

Public Consultation Document by OECD on BEPS Action 14: MAPping the global minimum standard

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Background

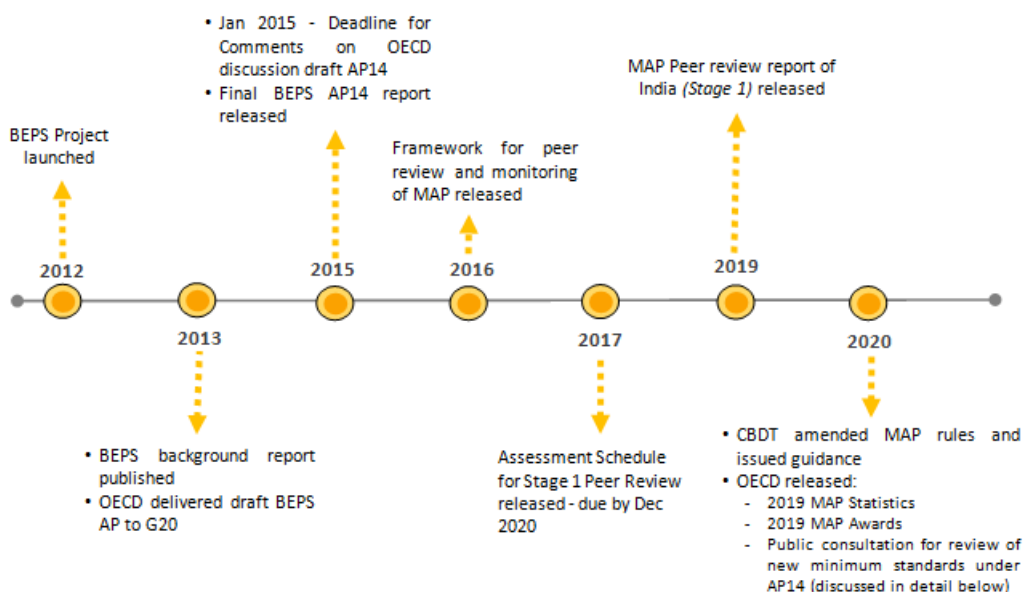
Whilst year 2020 has been referred to the year of uncertainty for the world economy, Organisation for Economic Cooperation and Development (OECD) on the other hand has made continuous progress to bring certainty to Multi-national enterprises (MNEs) under Base Erosion and Profit Shifting (BEPS) Action 14 (AP14) by setting up minimum standards for resolution of tax-related disputes between jurisdictions through Mutual Agreement Procedure (MAP). Inclusive Framework jurisdictions (G20 members) have committed to comply with the minimum standards reviewed and monitored through robust peer review process to increase efficiencies and improve the timeliness of the resolution of double taxation disputes through MAP.

In the process of eliminating opportunities for cross-border tax avoidance and evasion in order to build an international tax system that supports economic growth and resilient global economy, OECD introspects the need for an effective and efficient dispute resolution mechanism (DRM). In the absence of proper/ adequate DRMs, the world tax economy would become a place of disorder and turmoil amidst its efforts of addressing the BEPS; thereby necessitating the need for AP14.

In this article, we endeavour to discuss the recently released [Public Consultation Document by OECD on BEPS Action 14: Making Dispute Resolution Mechanism More Effective – 2020 Review \[1\]](#), and its impact on India’s MAP framework.

Timelines for BEPS AP14 and India specific developments w.r.t. MAP are captured in Chart below:

BEPS AP14 - Journey So Far...



Final AP14 report released by OECD in October 2015 consisted of 21 elements and 12 best practices, which

were shared with the member states as minimum standards for adoption in their domestic legal and administrative framework. The emphasis from the beginning is to strengthen the MAP under tax treaties so to improvise/ smoothen the DRM between the Contracting States (CS).

Subsequently, in 2016 year-end AP14 peer review process was launched, for review of 79 jurisdictions from 2016 to 2021 in 2 stages namely evaluation of jurisdictions' implementation of AP14 Minimum Standard and making recommendations to comply with the all requirements; and measurement of recommendations' follow-up.

BEPS AP14 - India's Evolution

OECD published peer review report addressing India's journey on MAP in late 2019, wherein comprehensive recommendations were made on India's MAP programme. To address the concerns in the OECD's MAP peer review report, India's Central Board of Direct Taxes (CBDT) recently amended the domestic MAP rules and issued MAP guidance on 7th August 2020. This is due to the fact that though the prescribed rules governing the MAP process were in place, the detailed information and comprehensive guidance on MAP was however missing for the taxpayers and administrators resulting in unwarranted disputes. The guidance also covers certain best practices recommended by the OECD showing the Government of India's intent to make MAP regime more efficient and effective, and taking a step towards collaborating with other CS in resolving disputes.

BEPS AP14 - Next Steps

OECD being at the stage of conclusion of Stage 1 of peer review process has recently released a public consultation document inviting comments, wherein certain already recommended best practices have been proposed to be elevated as AP14 minimum standards and proposal has been sought to strengthen MAP statistics reporting framework, to help jurisdictions to improvise their current MAP framework.

