

Guidelines for requesting Mutual Agreement Procedure (“MAP”) assistance in Bermuda

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1 Introduction

The purpose of this document is to set out the process through which persons in Bermuda who are taxpayers in other countries (“taxpayers”) can request assistance from the Competent Authority in Bermuda to resolve disputes arising from taxation not in accordance with the provisions of the relevant Bermuda double taxation agreement between Bermuda and the other country (“DTA”).

1. In Bermuda, the Ministry of Finance Treaty Unit (also referred to herein as “the Competent Authority”) is the delegated competent authority for matters pertaining to Bermuda’s DTAs.
2. Taxpayers may request mutual agreement procedure (“MAP”) assistance under the terms of the relevant DTA (in conjunction with the relevant articles of the Multilateral Instrument (“MLI”) where applicable).
3. MAP assistance is provided by the Bermuda Ministry of Finance Treaty Unit. Contact details for submitting a request for MAP assistance to the Bermuda Ministry of Finance Treaty Unit are included in Appendix 1 of this document. This document distinguishes between requests for MAP assistance and requests for correlative adjustments, as there can be no cases for correlative adjustments by Bermuda tax authorities because there is no domestic tax laws in Bermuda.
4. In the case of a correlative adjustment, a foreign associated taxpayer has settled a case unilaterally with its foreign tax administration with respect to a transaction with its Bermuda associated person. Subsequently the associated Bermudan Person has no cause to make a claim to Bermuda tax authorities for a correlative adjustment because a correlative adjustment is non-existent given there is no income tax regime in Bermudan, rather there is only consumption based taxation in Bermuda.
5. This document does not deal with applications for advance pricing agreements (“APAs”) because Bermuda does not have domestic income tax and thus there are no APAs. It is therefore not possible for a situation to arise that a person suffers Bermuda income taxation when it does not exist.

1.1 Legal basis for a MAP request

Article 25 of the OECD's Model Tax Convention on Income and on Capital ("MTC") provides a mechanism to resolve difficulties arising where the actions of one or both of the Contracting States result or will result for the taxpayer concerned in taxation not in accordance with the provisions of the convention. Under the equivalent of Article 25(2) of the MTC, within the relevant Bermuda DTA, the Bermuda Ministry of Finance Treaty Unit will endeavour to resolve such cases by mutual agreement with the Competent Authority of the other Contracting State. In such a case a taxpayer may request assistance from the Competent Authority to resolve the issue.

Generally, Bermuda's DTAs state that taxpayers must approach the Competent Authority of their country of residence to request MAP assistance. In cases where an adjustment to profits is made by a tax administration that affects related parties in different jurisdictions, it is advisable for each taxpayer to make a separate request for MAP assistance to the Competent Authority of the country in which it is resident.

Bermuda is not yet a Party to the MLI. However as a matter of policy the Bermuda Ministry of Finance Treaty Unit allows taxpayers to approach the Competent Authority of either jurisdiction to request MAP assistance under a DTA whether or not Bermuda's treaty partner has adopted the provision and ratified the MLI. Where both countries have elected to apply the new rule, taxpayers will be able to approach the Competent Authority of either treaty partner jurisdiction in order to request MAP assistance. Taxpayers should consult the relevant Bermuda DTA when making a MAP request.

2 Making a MAP request

2.1 Valid MAP request as considered by the Ministry of Finance Treaty Unit under Bermuda's DTAs

In order to request MAP assistance, a taxpayer must submit the MAP request in writing to the relevant Competent Authority, providing the required information as specified in section 2.1.2 below, of the action that has resulted or will result in taxation not in accordance with the relevant DTA.

The MAP request must be submitted within the time limit specified in the applicable DTA (refer to section 2.1.1 below). A valid MAP request must contain the minimum information set out in section 2.1.2 below.

2.1.1 Time limit for making a MAP request

The time limit for submitting a request for MAP assistance under a DTA is determined by the relevant DTA. Generally, Bermuda's DTAs follow Article 25 of the MTC and provide that a request for MAP assistance must be submitted within 3 years from the first notification of the action resulting in taxation not in accordance with the convention. However, some treaties provide for a different time period. Therefore, taxpayers should always consult the relevant DTA at an early stage to ensure that they submit a request for MAP assistance within the specified time limit. Where the time limit specified in a DTA has not been met, a request for MAP assistance will not be accepted. The Ministry of Finance

Treaty Unit considers the date on which the taxpayer receives the first tax assessment notice or equivalent that results in double taxation as being the beginning of the 3 year period.

