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Mutual agreement procedure in India

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Abstract

Trade is significant icon to earn profit, profit is blood of the business and it creates tax revenue, therefore, International tax is one of the tax avenues towards countries, globally; the key dispute resolution method in use is MAP. MAP is available irrespective of treatment on hand in International tax laws and addition international remedies. The performance of MAP overrides the condition of the international tax law limits. Under MAP the Revenue Authorities of two separate nation's together struggle to resolve a dispute that way to double taxation. Transfer pricing cases, in terms of a result adjustment. If statistics are anything to go by, today India is the world's fastest growing economy at 7.3% in 2015, outstripping the global average of 3.1% with a new government in the centre. The current law mechanisms such as the Settlement Commission, Authority for Advance Rulings (AAR), Dispute Resolution Panel (DRP) and Advance Pricing Agreement, are in the broader sense, forums for avoiding protracted litigation. However, most of these methods have not proved to be fully effective in expediting resolution of tax litigation for various reasons. On this note, the most immediate imperative on the agenda of the new Government should be to find a faster and alternative way to resolve disputes. While there are various means of resolving tax disputes by the way of domestic litigation processes, Settlement Commission, AAR, APA, arbitration and MAP, global giants such as Cairn, Nokia and Vodafone have resorted to international arbitration to resolve so called tax issues. Some other companies like Nokia have also initiated MAP as an alternative to resolve tax disputes in India. In order to reinstate the investor confidence in the Indian government and make India a more predictable tax jurisdiction, it becomes increasingly imperative for the Government to resolve these large tax disputes in India.

Keywords: Authority for Advance Rulings (AAR), Dispute Resolution Panel (DRP) and Advance Pricing Agreement (APA), Government, Revenue Authority, Mutual Agreement Procedure (MAP)

1. Introduction

Tax controversies and disputes seem to be the order of the day. In the international arena the increase has come from the exponential growth in cross border transactions and investments. This in turn has given rise to use of resources, markets and employment of persons overseas and their taxation in different jurisdictions^[1]. International tax disputes between taxpayers and governments may arise where there is double taxation or double non-taxation. These disputes can be resolved prospectively through advance tax rulings or advance pricing agreements, or after the fact, through negotiations under mutual agreement procedures ("MAP")^[2].

Domestic MNE/MNC and other tax authorities can seek liberation under the Mutual Agreement Procedure (MAP) provisions if they incur any transfer pricing additions for their operations in India. The MAP provisions are covered in the Double Tax Avoidance Agreements that India has with various countries. This paper seeks to analysis of basics of Double Taxation Avoidance Agreements and Developments in India, MAP in Indian context and OECD eye on MAP, existing scenario of MAP.

Figure-1 highlights the volume of transfer pricing adjustments in the eleven years (2002 to 2013). The Competent Tax authorities are aggressive in their job to control international tax disputes. Transfer Pricing Adjustment cases are lead to huge amount of revenue which inturn leading to litigations [see figure – 1]

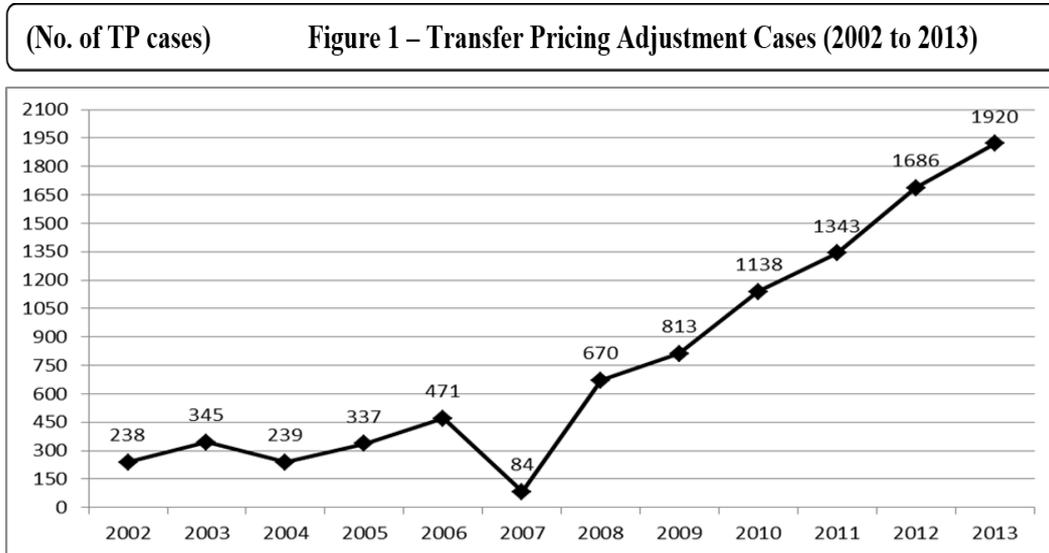
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2. Objective of the Study