OECD BEPS AP14 - Proposed recommendation in public consultation document

This document is divided into two parts:

- OECD's Proposals to strengthen the minimum standards – this has 8 proposals
- Proposals to strengthen the MAP statistics reporting framework – this contains 2 proposals

Let us analyse each of these proposals briefly.

I. OECD's Proposals to strengthen the minimum standards

Proposal #1 - Increase the use of Bilateral Advance Pricing Agreements (BAPAs) or suggest jurisdiction to introduce BAPAs as DRM. Also, the proposal suggests to allow roll-back of BAPAs in domestic law.

- Proposal seems to reflect OECDs objective viz. prevention and reduction of the tax disputes. The proposed minimum standards will act as a stepping-stone for all the jurisdictions in the direction of coordinated and unambiguous resolution of the tax dispute between the CS.

Proposal #2 - Expand access to training on international tax issues for auditors and examination personnel to ensure enhanced awareness amongst the relevant personnel. This in turn would act as safeguard against adjustments made due to lack of knowledge leading to unilateral relief in jurisdiction making such adjustment, thereby avoiding disputes at field officers' level.

- Digital era has made it difficult for auditors and examiners to stay abreast with the latest development due to information explosion/ overload. The lag between the Global updates and existing practice/ knowledge sometime lead to unintentional erred adjustment by the auditor during assessments which in-turn tips to the rise of prolonged litigation and adjudication.

Having a global e-training module would ensure that the auditors in any jurisdiction would have adequate knowledge and follows best practices to address certain tax dispute during assessment. This could be the effective dispute prevention tool to avoid MAP process being initiated at the first place.

Proposal #3 - Jurisdictions to define criteria to ensure that MAP access is granted in eligible cases and introduce standardised documentation requirements for MAP requests.

- A comprehensive guidance covering all the material aspects for the eligible taxpayer and required documentation for MAP request is a sine-qua-non for effective DRM. The "access to MAP" and documents'

requirement varies in different CS, thereby there is a need to bring uniformity in approach across all jurisdictions.

Proposal #4 - Jurisdictions to suspend tax collection for the duration of the MAP process under the same conditions as are available under the domestic rules, if any.

· Proposal stipulates to provide relief to the innocent taxpayers who are enforced to pay taxes on disputed income already taxed in another jurisdiction resulting in a double taxation and unwarranted financial hardship.

However, with suspension of tax collection, uncertainty with collection of tax post conclusion of MAP arise. Considering such issue, a mechanism to provide bank guarantee instead of tax amount to relevant authorities can be an option worth exploring.

Proposal #5 - Alignment of interest/ penalty charged in proportion to the outcome of the MAP process across jurisdictions i.e. only to the extent the tax dues remains after MAP concludes.

· Presently, Global average for conclusion of MAP cases is ~25 months^[21]. Since MAP cases take a considerable time for resolution, ensuing interest/ penalty on the disputed tax amount becomes as important as the tax amount. Considering the financial hardship faced by the taxpayer, the alignment of the interest/ penalty with MAP process has become a necessity.

Proposal #6 - Introduction of proper legal framework to ensure implementation of all MAP agreements.

· Not just an effective MAP process but timely implementation of concluded MAP agreement would make DRM effective and efficient for taxpayers. Therefore, OECD proposes for legal binding framework of the jurisdictions to ensure that all MAP agreements could be implemented notwithstanding the expiration of domestic time limits as provided in Article 25(2), second sentence, of the OECD Model Tax Convention. The aim is to avoid late adjustments for which double taxation relief via MAP would no longer be available on account of domestic time barring.

Proposal #7 - To reduce the pressure on MAP inventory, jurisdictions must allow multi-year resolution through MAP of recurring issues with respect to filed tax years.

· Proposal recommends as minimum standards, the jurisdictions should implement appropriate procedures to permit the multi-year resolution of recurring issues once the dispute is being resolved through MAP agreement, where the relevant facts of the case are identical as under the MAP process.

Proposal #8 - Implementation of MAP arbitration or other DRMs as a way to guarantee the timely and effective resolution of cases through the MAP.

· Implementing MAP arbitration (Article 18) could be an incentive to reduce the number of MAP disputes that are closed with no or only partial resolution but may also have a positive impact on more timely resolution of all pending MAP cases. The Minimum Standard requires that jurisdictions should provide transparency with respect to their respective positions on MAP arbitration.

II. Proposals to strengthen the MAP statistics reporting framework

Proposal #1 - Reporting of additional data relating to pending or closed MAP cases such as:

- (i) Identification of the jurisdiction(s) that made the adjustment or took the action at issue;
- (ii) Breakdown of the time taken to close MAP cases per type of outcome; and
- (iii) Identification of the year when MAP cases were initiated for those cases pending at year end, in order to achieve 24 months' target timeframe for MAP resolution.

Proposal #2 - Providing relevant information on other practices that impact MAP i.e. APA statistics: More specifically in relation to BAPAs so that complete picture of jurisdictional efforts in relation to dispute prevention and resolution can be analysed.