2.1.2 Minimum information required to be a valid MAP request

In order for a MAP request to be considered a valid request under the DTA, the MAP request submitted to the Competent Authority should specify, at a minimum:

- the tax period(s) concerned;
- the nature of the action giving rise, or expected to give rise, to taxation not in accordance with the DTA; and
- the full names and addresses of the parties to which the MAP relates.

2.2 Complete MAP request

While a MAP request will be regarded as presented for time limit purposes where the information set out in section 2.1.2 above has been provided, Revenue will not commence the MAP process until a complete request for MAP assistance is received. In order for a MAP request to be considered complete, taxpayers must provide the relevant information outlined in Appendix 2.

2.2.1 Start date/initiation of a MAP request

The receipt of the information outlined in Appendix 2 will determine the start date for a MAP request under a DTA. This start date is relevant for the purposes of computing the time taken to resolve a MAP request.

2.2.2 Analysis of a MAP request and taxpayer role

As the Ministry of Finance Treaty Unit begins the detailed analysis of the MAP request, it is likely that there will be further information requests. Taxpayers are expected to cooperate fully with the Ministry of Finance Treaty Unit by providing complete and accurate information without delay when requested. Without proper information and documentation, the Ministry of Finance Treaty Unit may be unable to resolve disputes.

MAP discussions between the Ministry of Finance Treaty Unit and the other Competent Authority are a government-to-government process. Taxpayer involvement in the MAP is generally limited to presenting its views to both Competent Authorities and providing the relevant information. Taxpayers are not involved in the actual discussions between the Competent Authorities. However, where appropriate, taxpayers may be invited to make a presentation before the Competent Authorities to ensure a common understanding of the facts of a particular case.

Throughout the MAP process, the taxpayer should ensure that each tax administration is provided with the same information at the same time. This applies to any information submitted by the taxpayer to

either tax administration as part of the MAP process. The Ministry of Finance Treaty Unit will keep the taxpayer informed of the status of their MAP request on an on-going basis.

2.3 Confidentiality

The information submitted to the Ministry of Finance Treaty Unit in connection with a MAP request will be treated as confidential.

The exchange of information between the Ministry of Finance Treaty Unit and the Competent Authority of the treaty partner country in relation to a MAP shall be carried out in accordance with the provisions of the relevant DTA. Information exchanged under Bermuda's DTAs is confidential and may only be used and disclosed in accordance with the provisions of the treaty.

2.4 Factors to be considered in determining whether to accept a MAP request

The factors which the Ministry of Finance Treaty Unit will consider in determining whether to accept requests for MAP assistance include:

- There is a DTA in place between Bermuda and the foreign jurisdiction which contains the appropriate enabling provision; and
- The actions of one or both countries result or may result in taxation not in accordance with the provisions of the DTA; and
- The Competent Authority receives a valid MAP request within the time limit specified in the applicable DTA (refer to section 2.1 above); and
- The issue or objection raised by the taxpayer appears to be justified/well founded.

The Ministry of Finance Treaty Unit will notify the taxpayer in writing, where possible, within 30 days of receipt of the taxpayer's MAP request, whether their request has been accepted or rejected. The Ministry of Finance Treaty Unit will provide the taxpayer with the reasons for its decision where a request is rejected.

2.5 Stages of the MAP Process

2.5.1 First stage - unilateral

For MAP requests where Bermuda is the jurisdiction raising the adjustment and a request is made to the Bermuda Competent Authority under the MAP article of a DTA, the Bermuda Competent Authority will first, if the request appears to be justified/well founded, attempt to resolve the matter unilaterally, without consulting the other Competent Authority. If the Bermuda Competent Authority is not itself able to arrive at a satisfactory solution, it will contact the Competent Authority of the other jurisdiction to set in motion the second bilateral stage of the MAP process. (This paragraph 2.5.1 is included for consistency of stages however it is redundant in respect of Bermuda as Bermuda does not have domestic income laws).

