case, the relevant DTA should be consulted, but generally South African treaties follow Article 25 of the Convention. In order to be admissible under the Convention, a case must be presented within three years from the first notification of the action which gives rise to taxation not in accordance with the Convention or the period as provided for in the DTA.

In most cases it will be clear what constitutes the relevant notice of assessment, official demand or other instrument for the collection or levying of tax, and there will usually be domestic law rules governing when that notice is regarded as being “given”. South Africa regards the first notification as being the finalisation of an enquiry or audit resulting in the raising of an assessment which gives rise to double taxation.

In South Africa the date when the assessment was issued is generally regarded as the first notification of the action which gives rise to taxation not in accordance with the Convention. South Africa considers that at that point, the taxpayer must be aware of the possibility that double taxation may arise and should therefore present a case to the competent authority. The South African competent authority will contact the competent authority of the other jurisdiction to seek agreement as to the commencement of the MAP.

If the relevant tax treaty does not include an Article on MAP,²⁷ a MAP request cannot be made to the South African competent authority. If the DTA does not provide a time period, domestic tax law on prescription will apply (see **3.2.2**).

If the time limit in the MAP article of that particular DTA allows for a longer period than the period in the domestic law, then the longer period in the DTA will apply.

²⁷ DTAs with Sierra Leone, Grenada, Malawi and Zambia.

3.2.2. Domestic tax law (prescription – three-year period)

A taxpayer that is aggrieved by an assessment made in respect of the taxpayer may, under section 104 of the TA Act, object to the assessment. Under section 104(3), a taxpayer that is entitled to object to an assessment or “decision”,²⁸ must lodge an objection in the manner, under the terms, and within the period prescribed in the “rules”.

Section 103 of the TA Act prescribes the “rules”²⁹ governing the procedures to lodge an objection and appeal against an assessment or “decision”, and the conduct and hearing of an appeal before a tax board or tax court. SARS may not issue a reduced assessment after three years from the date of the original assessment under section 99(1) of the TA Act. Therefore once the three-year period has lapsed SARS may only issue a reduced assessment if the circumstances in section 99(2) are applicable. The court held in *First South African Holdings (Pty) Ltd v CSARS*³⁰ that the three-year period begins to run once the original assessment is issued.

3.2.3 Extension of time under prescription

As indicated in the above paragraph, the MAP article in DTAs would generally contain a period in which a MAP request must be submitted. If the MAP article in the DTA does not provide for the limitation period under the domestic law to be overridden by the DTA, then the MAP cannot be accepted if the MAP request exceeds the domestic prescription period of three years after the date of assessment of an original assessment under section 99(1) of TA Act.

Under section 99(3) of the TA Act SARS may, by prior notice of at least 30 days to the taxpayer, extend the period for raising an assessment before expiry of the period, by a period approximate to a delay arising from failure by a taxpayer to provide all the relevant material requested or resolving an information entitlement dispute, including legal proceedings.

SARS may, under section 99(4), by prior notice of at least 60 days to the taxpayer, extend a period under section 99(1) before expiry of the period by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation³¹ relates to –

- the application of the doctrine of substance over form;
- the application of Part IIA of Chapter III of the Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;
- the taxation of hybrid entities or hybrid instruments; or
- section 31 of the Act.

²⁸ As defined in section 101 of the TA Act.

²⁹ Government Notice 550.

³⁰ 372/10 [2011] ZASCA 67 (11 May 2011).

³¹ Under Chapter 5 of the TA Act.

3.3 Objection, alternative dispute resolution and settlements

The MAP article in South Africa's DTAs provides taxpayers with an avenue in addition to the objection and appeals processes under the domestic tax law. Any taxpayer that is aggrieved by an assessment or a decision that is subject to objection and appeal, has a right to dispute it. Chapter 9 of the TA Act provides the legal framework for these disputes and must be read with the "rules"³² issued under section 103 of the TA Act. These rules prescribe the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal, procedures for ADR, the conduct and hearing of appeals by the tax board or tax court, an application on notice before a tax court regarding a procedural matter arising under the "rules". Reference can also be made to *Alternative Dispute Resolution: What to do if you Dispute your Tax Assessment* and the *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of Section 103 of the Tax Administration Act, 2011*.³³

Under section 103(2) of the TA Act and the "rules" promulgated under section 103 of the Act, a taxpayer or SARS may initiate an ADR process to resolve its tax dispute with SARS. ADR is a form of dispute resolution other than litigation or adjudication through the courts. It is less formal, less cumbersome, less adversarial, and a more cost-effective and speedier process of resolving a dispute with SARS. For more information refer to the *Alternative Dispute Resolution: Quick Guide*.³⁴

A person can pursue the MAP and domestic legal remedies simultaneously. SARS may concurrently consider a case presented to the competent authority for MAP and the objection lodged by the taxpayer under domestic tax provisions against the assessment. Depending on the circumstances, the competent authorities may defer the MAP until a decision has been reached on the objection or if a taxpayer has requested a settlement as set out below.