The main objectives of the paper are as under –

1. To analysis the conceptual frame-work of DTAA in India.
2. To know the developments of DTAA in India.
3. To review the conceptual of MAP in India.
4. To study the existing developments of MAP in India

3. Methodology Adopted For the Study: The information and data for the present study is drawn mainly from standard and authentic secondary sources such as the policy of the government, the reports of different tax committees, tax journals, magazines, published data and literatures relating to the subject have been referred as part of secondary sources.



Double Taxation Avoidance Agreements (DTAAs) are entered into by two countries to address principally two main objectives, one elimination of double taxation and two, prevention of fiscal evasion. The other important objective is allocation of taxing rights between the two countries of the DTAA. DTAA are meant to address juridical double taxation. It is to be noted that DTAA are critical in promoting cross border and commerce between two contracting states and would be finalised based on several parameters other than taxation relating to bilateral relations^[3]. DTAA promote international trade by allocating taxation rights between the country of source and the country of

residence, avoiding double tax, and enabling corresponding adjustments in the face of transfer-pricing adjustments in the other country. In addition, DTAA can also enable mutual assistance in collecting information, tax investigation, and collection of taxes between the respective countries as well as help in resolution of tax disputes^[4].

4.1 Arrangement of Double Tax Conventions

The arrangement/structure of DTA is similar under OECD Guidelines for resolving the tax issues. The common structure of DTA is as under [see below table].-

Table 1: The Arrangement of Double Tax Convention

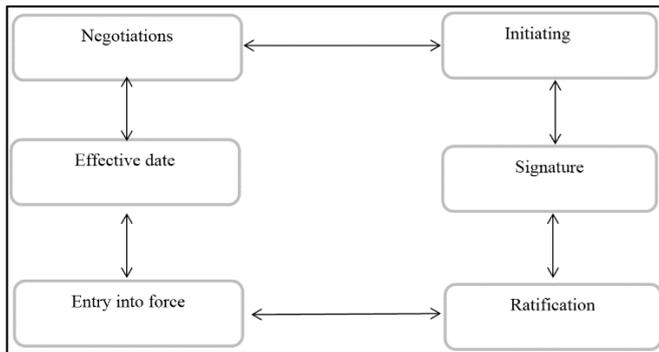
Sl. No.	Arrangement of Articles	Classification of Articles
1.	Scope of the Tax Convention	Article 1 - Persons covered
		Article 2 - Taxes covered
2.	Definitions	Article 3- General definitions
		Article 4 - Resident
		Article 5 - Permanent Establishment (PE)
		Article 30 - Entry into force
		Article 31 - Termination
3.	Taxation of Income	Article 7 - Business Profits
		Article 8 - Shipping, Inland waterways transport and Air Transport
		Article 14 - Independent Personal Services
		Article 15 - Income from employment
		Article 16 - Director's fees
		Article 17 - Artistes and Sportsmen
		Article 19 - Government Service
		Article 20 - Students
		Article 6 - Income from immovable property
		Article 10 - Dividends
		Article 11 - Interest
		Article 12 - Royalties
		Article 13 - Capital Gains
Article 18 - Pensions		
4.	Elimination of double taxation article	Article 21 - Other Income
		Article 23A - Exemption Method

		Article 23B - Credit Method
5.	Anti-Avoidance articles	Article 9 - Association Enterprises
		Article 26 - Exchange of information
		Article 27 - Assistance in the collection of taxes
6.	Miscellaneous Articles	Article 24 - Non - discrimination
		Article 25 - Mutual Agreement Procedure
		Article 28 - Members of diplomatic missions and Consular posts
		Article 29 - Territorial Extension

Source: Compiled from UN Model Double Taxation Convention (the UN Model), which was based on the 1977 OECD.

4.2 Various Phases in making DTAs

There are six stages that are to be passed through in developing DTAs. They are as under [see below chart]^[5] –



Source: P.V.S.S. Prasad & Sampath Raghunathan, 2014, International Taxation A Basic Study, Kolkata – India. Pp.97-98.

4.2.1 Negotiations

In this stage the negotiating parties of two countries contracting states are discussed the process at the first level of government and reach up to the representatives of ministry level.

4.2.2 Initiating

Once the terms of the DTA are agreed upon by both the parties it is initiated and submitted for approval of the concerned ministers or the cabinet of the respective contracting states.

