

**BIAC Comment on the OECD Discussion Draft:
Manual on Effective Mutual Agreement Procedures (MEMAP)**

June 19, 2006

Introduction

BIAC commends the OECD for its work on developing the MEMAP. We believe that it is very important that countries share and implement the Best Practices of the member States among one another as a crucial step towards resolving tax treaty disputes. The adoption of Best Practices would have the effect of making the MAP more reliable and more efficient. If implemented and adhered to, the MEMAP would have the effect of assuring taxpayers from the outset that there is a standard set of engagement and analytical practices common among the member States. In turn, taxpayers will have a greater confidence that the MAP process will lead to an effective resolution of double taxation controversies in a manner that avoids double taxation.

In our opinion, the MEMAP sets out a pragmatic framework for the MAP process that increases the information available to the taxpayers about the MAP. This is consistent with the goal to increase transparency and efficiency of the MAP process.

The comments below are consistent with a number of the discussion points raised at the public consultation on the Draft MEMAP on March 13, 2006 in Tokyo. These comments should be read as requests for clarifications in the Draft MEMAP.¹

Comments

Best Practice #1: Robust use of the authority to resolve issues of interpretation or application.

1. BIAC commends the OECD for recommending the robust use of Article 25(3) to resolve double tax issues. Consistent with this Best Practice, BIAC suggests that third country resident issues impacting the two Treaty countries should be taken up under the MAP process.
2. Additionally, BIAC believes the MEMAP should adopt the Best Practice of standardizing procedures for resolving collateral adjustments, e.g., the repatriation of funds, etc., in advance of or in conjunction with the settlement of the primary double tax matter under the broad powers of Article 25.

¹ Where BIAC does not currently have specific comments on a specific draft best practice and its commentary, it is noted "comments reserved."

Best Practice #2: Principled approach to resolution of cases.

3. BIAAC agrees with the OECD that a principled approach is critical to the efficient, timely and fair handling of double tax resolution cases brought under the MAP. As such, we recognize Best Practice #2 as a cornerstone for the MAP process. Therefore, we recommend that Best Practice #2 should further define a "principled approach" to include each State putting forth a written position that is consistent with both their domestic law and the OECD Guidelines. Furthermore, neither State should put forth a position that is intended as an "opening" position with the other State, because to do so is implicitly inconsistent with a principled approach.

4. BIAAC acknowledges the importance that each State must be consistent in its application of the arm's length standard regardless of whether the case creates a refund or an assessment in that State. Therefore, BIAAC recommends that the MEMAP state more affirmatively in Best Practice #2 that competent authorities be consistent and reciprocal in the positions taken and make efforts to explain any apparent discrepancies in approach.

5. BIAAC agrees that where the focus of the MAP is to reach an agreement to avoid double tax, it follows that it will be necessary to compromise in order to reach an agreement. Therefore, BIAAC recommends that States should endeavor to reach accord on the consistent treatment of certain key issues, e.g., conversions, limited risk structures, services vs. intangibles, etc., to achieve more efficient and consistent agreements while also effectively using limited government resources.

Best Practice #3: Transparency and simplicity of procedures for assessing and using MAP

6. In addition to maintaining current guidelines and procedures for accessing the MAP, States should strive to develop and publicize standard forms for notification purposes and requests for assistance, including the type of information requested. Regarding information necessary for the MAP, the MEMAP should emphasize that quality of data is more critical to resolving double tax cases than the volume of data.

Best Practice #4: Providing complete, accurate, and timely information to the competent authorities.

7. Among the Best Practices necessary for a transparent and simultaneous MAP process is the absolute necessity that competent authority requests for information from their taxpayers be copied to the other State.

8. As a result, BIAAC recommends additional language conveying the importance that all taxpayer information sent to one State is sent to the other State as a matter of course.

Best Practice #5: Allowing electronic submissions.

9. BIAAC believes that a continued commitment to submissions of data electronically will ensure information requests and information provided are provided to all parties accurately and simultaneously. Additionally, electronic submissions may help make the MAP more efficient.

Best Practice #6: Allowing early resolution of cases.

10. Taxpayers ought to be encouraged to seek MAP assistance at the first indication of probable double taxation to avoid unnecessary government and taxpayer expense in developing issues at the examination level of one State. Key concepts or approaches decided early on through the competent authorities could eliminate the conflict and speed agreed positions on a reciprocal basis.

