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Overview of the Mutual Agreement Procedures Guidelines Released by KRA

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The KRA has recently published Guidance on Mutual Agreement Procedures (the KRA Guidelines) to provide clarity to taxpayers on the process through which they should request for assistance from the Kenya Revenue Authority (KRA) to resolve disputes arising from taxation that they consider to be contrary to the provisions of Kenya's Double Tax Agreements (DTAs). This guidance is an attempt to align with the requirement under the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 14 Minimum standard which requires jurisdictions to put in place rules, guidelines and procedures for MAP that should necessarily contain the contact information of its competent authority as well as the manner and form in which the taxpayer should submit its MAP request, including the documentation/information that it should include in such a request.

The KRA Guidelines provide, among other things, the specific documents and process to be followed by taxpayers wishing to initiate a MAP process through the KRA, termination of a MAP and other relevant guidance. The publication of the Guidelines by the KRA are an important step in sensitising taxpayers about their rights under the existing double tax treaties which include a MAP process designed to assist taxpayers to have their tax disputes resolved through consultation between the competent authorities of bilateral partners to a tax treaty.

While experience in MAP appears to have been quite limited in its application in resolving Kenyan tax disputes, ALN Kenya takes pride in the fact that its experts have had the opportunity to see both sides of the process both as lawyers for the taxpayer and as a competent authority handling negotiations on behalf of the KRA in discussions with a counterpart tax authority.

In this article, we provide a brief overview and commentary of the KRA MAP Guidelines and more general facts about the MAP process to enhance knowledge about this process and its benefits.

MAP is a dispute resolution mechanism available under DTAs which provides a taxpayer with an important avenue to access competent authorities of the two governments involved in the double tax treaty with a view to resolve differences or difficulties regarding the application and interpretation of the Double Tax Treaty (DTT) on a mutually agreed basis. In Africa, MAPs have gained increasing prominence as countries strive to address cross-border tax challenges of double taxation and enhance the certainty of tax systems for investors.

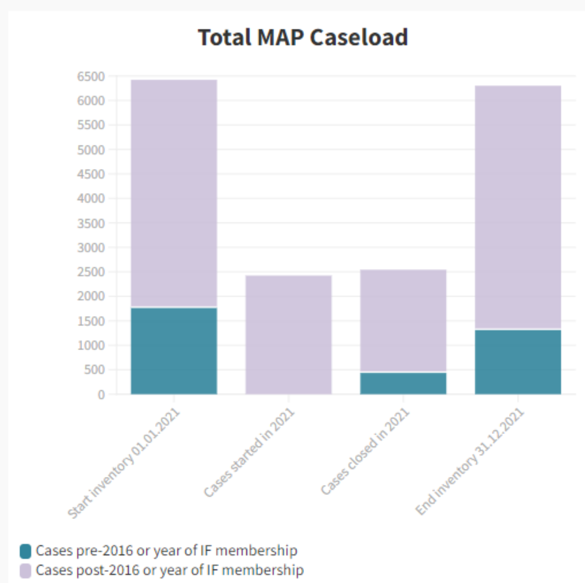
Double taxation occurs due to conflicting interpretations of tax treaties, inconsistent application of transfer pricing adjustments and disagreements arising over residency or permanent establishment status.

Kenya has a well-established DTT network with 15 tax treaties that help to alleviate the issue of double taxation on cross-border income, among other objectives. Most DTTs currently in force provides for the MAP as an additional dispute resolution mechanism in addition to domestic remedies available to every taxpayer involved in cross border transactions with other related parties.

The importance of MAP internationally has been highlighted by the report on BEPS Action 14 (*Making Dispute Resolution Mechanisms More Effective*) which contains a commitment by jurisdictions to implement a minimum standard to ensure that they resolve treaty-related disputes in a timely, effective and efficient manner which, is within two years. Tax dispute avoidance and resolution procedures are essential to the effective and efficient functioning of all tax administrations as well as ensuring certainty and predictability for businesses. Both these elements are critical for building an international tax system that supports economic growth and a resilient global economy.