A taxpayer whose objection has been disallowed may appeal to the tax board or tax court against that outcome. The appeal must be lodged in the manner, under the terms and within the periods prescribed in the TA Act and the "rules". A senior SARS official may, within prescribed limits, extend the period prescribed in the "rules" within which an objection or appeal must be lodged. In instances where a MAP applies (see 2), a taxpayer may initiate a MAP, within the time limits for requesting a MAP (see 3.2).

There is a distinction between administrative decisions (decision by SARS on an objection against an assessment) and judicial decisions (decision by the tax court or higher courts). A MAP cannot override a judicial decision in the domestic context. A MAP after a judicial decision had been handed down would thus have to be conducted within the constraints of the decision. It is therefore recommended that the domestic legal remedies after an appeal has been lodged or the rule 31 and 32 statements that have been filed be suspended until the MAP is concluded. If agreement cannot be reached on such a suspension, the competent authorities may defer the MAP until the domestic remedies have been exhausted.

³² Section 104(3).

³³ www.sars.gov.za ⇒ Legal Counsel ⇒ Legal Counsel Publication ⇒ Find a Guide ⇒ Tax Administration.

³⁴ As above.

Under section 144 of the TA Act, either SARS or a taxpayer may initiate a “settlement” procedure when a “dispute” exists, if certain requirements are met. It is SARS’ practice not to initiate settlement procedures in transfer pricing and other cross-border matters where the dispute is based on instances where a MAP may apply (see 2). In these instances only the taxpayer may initiate the settlement procedure. Where requests for settlements are made during the objection process, they will be referred to the Legal Advisory or Legal Delivery and Support subdivisions within SARS. Where they are made during the ADR process, they will be dealt with by the ADR unit within Legal Delivery and Support. Access to MAP will be blocked if a settlement is reached through this independent settlement procedure. In such a case the South African competent authority will notify the other competent authority of the decision to block access to MAP.

3.4 Right to access the mutual agreement procedure when domestic or treaty-based anti-abuse rules have been applied

Treaty benefits may be denied through the application of a treaty anti-abuse provision where obtaining a more favourable treatment based on the applicable treaty would be contrary to the object of the relevant treaty provisions.

When there is a disagreement between the taxpayer and the competent authority to which its MAP case is presented, as to whether the conditions for the application of a treaty anti-abuse rule (for example, a treaty-based rule such as the principle purpose test (PPT) rule or main purpose test (MPT) rule) have been met or whether the application of a domestic anti-abuse rule conflicts with the provision of a treaty, a taxpayer should be provided access to MAP where they meet the requirements of paragraph 1 of Article 25.³⁵ The South African domestic law and administrative processes do not include a provision allowing its competent authority to limit access to MAP in such cases. Although these cases are rare, South Africa considers that issues relating to the application of treaty anti-abuse provisions and the question whether the application of a domestic anti-abuse provision is in conflict with the provision of a tax treaty are within the scope of a MAP.

South Africa would therefore, provide access to MAP in cases in which there are disagreements between the taxpayer and the tax authorities making the adjustment as to 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. Questions as to whether the conditions for the application of a domestic anti-abuse provision have been met are not suitable for resolution through MAP, since they relate to the interpretation of domestic law.

³⁵ Minimum standard 1.1 Making Dispute Resolution Mechanisms More Effective Action 14 – 2015 Final Report.