Best Practice #7. Earlier notification of a potential case.

11. BIAC recommends expanding the interpretation with respect to “the probability that taxation is not in accordance with the applicable convention” to include: (1) changes in domestic law; (2) published domestic tax procedures; (3) published opinions from tax court matters; and (4) taxpayer initiated adjustments that conform to the law of one State and that are not consistent with domestic law of the other State. Early reporting in these cases would allow the competent authorities to consider proactive, principled and consistent resolution methods.

12. Regarding the taxpayer’s burden of proof, the MEMAP should determine that the burden of proof is sufficiently met if the request is supported by domestic circumstances applied to the taxpayer’s specific facts.

13. BIAC recommends an additional Best Practice recommending taxpayers protect domestic statutes to preclude difficulties in negotiations with respect to proposed adjustments in closed years.

Best Practices #8: Liberal interpretation of time limits for requesting access to MAP.

14. BIAC praises the efforts associated with providing taxpayers the greatest flexibility possible for requesting assistance under the MAP. Therefore, BIAC believes that this Best Practice should be expanded to include a tolling of the three-year notification period if the taxpayer opts to avail itself of domestic administrative or appeals processes. It should be noted that where such domestic processes are pursued without resolution of double tax, the competent authority of the initiating State should not be bound by the administrative decision, have sufficient independence to consider the matter under the Convention and have maximum flexibility to avoid double tax in its negotiations with the other State.

15. BIAC recommends elevating the statement “taxpayers should take all reasonable steps to ensure that such time limitations [domestic or treaty-based] do not expire without appropriate protective measures on their part” to a Best Practice and add that taxing authorities should take care to ensure the time limitations do not expire as well.

Best Practice # 9. Avoiding exclusion from MAP relief due to late adjustments or late notification.

16. BIAC recommends including language clarifying that tax authorities should notify taxpayers *formally* at the *earliest possible date* of their intention to make an adjustment. Such notification should include the time frame the taxpayer has under a specific treaty to take action to protect its position and a description of the MAP or references to the domestic procedures.

17. Where examiners in one State make adjustments to a taxpayer that give rise to double tax and (a) such adjustments are made late in the domestic statute of limitations period, e.g., 6 months or less on the statute, (b) earlier notification has not been made to the taxpayer, and (c) the adjustment is time barred under the domestic statute of the other State, the competent authority of the adjusting State should give unilateral relief if the competent authority of the other State is not obligated to accept the matter for the MAP. However, where the Treaty provides that the MAP is applicable, the competent authority of the other State should accept the matter under the MAP regardless of the other State’s domestic provisions.

Best Practices #10: Countries eliminate or minimize the “exceptions” to MAP.

18. BIAC emphatically agrees that where a Treaty is applicable, the competent authorities should be able to accept any matter of double tax under the MAP and have sufficient independence to resolve the matter. The competent authorities should not “reserve” on an issue

for reasons of domestic policy. Consistent with the need for greater transparency, the MEMAP should include as a Best Practice formal notice and written explanation to the other State and the taxpayer in all instances where a State denies access to the MAP for reasons of domestic policy.

Best Practice #11: Consideration of MAP assistance for cases described as “tax avoidance.”

19. BIAAC agrees that even where a member State has anti-abuse or tax avoidance rules in place, where by application of a domestic anti-abuse rule a member State initiates an adjustment to taxable income that results in double tax, Article 25 should control the taxpayer’s ability to seek relief. Furthermore, where a taxpayer is suffering double tax, the competent authorities should not invoke a domestic anti-abuse provision as the cause for not accepting the matter under MAP where Article 25 applies. The MEMAP should also clarify that the MAP should not be denied for transfer pricing cases with recommended penalties.

20. BIAAC suggests including as a Best Practice limiting the denial of MAP access to criminal sanctions or extremely uncooperative taxpayers, i.e., taxpayers who refuse to submit requested information or taxpayers who have circumvented the MAP process by taking its own self help corresponding adjustments.

Best Practice #12: Taxpayer presentations to competent authorities on fact-intensive or complex cases.