According to MAP data for OECD countries and some partner economies available on the OECD website, the global number of MAP disputes has been rising rapidly since 2015 as indicated by the diagram below:

2021 MAP STATISTICS AT A GLANCE



Type of case	Average time
Transfer pricing cases	32.3 months
Other cases	20.7 months

All cases*	2021 Start inventory	Cases started in 2021	Cases closed in 2021	2021 End inventory
Cases received prior to 1 January 2016 or of the year of joining the BEPS Inclusive Framework	1777	0	451	1326
Cases received on or after 1 January 2016 or of the year of joining the BEPS Inclusive Framework	4644	2423	2092	4975

Source: 2021 Mutual Agreement Procedure Statistics - OECD

However, according to the Commentary to the United Nations Model Double Taxation Convention between Developed and Developing Countries, tax administrations in Africa have not considered MAP as a priority given that most disputes are resolved internally. African tax authorities and taxpayers often rely on domestic remedies, such as tax tribunals and courts, rather than international mechanisms like MAP.

The biggest challenge is arguably the limited trust or strained relationships between African tax authorities and their treaty partners, noting that MAP's success depends on cooperation between the tax authorities of different countries. Some African authorities may perceive MAP as favouring multinational enterprises (MNEs) or developed countries over their tax base and thus the effort to prioritise domestic resolution to maintain control over tax matters, avoiding perceived external interference in domestic tax policy. Additionally, MAP can be a lengthy procedure, sometimes taking several years to resolve between competent authorities.

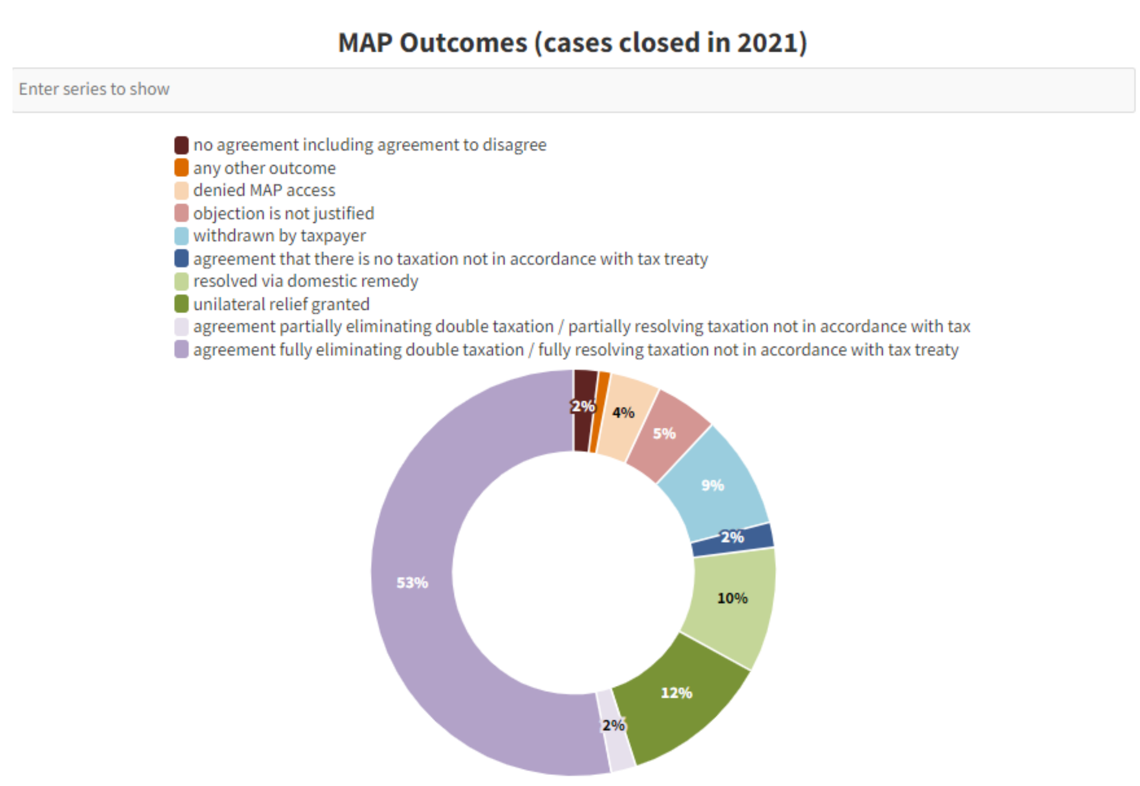
There remain other constraints such as lack of familiarity with MAP provisions in their treaties and unwillingness by tax authorities to engage with other authorities due to perceptions of limited capacity and ability to engage at par, as MAP processes often require specialised knowledge in international tax law and treaty interpretation. MAP may also not be a priority for African tax authorities due to the additional time taken to engage in. It may also be a major disincentive considering the very limited and stretched specialised staff resources with extremely high revenue targets to generate.