2.5.2 Second stage - bilateral

During the second, bilateral stage of the MAP process the Bermuda Competent Authority will endeavour to resolve the matter by mutual agreement with the Competent Authority of the other jurisdiction involved. It is important to note that paragraph 2 of Article 25 of the MTC requires both Competent Authorities to negotiate with a view to the avoidance of double taxation. However, in the absence of mandatory binding arbitration there is no guarantee that the case will be successfully resolved.

2.6 Interaction with domestic remedies

A taxpayer may request MAP assistance irrespective of the remedies provided by Bermuda's domestic law. A taxpayer can request MAP assistance from the Bermuda Competent Authority in situations where a decision has been rendered by a Bermuda court or courts. However, the Competent Authority cannot derogate in the MAP from a decision of the highest court in which the matter is heard.

The Ministry of Finance Treaty Unit does not envisage the parallel undertaking of a MAP where the taxpayer is simultaneously pursuing judicial or administrative remedies. However, a taxpayer may submit a request for MAP assistance while judicial or administrative proceedings are ongoing. In such cases, the Competent Authority will generally request that the taxpayer agrees to the suspension of its judicial or administrative remedies pending the outcome of the MAP. If the taxpayer does not agree to suspend the administrative or judicial remedies, the Competent Authority will delay the MAP process pending the outcome of the administrative or judicial proceedings. If the Competent Authorities cannot reach agreement through the MAP process or if the taxpayer rejects the agreement between the Competent Authorities, the taxpayer can then pursue any available domestic administrative or judicial remedies.

2.7 Other relevant guidance

- Relief from collections, interest and penalties - Under Bermuda domestic legislation, there is no income tax therefore issues such as suspension of tax collection during the MAP process are not applicable.
- Taxpayer-initiated foreign adjustments - Access to MAP will be available for issues arising from a bona fide taxpayer-initiated foreign adjustment. Bermuda's domestic legislation does not arise that a taxpayer would try to claim a deduction from Bermuda tax for the foreign adjustment in their tax return under self-assessment because there is no self-assessment for Bermuda income tax as there is no Bermuda income tax. Hence the matter does not arise in which Taxpayers are required to present such cases to the Ministry of Finance Treaty Unit for consideration by making a request for a correlative adjustment or a MAP request, given that Bermuda does not have income tax laws.
- Treaty anti-abuse and domestic anti-abuse provisions - Where issues arise relating to the application of treaty anti-abuse provisions or the application of domestic anti-abuse provisions, Bermuda will engage in consultation with the Competent Authority of the other Contracting State. However, taxpayers should be aware that while the Ministry of Finance Treaty Unit will

engage with the tax authority of the other relevant jurisdiction in relation to MAP requests which concern the application of treaty and/or domestic anti-abuse provisions, any claim of taxation not in accordance with the provisions of the convention may not necessarily be resolved and any double taxation may not be eliminated.

- Audit settlement - Audit settlement agreements between tax authorities and taxpayers do not preclude access to MAP.
- Multiple years - Taxpayers may submit MAP requests that span multiple years, subject to the time limit in the relevant DTA.
- Multilateral MAPs - Where a MAP issue involves more than two tax jurisdictions, the Ministry of Finance Treaty Unit will consider entering into a series of bilateral MAPs as a way of dealing with such multilateral situations. The Ministry of Finance Treaty Unit will also consider requests by the taxpayer to conduct multilateral meetings with the other tax administrations, subject to the terms of the relevant DTAs and the agreement of the other tax administrations.
- Absence of Article 9(2) in a DTA – Economic double taxation can arise as a result of the inclusion in the profits of an enterprise of one Contracting State, profits on which an enterprise of the other Contracting State has been charged to tax in that other State, under the equivalent of Article 9(1) of the MTC. Article 9(2) of the MTC provides for a correlative adjustment to be made to relieve the economic double taxation that could otherwise arise. Where a DTA does not include the equivalent of Article 9(2) of the MTC, the Ministry of Finance Treaty Unit regards such economic double taxation as being implicitly within the scope of the DTA by virtue of the inclusion of Article 9(1) and accordingly, the Ministry of Finance Treaty Unit is willing to consider a request in such cases for MAP (or correlative adjustment where it is applicable given that Bermuda does not have domestic income tax).
- Items not covered by MAP - No relief will be available, inter alia, for:
 - Interest and penalties imposed by the other country; and
 - Secondary/repatriation of profits adjustments implemented under the laws of the other country.