21. BIAAC believes strongly that greater taxpayer participation in the MAP process should be encouraged for all cases, regardless of complexity. However, BIAAC agrees that, *particularly*, in complex matters, taxpayer participation is essential to timely and effective resolution. Specifically, BIAAC proposes that MEMAP adopt the following steps in the Best Practice for taxpayer presentations: (1) hold an initial and joint meeting with the competent authorities and taxpayer to present and resolve factual issues and frame the technical matters at issue; (2) periodically, hold update meetings between the competent authorities that allow for the taxpayer to participate; and (3) entertain taxpayer presentations of reasonable settlements to both governments.

22. Additionally, in the event there is a disagreement over an industry practice, a valuation approach or industrial and technical knowledge, the competent authorities should employ an independent expert. The independent expert’s counsel would be at the taxpayer’s request and expense, but the competent authorities must warrant that in conjunction with the independent expert, the competent authorities will fully resolve the matter under the MAP.

Best Practice #13. Cooperation and transparency.

[Comments reserved]

Best Practice #14: Face-to-face meetings between competent authorities.

[Comments reserved]

Best Practice #15: Bilateral process improvements.

[Comments reserved]

Best Practice #16: Decision summaries.

[Comments reserved]

Best Practice # 17: Recommendations for MAP cases beyond two years.

23. BIAAC recommends an approach that proactively uses milestones, taxpayer participation and mandatory binding arbitration to avoid a MAP extending beyond two years. Specifically, BIAAC recommends that the use of the following milestones as a Best Practice:

- (a) A competent authority must file a position paper within three months of receipt of the other competent authority's position paper in a MAP or within 30 days of receipt of a position paper for an advance pricing agreement;
- (b) If settlement not reached within 12 months of the taxpayer's request for MAP, a mediator, facilitator or higher government manager should be asked to help resolve the case within 6 months, but with an active taxpayer role; and
- (c) Mandatory and binding arbitration, which includes a position paper from the taxpayer, if the case is not resolved within 24 months.

24. If the above milestones are not adopted, the MEMAP should adopt as a Best Practice that where a MAP is going to extend beyond two years, a taxpayer should be able to: (1) demand a joint conference-of-right with the competent authorities; (2) have access to the competent authorities' position papers; and (3) provide assistance and positions to competent authorities to resolve the matter.

25. A competent authority should not base its position on the use of secret comparables; secret comparables only serve to delay the resolution of a MAP because the information may not be verified by the other competent authority or the taxpayer.

Best Practice #18: Avoid blocking MAP access via audit settlements or unilateral APAs.

26. BIAAC encourages the MEMAP to adopt as a Best Practice the principle that competent authorities have complete authority to deviate from any domestic audit settlements, appeals processes and settlements, or unilateral advance pricing agreements in order to resolve a double tax matter under the MAP.

Best Practice #19: Interest relief.

27. BIAAC encourages the MEMAP to fully implement interest relief on any tax assessment under the MAP process. The MEMAP should adopt as a Best Practice that interest should be waived during the MAP. However, there should be no suspension of interest payable on tax refunds by the other State, under the same principle that the time to resolution is not controllable by the taxpayer.

Best practice #20: Suspension of collections during MAP.

28. BIAAC agrees with the suspension of collections during the MAP and encourages the MEMAP to further adopt flexible arrangements to allow taxpayers to enter the MAP where suspension of collections is not possible under domestic law. In addition, where that pending tax amount would be subject to refund in the other State, the competent authority of the initiating state should make contractual or legal arrangements for the refund. The competent authorities may want to examine use of an escrow agent.

Best Practice #21: Readily available access to a competent authority.

[Comments reserved]

Best Practice #22: Independence of a competent authority.

29. BIAAC encourages the MEMAP to adopt additional Best Practices around competent authority independence. MAP discussions should not have examiners directly participating in the MAP in order to preserve the independence of the competent authority analyst.

30. Likewise, the competent authority analyst should not participate in the domestic examination process.

Best Practice #23: Performance indicators for the competent authority function and staff.

[Comments reserved]

Best Practice #24: Implementing and Promoting ACAP and Bilateral APA Programs.

31. BIAAC suggests clarifying this Best Practice to say that where similar issues, facts and circumstances exist in filed tax years subsequent to those already at issue, a standardized accelerated competent authority process should be automatic at the taxpayer's request.

32. Likewise, BIAAC suggests clarifying that bilateral advance pricing agreements should be encouraged to take settled MAP issues from prior years forward as approved transfer pricing methodologies for future years.