4. Making a mutual agreement procedure request

4.1 General mutual agreement procedure process

The process that is generally followed when a MAP is initiated is outlined below:

- The taxpayer is a resident of one of the contracting jurisdictions and establishes that an action by one or both of the jurisdictions results or will result in taxation not in accordance with the Convention.
- The taxpayer submits all information as required in 4.3 to the competent authority of South Africa or both competent authorities. The taxpayer notifies both competent authorities that it submitted the MAP request to the competent authority of the applicable jurisdiction.
- The competent authority sends an acknowledgement of receipt of the taxpayer's request with the expected next steps to the taxpayer.
- The competent authority will consider if –
 - there is an applicable tax Convention covering the issue or transaction;
 - the taxpayer considers that the actions of one or both countries result or will result in taxation not in accordance with the provisions of the tax Convention; and
 - the competent authority is notified within the applicable time limit;
- The South African competent authority advises whether it considers that the taxpayer's objection appears to be justified. It may first determine if the MAP can be resolved unilaterally, for example, where the taxation contrary to the provisions of the Convention is due in whole or in part to a measure taken in the jurisdiction to which the taxpayer presented its MAP case.
- If the South African competent authority cannot resolve the case unilaterally, it will initiate a MAP request with the competent authority of the applicable jurisdiction to which the MAP pertains.
- The competent authority in the other jurisdiction will send an acknowledgement of receipt to its counterpart.
- Usually an agreement between the competent authorities as to how the DTA should be applied in the taxpayer's case is determined, with both the competent authorities applying the same interpretation of the DTA.
- The competent authority that received the MAP request will notify the taxpayer of the outcome of the MAP request.
- Implementation of the resulting mutual agreements (that is, by making the appropriate adjustments to the tax assessment).
- Notification to the other competent authority and the taxpayer that the MAP was implemented.

4.2 Format of a mutual agreement procedure request

A MAP request should be submitted to the competent authority in the prescribed manner as provided in 1.5. A written MAP request must be submitted in English and contain the minimum information required (see 4.3). Information furnished must be substantial and specific and the complete MAP request must be sent to the specific dedicated email address for those types of MAP request, that is, transfer pricing or a MAP relating to interpretation of a DTA (see 4.6). In instances where a taxpayer wishes to provide information in encrypted format, such as password protected Microsoft Office or PDF files, the taxpayer should send a request to do so to the relevant email address, providing comprehensive contact details and the proposed format.

For multiple requests, separate letters of request, pertinent to each case, and the relevant DTA must be submitted. If applicable, translated copies of supporting documents can be supplied with those in the foreign language to assist the South African competent authority in its processing of the MAP request.

4.3 Minimum information requirements

All of the following information must be provided in a MAP request:

(a) Taxpayer details:

- Full names and surname of the individual or company/entity name (for persons other than an individual).
- Identification number or birth date or company registration number.
- Physical address.
- Contact details.
- Income tax reference number of the South African resident person.
- Relationship between the taxpayers covered in the MAP request (where applicable) – set out how the relevant enterprises are associated.
- Company organogram showing the tax residency or registration of each entity (if applicable).
- If a representative is acting on behalf of a taxpayer, a signed statement from a taxpayer that a representative is authorised to act for the taxpayer.

(b) The basis for the request:

- Specific tax treaty applicable to the case.
- Applicable Articles in the treaty which the taxpayer considers is not being correctly applied.
- Confirmation that the request is submitted within the specified time limit under the MAP Article or domestic time limits for filing objections (see 3.2).

(c) Facts of the case:

- All the facts of the case.
- Documentation to support these facts including correspondence, agreements/contracts, tax certificates, receipts etc. (Please provide an English translation of documents in a foreign language.)
- Taxation years involved.
- Amounts involved (in both the local currency and foreign currency).

(d) Analysis of the issue(s) requested to be resolved via MAP:

- Analysis of the issue(s) involved, including the taxpayer's interpretation of the application of the specific treaty provision(s) or transfer pricing guidelines, to support its basis for the MAP request.
- Supporting documents for analysis, for example, documentation required under transfer pricing legislation or published guidance, copies of tax assessments, relevant correspondence etc.
- An identification of the domestic and DTA time limits in the relevant jurisdictions in respect of the years for which relief is sought.
- Any other facts that the taxpayer may consider relevant.

(e) A statement indicating whether the taxpayer has submitted the MAP request to the other jurisdictions or to another authority. If so, the taxpayer should 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 the submission (including all documents filed with the submission, unless exactly the same as this MAP request).
- Whether the issue(s) involved were previously dealt with, for example, in an advance ruling, APA, settlement agreement or any tax tribunal or court. If so, the taxpayer should provide a copy of these rulings or agreements or decisions.

(f) 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 endeavours to resolve the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner.

In case of withholding tax

(g) The following minimum information in addition to the above must be provided of the person who withheld the tax:

- Full names and surname.
- Physical address.
- Contact details.
- The taxpayer reference number (if known).
- All receipts of tax withheld.