4.2.3 Signature

When the DTA is approved by both the Governments it is formally signed by the respective Ministers or the representatives.

4.2.4 Ratification

The DTA signed by both the Ministers of the respective Governments would be ratified in order to make the same part of the domestic law or enforceable by a delegated legislative power given to the Government. Both the states exchange notes with respect to ratification of DTA.

4.2.5 Entry into force

The DTA comes into force on a particular date mutually agreed upon, from which date it become legal obligation binding on both the states.

4.2.6 Effective date

Even after DTA comes into force it may still not be effective as generally the effective date arises subsequently on the beginning day of a tax year of each contracting state. If contracting state has different tax years, then effective dates may also be different.

5. Indian Development of Double Tax Avoidance Agreement

Table 2: DTAA of India for the period of Pre and Post Globalization

Sl. No	Current status of DTAA	Number of Countries	Period of DTAA
1.	Renegotiation completed	Tanzania, Srilanka, Zambia, Finland, Kenya, Thailand, Norway, Romania, Indonesia, Nepal, Netherlands and Poland.	Pre – Globalization DTAA.
2.	Under - Renegotiation	Greece, Egypt, Libya, Mauritius, Korea, New Zealand, Denmark, Japan and United States of America.	
3.	New DTAA Negotiation completed.	-----	
4.	Renegotiation completed	Australia, Brazil, Bangladesh, UAE, United Kingdom, Uzbekistan, Singapore, France, Swiss Confederation, Spain, Malta, South Africa, Sweden, Morocco and Malaysia.	Post – Globalization DTAA.
5.	Under - Renegotiation	Philippines, China, Cyprus, Vietnam, Bulgaria, Italy, Mongolia, Israel, Germany, Turkey, Canada, Oman, Turkmenistan, Belgium, Kazakhstan, Russia, Belarus, Namibia, Czech Republic, Trinidad and Tobago, Jordan, Qatar, Portuguese Republic, Kyrgyz Republic, Austria, Ukraine, Ireland, Sudan, Uganda, Armenia, Slovenia, Hungary, Saudi Arabia, Kuwait, Iceland, Botswana, Montenegro, Serbia, Syria, Myanmar, Tajikistan, Luxembourg, Mexico, Mozambique, Taiwan and Georgia.	
6.	New DTAA - Negotiation completed.	Azerbaijan, Iran, Senegal and Venezuela	
7.	New DTAA - Under-Negotiation completed.	Colombia, Ethiopia, Lithuania, Estonia, Uruguay, Bhutan, Chile, Croatia, Fiji, Latvia, Albania and Albania.	

Source: Information compiled and access from White Paper Ministry of Finance, May, 2012. Pp.87.

Table 3: DTAs Signed by India during Pre and Post Globalization Period (1965 -2014)

Year	Number of Cumulative agreements	Year	Number of Cumulative agreements	Year	Number of Cumulative agreements
Pre - Globalization			Post - Globalization		
1965	1	1991	19	2001	60
1969	3	1992	22	2003	64
1982	6	1993	27	2004	65
1985	9	1994	34	2006	70
1986	10	1995	36	2007	72
1987	12	1996	42	2008	76
1988	13	1997	49	2010	78
1989	18	1998	53	2011	85
		1999	58	2013	86
		2000	59	2014	88

Source: Compiled from different sources.

Table -3 reveals the member of cumulative agreements signed by India from 1965 (Year-wise) along with the year wise agreements signed. It is evident that up to 1991 India had only 18 agreements out of the total 88 agreements (as of now). So, 70 agreements i.e. 79.54% are signed after 1991.

This is due to increase in the India’s international trade, commercial relations and importance attached to taxation issues in the globalised era. As many as seven agreements were signed in a single year in 1994, 1997 and 2011.