3. Resolution of a MAP request

There are a number of potential outcomes in a MAP case, including:

1. Unilateral relief (refer to section 2.5.1 above);
2. Competent Authority agreement for full or partial elimination of double taxation;
3. No Competent Authority agreement is reached, including agreement to disagree;
4. MAP request withdrawn by the taxpayer.

In line with BEPS Action 14, the Ministry of Finance Treaty Unit is committed to seeking to resolve MAP cases within an average timeframe of 24 months of receipt of the complete MAP request. However, this is dependent on a number of factors such as the complexity of the case, the co-operation of the taxpayer and the number of rounds of negotiations required.

3.1 Competent Authority agreement has been reached

Once a mutual agreement has been reached between the Ministry of Finance Treaty Unit and the other Competent Authority, the Ministry of Finance Treaty Unit will notify the taxpayer in writing of the agreed outcome, where possible within 30 days of the Competent Authority meeting. The Ministry of Finance Treaty Unit will request that the taxpayer confirm in writing whether it accepts the mutual agreement within 30 days of receipt of the letter from the Ministry of Finance Treaty Unit. If the taxpayer rejects the mutual agreement reached between the Competent Authorities, it can withdraw from the MAP process and pursue any available domestic remedies.

3.1.1 Implementing agreement

If the taxpayer confirms in writing its acceptance of the mutual agreement, the Ministry of Finance Treaty Unit will give effect to the mutual agreement and seek to ensure its implementation without delay. In cases where a refund is due to the taxpayer, the taxpayer should contact its local tax District to begin the process of obtaining the refund. The taxpayer will be required to submit revised tax computations for the affected accounting periods to the Ministry of Finance Treaty Unit.

In cases where a refund is due to the taxpayer (which can only be a refund due from a third country given that Bermuda has no domestic income tax) to the extent that the Ministry of Finance Treaty Unit has not received from the third country a refund of tax arising from the mutual agreement within 93 days of the receipt from a taxpayer of a valid claim for repayment of tax, the Ministry of Finance Treaty Unit will follow up with the third country and seek to obtain the refund that was agreed.

3.2 Competent Authority agreement has not been reached

In the event that the Ministry of Finance Treaty Unit is unable to reach agreement with the Competent Authority of the foreign tax administration and in the absence of mandatory binding arbitration, the Ministry of Finance Treaty Unit will notify the taxpayer in writing, where possible within 30 days of the Competent Authority meeting, setting out why agreement could not be reached. Except for cases involving arbitration (refer to section 3.2.1 below), the Ministry of Finance Treaty Unit is not obliged to engage in further discussions with the other Competent Authority where Revenue or the other Competent Authority believes that agreement cannot be reached.

3.2.1 Arbitration

The Competent Authorities will endeavour to resolve cases with the objective of eliminating double taxation. However, it may not always be possible for the Competent Authorities to reach agreement, in which case arbitration may be available under the relevant DTA as applicable.

3.2.1.1 MAP request submitted under a DTA with an arbitration provision

Where MAP arbitration provisions are currently included in Bermuda DTAs but are subject to an exchange of notes to establish procedures and, in some cases, to bring MAP arbitration into effect, the Ministry of Finance Treaty Unit undertakes to arrange the arbitration as quickly as possible.

3.3 MAP request withdrawn by the taxpayer

Where a taxpayer wishes to withdraw a MAP request the taxpayer is required to provide the Competent Authority (to which it submitted the MAP request) with a notification, in writing, of the withdrawal of its MAP request, without delay. This notification should include the reason for the withdrawal (for example resolution of the issue through remedies provided by the domestic law of a Contracting State).