In case of transfer pricing MAP cases

(h) The following minimum information in addition to the above must be provided:

- Details regarding the adjustment (or proposed adjustment) in addition to the facts provided above.
 - Calculations setting out the adjustment or proposed adjustment translated in both currencies.
 - State how effect was given to the adjustment in practice including an explanation of the accounting treatment.
 - State clearly whether any portion of the adjustment relates to secondary adjustments.
 - State clearly whether any portion of the adjustment relates to interest on unpaid taxes or statutory penalties.
- State whether any previous or subsequent years are to be audited where there is a prospect of similar issues arising.
- An indication of any specific issues raised by the foreign competent authority. Set out those elements of the transfer pricing policy that the other jurisdiction did not agree with and why, and how the associated enterprise sought to rebut the other jurisdiction's findings, including copies of all relevant correspondence.
- Statements indicating whether the taxpayer has –
 - filed a refund claim; or
 - entered into a settlement agreement, in either of the jurisdictions related to the relief sought.
- Supporting documents in addition to the supporting documents listed above should include the following:
 - Copies of the relevant related party agreements.
 - Copies of the South African and foreign-related parties' transfer pricing policies or documentation and benchmarking studies whether at a group level or at a company level.
 - Copies of the financial statements of both related parties.
 - Copies of the tax return disclosure of the South African taxpayer involved.
- The following minimum information must be provided of any related foreign taxpayer involved:
 - Company/entity name.
 - Physical address.
 - Contact details.
 - Tax or other identification number (if possible).

Access to MAP will be granted if the taxpayer provides the applicable minimum information listed above and the MAP complies with the requirements under **2** and is an accepted MAP under **3**.

4.4 Mutual agreement procedure request for multiple tax years and recurring issues

In certain cases and after an initial tax assessment, requests made by a taxpayer are permitted, which are within the applicable time limit, for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

4.5 Checklist before submitting a mutual agreement procedure request

The taxpayer should ensure that all of the steps below are met:

- Determine if the case falls under the circumstances in **2.1.** and **2.2.**
- Check if the MAP request meets the requirements to be accepted under **3.**
- Check if the MAP request is made within the time period allowed under the treaty or domestic law as applicable (see **3.2**).
- Ensure that the MAP request comply with the requirements under **4.**

4.6 How to submit a mutual agreement procedure request

A taxpayer should submit its MAP request to the competent authority where it is tax resident or can submit it to the competent authorities of both contracting jurisdictions. The taxpayer or its authorised representative should refer to the **SARS website** for a summary of the above requirements. The specific webpage³⁶ sets out the process and minimum information required for a transfer pricing or other MAP cases.

MAP requests should be made to:

South African Revenue Service, Legal Counsel, Legislative Research and Development
Private Bag X923, Pretoria, 0001, Tel: +27 12 422 5143 / Fax: +27 12 647 2849.

Transfer pricing MAP cases:

- Head: Legislative Policy Tax, Customs and Excise
South African Revenue Service
Fax: +27 12 647 2849
Email: **TransferPricingMAP@sars.gov.za**

All other MAP cases:

- Senior Manager: International Development and Treaties
South African Revenue Service
Fax +27 12 647 2849
Email: **SARSMAP@sars.gov.za**

³⁶ www.sars.gov.za ⇒ Legal Counsel ⇒ International Treaties & Agreements ⇒ Double Taxation Agreements & Protocols ⇒ Mutual Agreement Procedure (MAP).

4.7 Withdrawal of a mutual agreement procedure request

If the taxation not in accordance with the provisions of the tax treaty is resolved through domestic remedies, the taxpayer must notify the applicable competent authority to withdraw the MAP request. A foreign competent authority may also withdraw a MAP in the event that unilateral relief is provided, by informing the SARS competent authority that such relief has been granted. A taxpayer can withdraw its request for MAP at any time before a MAP agreement has been reached. Withdrawal of a request for MAP must be made in writing, stating the reasons for the withdrawal. The competent authority will acknowledge receipt of the taxpayer's request for withdrawal and close the MAP request.

4.8 Use of information within a mutual agreement procedure process

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, TIEAs and DTAs entered into by South Africa require that information exchanged shall be kept secret and include confidentiality provisions in line with Article 26 of the Convention and Article 8 of the OECD Model TIEA. Further, the agreements generally provide that exchanged information may only be disclosed to and used by courts, administrative bodies and others involved in and for the purposes of assessment, collection or administration, enforcement or prosecution, or determination of appeals concerning the taxes covered by the agreement. The information exchanged may be used for other purposes only with the written consent of the supplying jurisdiction.