The focus in Africa also appears to be shifting to other ways of resolving disputes including unilateral APAs and Alternative Dispute Resolution (ADR). Several East African countries have adopted APAs in their tax legislation but are currently not implementing them in practice. Kenya has heavily invested in engagements with taxpayers through ADR. The KRA reports that the ADR framework has enhanced revenue collection through the release of KES 21.9 billion for collection from 1,184 concluded cases. The efforts to bring APAs into the realm of Kenyan tax law were set back when the President declined to assent to the Kenya Finance Bill 2024.

The ultimate loser from tax disputes not being resolved promptly and cost effectively is the multinational business exposed to double taxation. Businesses faced with such a predicament should seriously consider the opportunities availed by the MAP process where a DTT is in place between the two jurisdictions involved in each transaction.

As a rule, taxpayers have minimal involvement in the MAP process once they avail all documents as the competent authorities are required to engage between themselves to solve although not compelled to arrive at an agreement during a MAP negotiation.

As a matter of fact, global statistics show that not all disputes handled under MAP result in the settlement of double taxation cases as demonstrated by the diagram below.



Source: 2021 Mutual Agreement Procedure Statistics - OECD

The KRA Guidelines detail all the relevant documents to be submitted by the taxpayer to the Competent authority to review, validate the MAP request and facilitate negotiations with the other competent authority.

Key Factors to Consider When Choosing MAP to Resolve a Dispute with KRA

MAP is in essence an amicable manner to resolving an international tax dispute with a focus on eliminating double taxation and fiscal evasion. MAP can be advantageous to a taxpayer since it affords some additional benefits worth considering including:

a) the 'peer review' scrutiny by competent authorities from another tax administration offers a moderating effect to the KRA assessment as highly skilled professionals get to provide feedback on the validity of the assessment;

b) MAP offers a taxpayer an additional opportunity to a taxpayer to settle an international tax dispute outside the domestic law; and

c) MAP can be used by taxpayers to avoid instances of double taxation through corresponding adjustments that would be required on the tax assessed on a related enterprise in the other country if the transfer prices or allocations of profit adopted by a Kenyan taxpayer in its dealings with that related party are reassessed validly by KRA.

A key limitation of MAPs is that the process is only available in the context of a double tax treaty of which Kenya has a limited number. The bulk of tax assessments may relate to transactions between taxpayers and related entities in countries with which Kenya has no DTA meaning that the MAP process will be unavailable to those taxpayers. Kenya's DTA stated policy is to enter DTAs with its largest trading partners, but this has not been borne out in practice with majority of the DTAs initiated at the instance of Kenya's treaty partners and not covering Kenya's major trading partners for instance, the USA, Pakistan, Japan, EU, and EAC countries.

Some taxpayers would consider additional scrutiny by another tax administration over the tax dispute as an unwelcome intrusion likely to open up other issues which the taxpayer would rather not deal with. In this regard, MAP should be reserved for only cases of extreme double taxation. Another major drawback is that the MAP process and its outcomes cannot shield a taxpayer from imposition of interests and penalties for taxes found due under the MAP process. This can only be resolved unilaterally with the KRA under domestic law.

Some unique features of the Kenyan MAP Guidelines include the following;

a. Protective MAP Requests:

Taxpayers can file to preserve their right to MAP while awaiting further developments, particularly if the time to access MAP is running out. In such cases, the taxpayer should indicate or agree that the request should not be examined until further confirmation is provided by the taxpayer.

b. Kenya does not adopt the new international norm to allow easier access to MAPs by taxpayers.

Kenya opted not to adopt the amendment proposed by BEPS MLI to expand access to MAP by allowing taxpayers to be able to file a MAP request with either competent authority (i.e. the KRA or another revenue authority in the other state). Currently, Kenya restricts a taxpayer to file a MAP request in the country of residence. This limitation may prevent the access by the taxpayer to the MAP remedy due to conflict-of-interest issues with the KRA who raised an assessment.

c. Kenya does not adopt mandatory binding arbitration, limiting the enforceability of MAP outcomes.