4. Correlative adjustments

A correlative adjustment is defined as an adjustment of profits under the terms of a DTA which Bermuda has entered into with another country. The purpose of a correlative adjustment is to provide the Bermuda person with relief from double taxation resulting from an adjustment initiated by the foreign tax administration and accepted by the taxpayer and involves a third country given that it cannot involve Bermuda which has no income tax. The term 'correlative adjustment' is similar to the term 'corresponding adjustment' used by the OECD. In order to make a claim for a correlative adjustment, there must be a DTA in place between Bermuda and the foreign jurisdiction which contains the appropriate enabling provision.

Correlative adjustment cases may arise where a taxpayer settles a dispute unilaterally with the foreign tax administration without involving the Bermuda Competent Authority, i.e. the taxpayer has agreed to the adjustment that was raised by the foreign tax administration and has paid the additional foreign tax resulting from the foreign-initiated adjustment. The taxpayer cannot make a claim to the Ministry of Finance Treaty Unit for a correlative adjustment from Bermuda income tax because Bermuda income tax does not exist rather the double taxation will exist in a third country and Bermuda would further action the MAP with the foreign country with which Bermuda has a DTA. This is on the basis that they do not involve the negotiation of the original MAP request between the first two Competent Authorities.

The Ministry of Finance Treaty Unit will consider requests for correlative adjustments in accordance with the DTA provision equivalent to Article 9(2) of the MTC. As mentioned in Section 2.7 above, where a DTA does not include an equivalent of Article 9(2), the Ministry of Finance Treaty Unit regards economic double taxation as being implicitly within the scope of the DTA by virtue of the inclusion of an equivalent of Article 9(1) of the MTC and accordingly, the Ministry of Finance Treaty Unit is willing to consider a request for a correlative adjustment. Requests for correlative adjustments should be sent to the Ministry of Finance Treaty Unit. Taxpayers should refer to Appendix 3 for details of the information and documentation required to be submitted with a request for a correlative adjustment.

The Ministry of Finance Treaty Unit will review the case and request from the relevant third country a correlative adjustment to the profits of the affected company to the extent it considers the adjustment to be arm's length. As a claim for correlative adjustment represents a one-sided review, based on the facts and circumstances of the case, the relevant third country may not agree with the appropriateness

of the whole or part of the primary adjustment and double taxation may therefore arise. Where, following the review, the Ministry of Finance Treaty Unit advises the taxpayer that the third country agrees to the whole or part of a correlative adjustment confirmation will need to be obtained from the other relevant jurisdiction by the Ministry of Finance Treaty Unit that tax has been paid on that amount.

To the extent that a refund is due to the taxpayer, the taxpayer will be required to submit revised tax computations for the affected accounting periods to Revenue of the relevant third country. In making a claim to a relevant third country via the Ministry of Finance Treaty Unit it is important to be aware that no relief will be available, inter alia, for:

- Interest and penalties imposed by the other country; and
- Secondary adjustments or repatriation of profits adjustments implemented under the laws of the other country.

If any part of the correlative adjustment claim is not granted by the relevant third country dealing with the taxpayer's affairs, the taxpayer may request MAP assistance from the Ministry of Finance Treaty Unit provided the request is within the time limit for a MAP claim as set out in Section 2.1.1 above. Taxpayers should note that they must comply with the time limit set out in the relevant DTA.

Appendix 1:

Contact details for submitting a MAP request under a DTA

Transfer pricing and attribution of profits to a permanent establishment MAP requests

Requests for MAP assistance that relate to matters of transfer pricing or the attribution of profits to a permanent establishment are dealt with by the Ministry of Finance Treaty Unit and should be addressed to the attention of the Assistant Financial Secretary (Treaties), 30 Parliament Street, Hamilton HM 12, Bermuda

Non-transfer pricing MAP requests

Requests for non-transfer pricing MAP cases are dealt with by the Ministry of Finance Treaty Unit and should be addressed to the attention of the Assistant Financial Secretary (Treaties).), 30 Parliament Street, Hamilton HM 12, Bermuda

Appendix 2:

Information and documentation required to be submitted with a request for MAP assistance

Information and documentation submitted with a request for MAP assistance should be provided in three hard copies, in English.