Under the TA Act, exchanged information constitutes both confidential "taxpayer information" and "SARS confidential information" (as referred to in sections 67(1)(a) and 68(1)(h) of the TA Act respectively), is subject to statutory confidentiality under Chapter 6 of the TA Act, and may only be disclosed to the extent permitted by the TA Act and the relevant exchange of information instrument. Disclosure contrary to the limitations under the TA Act or exchange of information instrument constitutes a criminal offence under Chapter 17 of the TA Act.

The TA Act allows for disclosures to non-tax government bodies, in particular financial regulatory bodies. However, under section 231 of the Constitution, an international agreement, such as a DTA, becomes law if enacted under domestic legislation. DTAs are enacted under section 108 of the Act, become part of the Act, and for purposes of the TA Act constitute "international tax agreements". Under section 4(3) of the TA Act, in the event of conflict between the TA Act and another tax Act, such as the Income Tax Act, which includes international tax agreements enacted under that Act, the latter prevails. Accordingly, to the extent that the TA Act or any other Act may allow for wider disclosure of confidential "taxpayer information" or "SARS confidential information" than the relevant international tax agreement incorporated under the Income Tax Act, the confidentiality provisions of the latter will prevail. This is also in line with section 233 of the Constitution, which provides that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". The principle that an exchange of information instrument will prevail over other domestic law in the case of conflict is also established by South African case law.

There is an oath or solemn declaration of secrecy required under Chapter 6 of the TA Act. It entails the duty to preserve the secrecy of confidential taxpayer information and SARS confidential information, and to only disclose such information to the extent permitted by law (whether under the TA Act, the Income Tax Act – including international tax agreements enacted under such Act – or other statutes that permit disclosure).

Exchanges of information for the purposes of a mutual agreement procedure are governed by Article 26 of a DTA. Generally Article 26 provides that the competent authorities of the contracting jurisdictions shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the contracting jurisdictions concerning taxes of every kind and description imposed in these jurisdictions even if, in the latter case, a particular Article of the Convention need not be applied. Information that may be needed for the purposes of applying Article 25 will be requested under Article 26 of a DTA.³⁷

5. Concluding a mutual agreement procedure request

The competent authorities will endeavour to resolve MAP cases in accordance with their terms, in the light of the object of the DTAs, and resolve these cases in a timely manner. The time taken to resolve a MAP case may vary according to its complexity, but competent authorities will endeavour to reach resolution on MAP cases within an average timeframe of 24 months.³⁸

5.1 Objections not considered to be justified

In cases where South African DTAs do not permit a MAP request to be made to either contracting jurisdiction and the South African competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the South African competent authority will implement a bilateral consultation or notification process that allows the other competent authority to provide its views on the case.³⁹

The competent authority will consider the case to be justified if the –

- taxpayer has provided the minimum information required (see 4.3) and laid a sufficient factual and legal basis for the case; and the taxpayer's MAP request demonstrates that the –
 - actions forming the basis of the request results or will result for in taxation not in accordance with the DTA; and
 - risk of such taxation is at least probable, not just possible (see 3.1).

After the competent authority determines that the MAP request is justified, the competent authority will let the taxpayer know that the case has been accepted for the MAP process to commence.

Actions that do not justify a MAP request include:

- An audit or examination of the taxpayer's affairs or those of an associated enterprise prior to the issue of a statement of audit findings or equivalent position paper from another jurisdiction.
- Exchange of information requests about dealings between the taxpayer and an associated enterprise.

³⁷ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017).

³⁸ Making Dispute Resolution Mechanisms More Effective Action 14 – 2015 Final Report at 15.

³⁹ Making Dispute Resolution Mechanisms More Effective Action 14 – 2015 Final Report.

- Discussions between the taxpayer (or an associated enterprise) and SARS (or a foreign tax jurisdiction) about the taxpayer's tax affairs.
- Public advice and guidance of a general nature, even if the taxpayer believe it could apply to the taxpayer and, if applied, may result in taxation not in accordance with the DTA.

If the competent authority considers that the case is not justified, then the taxpayer will be advised that no further action in relation to the MAP request will be taken.