Impact on India's MAP framework if above AP14 proposals become minimum standards

While CBDT has issued comprehensive guidance and amended the prescribed rules governing MAP process for making it effective, these are still at a very nascent stage being recently implemented. Some of the above proposed minimum standards have already been incorporated (*with or without necessary modifications*) in

India's legal MAP framework and rest are under the consideration and review of the authority. Below, we discuss the status of India's MAP framework in respect of the proposals recommended by OECD for AP14:

- In India, APA regulations are already in place aligned with the global landscapes and best practice as per proposal #1. The enacted BAPAs rules and regulations has made it an effective tool in India for resolution of taxation dispute with other CS. Although, there are APA guidance in place, however, CBDT should ensure conclusion of BAPAs in time-bound manner. India's APA report for FY 2018-19, elucidate 51.82 months as an average time-period for the conclusion of BAPAs.

- Till now there is no such mandatory training program in India for the officers. Imparting awareness regarding the best practice followed by other jurisdiction(s) to the officer would further increase their knowledge and understanding levels. Since there is a rise in tax disputes in India, proper mandatory training programme will ensure better awareness and understanding of assessment officer, thereby resulting in reduced unjust adjustments and fewer MAP applications. (Proposal #2)

- CBDT's MAP guidance provides procedural and administrative aspects of the MAP process in comprehensive manner, including the requisite documentation from taxpayers electing for MAP proceeding.

Further, the guidance defines criteria to ensure that access to MAP is granted in eligible cases; however, certain circumstance has been defined wherein the Indian Competent Authority (CA) would not negotiate any outcome other than that has already been decided by the Income-tax Appellate Tribunal (ITAT), highest fact finding administrative body in India. Such provision would defeat the purpose of MAP, since it involves CAs of another CS as well, and it might be possible that they are not in complete agreement with the ITAT judgement, thereby resulting in closing of MAP cases without an agreement.

Additionally, even though the taxpayer opts for MAP, the other domestic proceedings relating to the tax dispute continue to follow after final assessment order, thereby exerting unnecessary pressure on the limited resources in the domestic dispute resolution machinery. Therefore, providing an option to taxpayers and tax authorities to keep such proceedings in abeyance in case the taxpayer opts for/ enters into resolution under MAP, as practically seen in the past prior to the MAP guidance wherein the result of the MAP portion has also been applied in case of non-MAP portion of international transactions (such as **IBM Daksh Business Process Services Private Limited** [\[TS-1085-ITAT-2019\(DEL\)-TP\]](#); **JP Morgan Service Private Limited** [\[TS-578-ITAT-2015\(Mum\)-TP\]](#); **Fidelity Business Services India Pvt. Ltd.** [\[TS-107-ITAT-2018\(DEL\)-TP\]](#), is worth exploring by the CBDT. (Proposal #3)

- With regard to the suspension of tax collection, India has signed the MoU with some treaty partners (viz. Denmark, Sweden, South Korea, United States, and United Kingdom) for suspension of tax collection during MAP process by furnishing bank guarantee in some cases. With respect to the MAP with other CS, the local law would govern the procedures for stay of demand/ collection of tax. However, in order to safeguard the interest of the relevant CA and address taxpayer's concern, the Indian tax authorities could ask the taxpayers, undergoing MAP resolution, to furnish bank guarantee of an amount equivalent to the tax due instead of complete tax payment. (Proposal #4)

Concluding Remarks

In India, there has been a greater shift in the acceptance of alternate dispute resolution mechanisms such as APA, MAP, safe harbours, etc. over the last few years amongst MNEs operating in India. Currently, with India's commitment to endeavour a MAP resolution within 24 month's timeframe in line with BEPS AP14 recommendation and protracted TP litigation (both in number of cases and quantum of adjustment) faced by MNEs, MAP becomes a more lucrative option to choose for the MNEs for early disposal/ resolution of their disputes vis-à-vis traditional court route or filing BAPAs with roll back option.

Further, OECD's continuous effort to make its member nations implement the recommended best practice would make MAP process an effective tool for dispute resolution and prevention of double taxation. Whilst OECD is taking all requisite steps in the right direction to promise less adversarial tax regime globally for the taxpayers, its upto the respective jurisdictions to get their act together by building required infrastructure, deploying necessary resources, putting in place relevant guidelines and processes to meet the recommended standards for MAP resolution. Till the time BEPS AP14 publishes the final minimum standards document, let us wait for the rise of the dawn of the new tax era of indelible tax certainty. "One learns by doing the thing; for though you think you know it, you have no certainty until you try" - Sophocles

[\[1\]](#) The OECD has requested the interested parties to send their comments, no later than Friday 18 December 2020, 18:00 (CET), to the International Co-operation and Tax Administration Division, Centre for Tax Policy and Administration.

[2]Source: <http://www.oecd.org/tax/oecd-releases-2019-map-statistics-and-calls-for-stakeholder-input-on-the-beps-action-14-review-on-tax-certainty-day.htm>