The BEPS MLI also sought to apply mandatory binding arbitration through a mutual agreement procedure between Contracting Parties, a mechanism that would only apply if the contracting Parties have expressly chosen to adopt it. Notably, Kenya elected not to adopt the mandatory binding arbitration out of concerns that the imposition of a foreign arbiter would impede on its sovereignty and lead to skewed decisions against its interests. The OECD Model Convention contains a new clause 5 which proposes that countries adopt binding arbitration at the request of the taxpayer where no agreement is reached within two years. It is noteworthy that, so far only the Kenya and Netherlands DTT signed in July 2015 (not in force) contains a binding arbitration clause. Recently, Kenya unilaterally ended its Bilateral Investment treaty with the Netherlands in December 2023, rendering it inoperative from 11 June 2024. It remains to be seen whether the DTA will itself see the light of day in its current form in view of these developments.

d. Interaction between MAP and domestic legal processes.

The Guidelines published by the Commissioner provides that the taxpayer is free to pursue both remedies simultaneously with the taxpayer entitled to initiate MAP at any time during the domestic process within the timeline specified in each tax treaty normally between two to three years. These simultaneous processes present a challenge considering that the Guidance indicates that the Commissioner would be bound by a decision of the tribunal or courts regardless of whether the CAs arrive at a different result.

The Mutual Agreement Procedure (MAP) clauses in Kenyan tax treaties do not explicitly provide that the MAP outcomes override domestic laws or judicial decisions. The implications of this are that the MAP can only be afforded the status of an out of court settlement. The Tax Appeals Tribunal and Courts are empowered to stay proceedings for up to 120 days to give parties time to conclude out of court settlement negotiations before making any decisions on the dispute.

The view of the courts on MAP process in Kenya was laid bare by in recent judgment from the High Court *De La Rue Currency Security Print v. Commissioner of Domestic Taxes [2023]*, where the Court reinforced the view that while the contracting states are obligated to "endeavour" to resolve disputes through MAP, there is no binding requirement to prioritise it over domestic remedies.

e. Timeline provided to initiate MAP in Guidelines does not correspond with all treaties

The Guidelines allow a three-year period to initiate a MAP request, unless the relevant DTA specifies a different timeline. Therefore, taxpayers seeking to initiate the MAP process under DTAs with different timelines must comply with the timeline specified in the DTA. For instance, the Kenya-UK and Kenya-Canada DTAs provide a two-year period, not three years.

f. Multilateral MAPs

The Guidelines provide that the Kenyan competent authority may consider entering into a series of bilateral MAPs in situations where a MAP issue involves more than two jurisdictions. Multilateral Mutual Agreement Procedures (MMAPs) are relatively uncommon compared to bilateral MAPs (those between two countries). However, their usage has been gradually increasing, particularly as global tax issues become more complex and as more countries cooperate under international frameworks like the OECD/G20 Base Erosion and Profit Shifting (BEPS) project. The OECD's MAP Statistics provide data on MAP cases, showing that while bilateral MAPs dominate the landscape, the number of multilateral MAP cases has been rising, especially for larger multinational groups involved in more complex international tax arrangements. A few notable multilateral MAPs have occurred in contexts such as transfer pricing adjustments or the resolution of tax treaties in multiple jurisdictions under the framework of MLI.

h. Treaty Overrides on domestic law limits

In several Kenyan treaties, MAP provisions explicitly apply notwithstanding any domestic law, time limits. This includes the Kenya-UK DTA. Similarly, other treaties with developed countries, such as Germany, France, and Canada, tend to align with the OECD model and allow MAP to operate outside domestic law constraints. The Guidelines state 'Where the tax treaty specifies that the agreement shall be implemented notwithstanding the time limits in the domestic law, the tax authority shall implement the MAP decision irrespective of the time limit specified in the domestic law.' This clause raises questions about whether the domestic law limits purely relates to time within which to file the MAP or whether this override would affect other domestic law limits such as the five-year assessment limit specified under the Tax Procedure Act. Cap 469B of the laws of Kenya. This would be particularly of concern in the event that a taxpayer has filed a protective MAP request detailing years which the Commissioner is subsequently not allowed by domestic law to assess due to the expiry of the five-year period.

Conclusion

With increased instances of cross border transfer pricing adjustments and disputes arising under DTAs, it is worth companies exploring the benefits afforded by engaging in a MAP process, understanding its unique characteristics and the role it plays in resolving international tax disputes. MAP offers a unique set of advantages, including efficiency, effectiveness, flexibility and relief from double taxation. Thus, successful navigation of the MAP process can position taxpayers to achieve an effective resolution of double tax issues.

By building more awareness about the benefits and processes of MAP, taxpayers will become more empowered to take decisions about how best to resolve their current and future tax disputes through the MAP process where such an option is available to them.

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