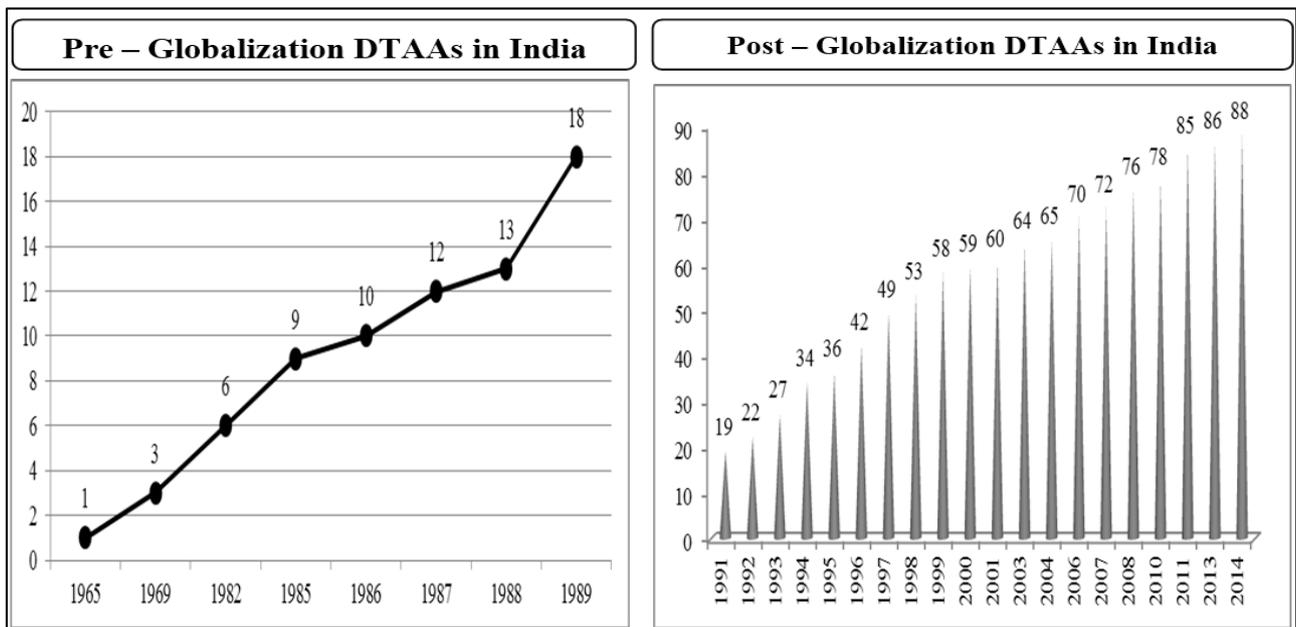


Fig 2: DTAs Signed by India during Pre and Post Globalization Period (1965 -2014)

6. Mutual Agreement Procedure (Map)

Transfer pricing is becoming a serious issue to the tax authorities with trade and economic. Growth of Multinational Enterprises (MNCs) in order to protect the tax benefits, tax authorities are all push forward strict measures to the transfer pricing issues by way of tax legislation and government. On the other hand in order to protect the taxpayers from international double taxation tax authorities shall co-operate with others tax jurisdiction to resolve disputes by way of consultation. Mutual Agreement Procedure and Advance Pricing Agreement become more and more important in today’s international taxation.

6.1 Mutual Agreement Procedure – Concept and Meaning

The term mutual agreement procedure may be attributed the meaning and definitions as under –

➤ The MAP is a well-established means through which tax administrations consult to resolve disputes regarding the application of double tax conventions. This procedure, described and authorities by Article 25 of the

OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment⁶.

➤ MAP is a dispute resolution mechanism provided for under the DTAA and is a special procedure, which is outside the scope and purview of the domestic tax regulation ^[7].

Therefore, MAP can be defined as a dispute resolution between taxpayer and taxing authority of one or multiple tax jurisdictions for eliminating double taxation on international transaction.

6.2 Key Features of MAP Provisions

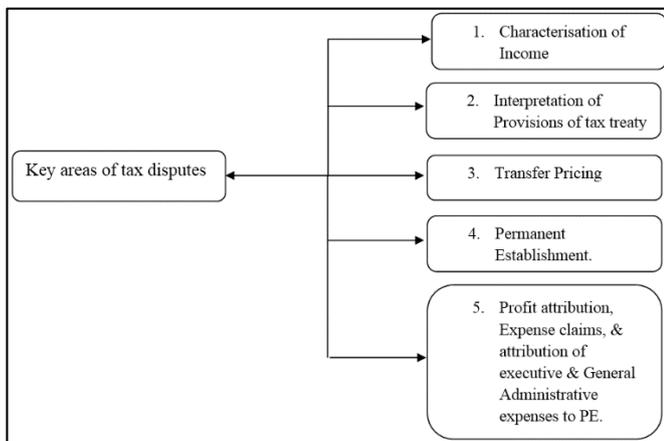
Some of the key features of MAP provisions are discussed are as under ^[8]–

1. The MAP provisions only apply in respect of the provisions of the DTAA and not the domestic tax laws.
2. It is interesting to note that MAP needs to be invoked by an overseas taxpayer by approaching the competent

- authority in his State of Residence ('SOR') and not by directly approaching the Indian tax authorities.
3. The MAP provisions can be invoked in addition to the remedies available to a non-resident taxpayer under the Act. Then a taxpayer can simultaneously file appeals before the appellate authorities and seek resolution under the MAP process.
 4. Typically the MAP procedure would take 3 - 4 years which is still shorter than the typical litigation lifecycle in India which lasts 7 – 10 years.
 5. In case a taxpayer is not satisfied with the resolution under the MAP process, it can choose not to be bound by the MAP and pursue alternative legal remedies.
 6. Since the MAP process involved competent authorities of both countries, the possibility of obtaining correlative relief for eliminating double taxation are higher.