5.2 Notifying the taxpayer

The competent authority of South Africa will notify the taxpayer in writing in the following circumstances:

- Upon receiving a MAP request to confirm receipt and request additional information if required.
- If a MAP request was rejected, providing the basis for the decision.
- Upon request, or when necessary, update the taxpayer on the status of the MAP to the extent that the update does not hinder the MAP process.
- Upon conclusion of a MAP case, providing the details of the decision or agreement.
- Upon implementation to provide the process to follow after an agreement is reached to process and provide relief (if applicable).

Where it is determined in a transfer pricing MAP case that an agreement will be reached between the competent authorities, the taxpayer will be informed by the competent authority of South Africa of the contents of the proposed agreement or decision in writing and provided a reasonable time to confirm acceptance of the proposal. If the taxpayer is not satisfied with the proposed agreement or decision by the competent authorities, the taxpayer may provide reasons in writing. If this occurs, the competent authorities may either vary the proposed agreement or decision or close the MAP case and inform the taxpayer accordingly. Competent authorities of contracting jurisdictions use their best endeavours to reach an agreement, however, in instances where no agreement can be reached, the competent authorities will consider the case closed and notify the taxpayer accordingly. If a valid notice of objection or an appeal has been filed, the taxpayer will still have the right to proceed with through the appeals process or the tax court (see **3.3**).

5.3 Providing relief

Competent authorities of contracting jurisdictions are not compelled to reach an agreement in order to resolve a tax dispute under the MAP article in the DTA, but are obliged only to use their best endeavours to reach an agreement. Any mutual agreement reached by the competent authorities will be implemented and relief will be provided where applicable.

In case of dual residency a DTA sets forth the criteria to determine which of the jurisdictions will have the sole right to tax or allow one of these jurisdictions to treat that person as a resident for purposes of the DTA. If a person was taxed on income in South Africa, but it is determined under the MAP that the other jurisdiction has the sole right to tax, SARS will provide relief by issuing reduced assessments and will refund taxes paid.

Withholding tax levied by a jurisdiction on a particular class of income in respect of which the DTA gives an exclusive right to tax to the other jurisdiction, will become a MAP if the withholding agent or foreign tax authority refuses to refund the withholding taxes deducted (see 2.1.2). A similar situation may arise if the rate withheld is above the rate in the treaty. In South Africa a rebate for foreign tax payable on income sourced outside of South Africa may be available under section 6quat. One of the requirements of section 6quat is that the foreign tax must be “proved to be payable”. In determining whether a foreign tax is proved to be payable, regard must be had to the terms of the relevant article of any applicable tax treaty. For example, if the foreign company withholds foreign tax of 25% notwithstanding that the tax treaty limits the amount that may be withheld to 15%, South Africa will not give credit for the excess 10%. See Interpretation Note 18 “Rebates and Deduction for Foreign Taxes on Income (Issue 3)” for more information.

Where the transfer pricing or profit reallocation adjustment is made that leads to economic double taxation, provisions such as Article 9(2) or, in the absence of Article 9(2), provisions of domestic law enable contracting jurisdictions to provide for a corresponding adjustment.

Regarding a request for a refund of tax for pension and annuity income that was withheld under the Act, see 7.5.

5.4 Secondary adjustments, withholding tax and repatriation on transfer pricing adjustments

Where the primary transfer pricing or profit reallocation adjustment is made by a contracting jurisdiction, the competent authority of South Africa will seek to resolve the case by reaching a mutual understanding as to –

- the principles in the DTA;
- the facts of the particular case; and
- how those principles should be applied to the facts of the case in a way that does not result in unrelieved double taxation.

Transfer pricing adjustments made under domestic law may also give rise to so-called “secondary adjustments”. For example, the amount of the income adjustment to a subsidiary for its excessive payment on a transaction with a non-resident parent may also be treated by the subsidiary’s jurisdiction as a deemed dividend paid to the parent, and therefore a withholding tax may be applicable. Under normal circumstances, these secondary adjustments are reversed if the primary adjustment is reversed or, where correlative relief is provided by the other competent authority, if the taxpayer repatriates funds from the non-resident equivalent to the amount of the transfer pricing adjustment. In these two instances, relief from the secondary adjustment should be a consequence of the MAP settlement.