Refer to Appendix 1 of the document for the relevant contact information. The information that must be included with a request for a MAP presented under either a DTA is set out below:

- i. Identity (such as name, address, tax identification number or birth date, contact details) of the taxpayer(s) covered in the MAP request and of the other parties to the relevant transaction(s).
- ii. Details of the relationship between the taxpayer and the other parties to the relevant transaction(s).
- iii. The legal basis for the request i.e. the specific tax treaty including the provision(s) of the specific article(s) which the taxpayer considers is not being correctly applied by either one or both Contracting States (and to indicate which state and the contact details of the relevant person(s) in that state).
- iv. Facts and circumstances of the case (including any documentation to support these facts such as financial statements and intercompany legal agreements, the taxation year(s) or period(s) involved and the amounts involved, in both the local currency and foreign currency).
- v. An analysis of the issues involved (supported with relevant documentation, for example, tax assessment notices, tax audit report or equivalent leading to the alleged double taxation, evidence of tax paid (where applicable)), including the taxpayers interpretation of the application of the specific treaty provisions(s), to support its basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both Contracting States;
- vi. The request should state whether the issue(s) presented in the MAP request have been previously dealt with, for example, in an advance ruling, APA, settlement agreement or by any tax tribunal or court. This includes details of any appeals and litigation procedures initiated by the taxpayer or the other parties to the relevant transactions. If yes, a copy of these rulings, agreements or any court decisions concerning the case should be provided.
- vii. Any other information or documentation requested by the Competent Authority. Responses to requests for additional information should be complete and submitted within the time stipulated in the request for such information or documentation.
- viii. An undertaking that the enterprise shall respond as completely and quickly as possible, providing wholly accurate and complete information, to all reasonable and appropriate requests made by a Competent Authority and have documentation at the disposal of the Competent Authorities.
- ix. Confirmation of whether the MAP request was also submitted to the Competent Authority of the other Contracting State – if so, the MAP request should make this clear, together with 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 that submission (including all

documentation filed with that submission) should also be provided unless the content of both MAP submissions are the same.

Appendix 3:

Information and documentation required to be submitted with a request for a correlative adjustment

To enable the Ministry of Finance Treaty Unit to examine the merits of a claim for correlative adjustment, taxpayers should:

- i. Quote the legal basis for the claim i.e. the relevant article(s) in Bermuda's double taxation agreements (including a statement as to why the agreement quoted is the relevant agreement);
- ii. Set out how the relevant enterprises are associated;
- iii. Explain what the transfer pricing policy was prior to the audit of the associated enterprise in the other country (attaching a copy of all documentation evidencing that policy e.g. intercompany legal agreements, transfer pricing study, benchmarking study, economist report, and other expert advice);
- iv. Set out those elements of the transfer pricing policy that the other country did not agree with and why, and how the associated enterprise sought to rebut the other country's findings, including copies of all relevant correspondence;
- v. Set out how the final agreement with the other country was arrived at to include the following details:
 - a. An explanation of the final adjustment;
 - b. The quantum of the adjustment agreed and the financial years covered;
 - c. An explanation as to how the original transfer pricing policy was not arm's length and how the final adjustment is arm's length in accordance with OECD principles, including evidence supporting the arm's length nature of the adjustment;
 - d. The process by which agreement was reached including an account (if relevant) of the considerations leading to acceptance of the adjustment as opposed to litigation or MAP;
 - e. A copy of the settlement agreement; and
 - f. A copy of the assessments issued by the tax authority of the other country.
- vi. State how effect was given to the adjustment in practice including an explanation of the accounting treatment;
- vii. State clearly whether any portion of the adjustment relates to secondary adjustments such as imputed or notional interest on intercompany balances;
- viii. State clearly whether any portion of the adjustment relates to interest on unpaid taxes or statutory penalties;
- ix. State whether any previous or subsequent years are to be audited where there is a prospect of similar issues arising; and
- x. State whether there are audits being undertaken by other countries that might affect the profits of the Bermuda associated enterprise.

As a claim for correlative adjustment is essentially a one sided review of a matter concerning potential double taxation, in order to ensure an efficient and expedient review process, the Ministry of Finance Treaty Unit expects to be provided with all relevant information as was provided to the tax authority in the other country.