6.3 Key Areas of Dispute

Increasing of Globalization has led to a rise in international trade disputes and some of the key areas of disputes are as follows [see chart] –



6.4 The Article on MAP is provided in Clause/Article 25 of the OECD Model Convention and reads as under

“Where a person considers that the actions of one or both of the contracting states result or will result for him in taxation not in accordance with the provisions of this convention, he may, irrespective of the remedies provided by the domestic law of those states, present his case to the Competent Authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. 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. The Competent Authority shall endeavour, if the objection appears to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the Competent Authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting State. The Competent Authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the convention. The Competent Authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs”.

6.5 International Developments of MAP

MAP is very much needed area of international taxation for the base of international trade and business purpose. The main organisation for economic cooperation and development (OECD) has recently updated the statistics of MAP in 2013 from different regions of the world (see table 4) are as under:

Table 4: Countries with the highest number of New MAP cases in 2013.

Country	Number of new MAP cases in 2013	Rank-Wise (Lowest -1 to Highest -10)	Difference (Each country comparison)
United States	403	10	136
Germany	267	9	
France	216	8	85
Switzerland	131	7	
Canada	127	6	03
Belgium	124	5	
United Kingdom	79	4	04
Netherlands	75	3	
Sweden	65	2	09
Finland	56	1	

Source: Compiled from OECD

7. MAP in India

Government of India introduced mutual agreement procedure accordance the Rule 44G and 44H of the Indian income tax rules, on 1962 need to be duly considered. The main intension for introduced this procedure is to control the tax disputes of international tax controversies and to utilized the large financial resource are blocked for not solved the different tax cases.

In Indian MAP procedure rules are contained in Rules 44G and 44H. Rule 44G states that the request for competent

authority assistance shall be made by an Indian resident in Form No.34F.

- It is simple form which calls for basic details.
- There is no filing fee for a MAP request.
- In India a tax payer is entitled to follow both the MAP process and the appellate proceedings simultaneously.
- Tax payer in India has even the option of rejecting or accepting the MAP resolution.
- Once a tax payer accepts MAP resolution he has to withdraw his appeal from the Court or Tribunal as the case may be, as per Rule 44H.

7.1 The existing position in India

Despite the change of stance both by the OECD as also the UN, India continues to adopt MAP without arbitration in the DTAA's. Even in the latest of the DTAA's entered into by India with other countries; MAP without arbitration

continues to find its way. The factual position relating to resolution of disputes under the mutual agreement procedure reveals a far from satisfactory outcome. Information obtained from the Competent Authority of India under the Right to Information Act revealed the following facts ^[9];

Table 5: Indian developments of Mutual Agreement Procedure

Sl. No	Period	Total number of application received by Govt. of India under "Mutual Agreement Procedure (MAP)" for resulting of dispute in terms of DTAA between India and other countries.
1.	1-1-2000 to 31-12-2009	167
2.	1-1-2010 to 31-12-2011	35
3.	31-12-2011 to 25-06-2012	15

Source: Compiled from the Under Secretary – 1(1) (FT &TR – 1), Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India vide letter F.No.500 187/RTI/2012-FTD-1 dated 21-9-2012.

Table - 5 reveals that Indian developments of mutual agreement procedure by the guidance of central board of direct taxes in India for the period of 2000 to 2012. Total number of MAP application received by the government of India for resulting of dispute of DTAA's of 10 years from (1-1-2000 to 31-12-2009), it is 167. In 2010 to 2011 it is about 35 and in the year 2012 it is 15 application is received by the competent tax authorities of India from tax payers it shows that there is more scope for elimination of double taxation and to protect tax revenue in domestic countries it is more beneficial to multinational enterprises.

8. Conclusion

Mutual agreement procedure is one of the connective bridges between country trades to another country relationship. It is very helpful to corporates and tax authorities of different tax jurisdiction. If the corporates are feel free to do the business in international level need of MAP is urgent required for successful implementation of MAP world-wide. Nowadays, international taxation disputes are regularly arises in international scenario. Overcome of these problems of international disputes to urgent enactment and to followed advanced countries practice of MAP in all over the world.

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