In essence, repatriation means reversing the funds so that the accounts of the parties involved are in line with the economic intent of the primary adjustment. The OECD Transfer Pricing Guidelines describe some of the possible ways in which repatriation might be made.⁴⁰ The OECD’s MEMAP also contains guidance on repatriation. The OECD Transfer Pricing Guidelines recommends discussing repatriation in a MAP where it has been initiated for the

⁴⁰ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations in paragraph 4.73.

related primary adjustment.⁴¹ If repatriation is part of a settlement, the terms may vary, but often allow for the repatriation of funds to be effected either by a direct reimbursement or through an offset of inter-company accounts or by reclassifying other transfers, such as dividend payments where the adjustment is between parent and subsidiary, as a payment of additional transfer price (where the original price was too low) or as a refund of transfer price (where the original price was too high). Typically, the agreed terms also allow a taxpayer to repatriate within a mutually agreed reasonable time period, free from withholding taxes by the jurisdiction out of which the repatriation is made and from any additional taxable treatment in the jurisdiction to which the repatriation is made. Repatriation may be subject to audit verification.

5.5 Penalties and interest

Interest and penalties are levied under the TA Act and are not more onerous for taxpayers in the context of the MAP than they would be in the context of taxpayer-initiated domestic review. Adjustments to the amount of interest and penalties resulting from adjustments made pursuant to a MAP agreement will follow from any adjustments to the underlying tax involved. Administrative penalties that concern domestic law compliance issues that are not directly connected to a tax liability that is the object of a MAP request would generally not fall within the scope of MAP.

6. Interaction with domestic law

6.1 Suspension of payment pending mutual agreement procedure outcome

Section 164 of the TA Act contains the provisions pertaining to payment of tax pending objection or appeal. The obligation to pay tax, and the right of SARS to receive and recover tax, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal, unless a senior SARS official suspends payment of the disputed tax or a portion thereof having regard to relevant factors listed in section 164 of the TA Act.

A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer disputes or intends to dispute the liability to pay that tax under Chapter 9 (Dispute Resolution) of the TA Act. It is therefore advisable for a taxpayer to lodge an objection or appeal concurrently with the MAP process.

6.2 Mutual agreement procedure and assistance in collection of taxes

The Convention provides for “assistance in the collection of taxes” in Article 27. An agreement of this nature between jurisdictions is aimed at ensuring that any instances of a “revenue-claim” would be sufficiently covered and provided for. Many of South Africa’s DTAs contain an article on assistance in collection. Where the DTA provides for assistance in collection, the one competent authority may request the other competent authority to assist with the collection of taxes.

In the event that a taxpayer requests the suspension of payment for assistance in a collections matter that relates to outstanding taxes in the other jurisdiction and that relates to a MAP request, the competent authority of the other jurisdiction must agree to the suspension of payment pending the outcome of the MAP. The taxpayer should make a submission to the

⁴¹ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations in paragraph 4.76.

competent authority of the other jurisdiction for the suspension of payment for assistance in a collections matter pending the outcome of the MAP.

7. Miscellaneous issues

7.1 Advance pricing arrangement programmes

An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (for example, method, comparable and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.⁴² South Africa does not have an APA programme in place.

7.2 Issues related to self-initiated foreign adjustments

Taxpayer-initiated foreign adjustments are taxpayer-initiated adjustments permitted under the domestic laws of a treaty partner, which allows a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust –

- the price for a transaction between associated enterprises; or
- the profits attributable to a permanent establishment, with a view of reporting a result that is in the view of a taxpayer, in accordance with the arm's length principle.

For such purposes, a taxpayer-initiated foreign adjustment should be considered *bona fide* where it reflects the good faith effort of the taxpayer to 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 the two jurisdictions.

7.3 Protective mutual agreement procedure filing

An “initiated” case is one that has been accepted by a competent authority. In most cases, competent authorities will accept a person's request for competent authority assistance via MAP on the date the request is considered complete, and this is commonly evidenced by a notification from the competent authority to the person that the request has been accepted. A “complete request” is one where there is sufficient information included to allow the competent authority to decide whether the objection underlying the case appears to be justified.

In some jurisdictions, taxpayers may protect their rights to certain domestic recourse procedures by filing a protective claim before any applicable deadlines. A timely claim may have the effect of keeping any applicable periods of limitations open until the claim is resolved or withdrawn.

For this purpose, a “protective” competent authority filing (that is, one which is made before the expiration of a time limit on making a competent authority request, but which does not contain enough information to allow the competent authority to decide whether the objection underlying the case appears to be justified) should not be considered an “initiated” case.⁴³ It is only as of the moment of receipt of a completed request that the MAP request is regarded as

⁴² OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration.

⁴³ www.oecd.org/ctp/dispute/definitionsoftermsusedinmapstatistics.htm [Accessed 1 February 2018].

received by a competent authority for purposes of determining the start date under the MAP Statistics Reporting Framework. Generally, protective MAP filings for transfer pricing MAP cases usually involve litigation in the other jurisdiction. The taxpayer submits a protective filing to ensure its MAP request is within the time limit specified in the treaty or domestic law while waiting for the outcome of the litigation in the other jurisdiction.

7.4 South Africa's position on mutual agreement procedure arbitration

Some DTAs provide for a mechanism that allows a taxpayer to request the arbitration of unresolved issues that have prevented competent authorities from reaching a mutual agreement in two years. An arbitration provision is included in the DTAs with Canada (1997), Netherlands (2008) and Switzerland (2009). South Africa has not committed to MAP arbitration under Action 14.

7.5 Pension and annuities (RST01 and RST02 application forms)

Most countries impose tax on the worldwide income earned by a resident of that jurisdiction and on income earned by non-residents on locally-earned income. Therefore double taxation may occur because the individual can be taxed in the jurisdiction of residence as well as in the jurisdiction where the income was earned.

A non-resident, who is a tax resident in the jurisdiction of residence who receives income from a source in South Africa needs to apply for a directive for the relief from South African tax on pension and annuity income or wants a refund of tax that was withheld in terms of the South African Income Tax Act should the treaty provide that the resident state may only tax the pension and annuity income.

The request should be in terms of the DTA that is in place between South Africa and the non-resident's jurisdiction of residence. A person can apply for a directive if the person qualifies as per the definition of "non-resident". In order to avoid MAP requests for refunds it is recommended that the taxpayer follow the process as set out on the **SARS website** and obtain a directive in advance to ensure that the fund has not withheld PAYE on the pension and annuity income. For further information refer to SARS website at **www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/tax-and-non-residents/relief-from-south-african-tax-for-pension-and-annuity-income/**.

7.6 Multilateral mutual agreement procedures

The combination of bilateral tax Conventions concluded among several jurisdictions may allow the competent authorities of these jurisdictions to resolve multilateral cases by mutual agreement under paragraphs 1 and 2 of Article 25 of these Conventions. A multilateral mutual agreement may be achieved either through the negotiation of a single agreement between all the competent authorities of the jurisdictions concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.

This may, for instance, be the case to determine an appropriate allocation of profits between the permanent establishments that an enterprise has in two different jurisdictions with which the jurisdiction of the enterprise has tax Conventions.

In such case an adjustment made with respect to dealings between the two permanent establishments may affect the taxation of the enterprise in the jurisdiction of residence. Based on paragraphs 1 and 2 of Article 25 of the tax Conventions between the jurisdiction of the enterprise and the jurisdictions in which the permanent establishments are situated, the

competent authority of the jurisdiction of the enterprise has the authority to endeavour to resolve the case by mutual agreement with the competent authorities of the jurisdictions in which the permanent establishments are situated, and to determine the appropriate attribution of profits to the permanent establishments of its residents in accordance with both tax Conventions. Where the tax Conventions between the jurisdiction of the enterprise and the jurisdictions in which the permanent establishments are situated contain different versions of Article 7 (that is, the version included in the OECD Model in 2010 in one Convention and the previous version of Article 7 in the other Convention), the competent authorities may have regard to considerations of equity as mentioned under the paragraph above in order to find an appropriate solution with a view to ensuring taxation in accordance with the provisions of the applicable Conventions.

This may, for instance, also be the case where a number of associated enterprises of different jurisdictions are involved in a series of integrated controlled transactions and there are bilateral tax Conventions among the jurisdictions of all the enterprises. Such a series of integrated controlled transactions could exist, for example, where intellectual property is licensed in a controlled transaction between two members of a multinational enterprise (MNE) group and is then used by the licensee to manufacture goods sold by the licensee to other members of the MNE group. Based on paragraphs 1 and 2 of Article 25 of these tax Conventions, the competent authorities of the jurisdictions of these enterprises have the authority to endeavour to determine the appropriate arm's length transfer prices for the controlled transactions in accordance with the arm's length principle of Article 9.⁴⁴

⁴⁴ OECD Model Tax Convention on Income and on Capital: Condensed Version (as it read on 21 November 2017) Commentary on Article 25 in paragraph 38.1 to 38.3.