



# GUIDELINE ON MUTUAL AGREEMENT PROCEDURE

Version 1.0

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# Guideline on the Mutual Agreement Procedure pursuant to conventions to avoid double taxation and to prevent tax avoidance and evasion with respect to taxes on income and on capital

## CONTENTS

1. INTRODUCTION
2. MUTUAL AGREEMENT PROCEDURE (MAP)
  - 2.1. Definition
  - 2.2. Current legal framework
  - 2.3. MAP Competent Authority
    - (i) Peruvian Competent Authority (PCA)
    - (ii) Competent Authority of other Contracting State (ACE)
  - 2.4. Matters that can be subject to a MAP
  - 2.5. MAP modalities
    - (i) Unilateral
    - (ii) Bilateral
3. MAP REQUEST
  - 3.1. Deadline for submission
  - 3.2. Taxpayer's role
4. CAUSES TO NOT ACCEPT THE MAP
5. MAP CONCLUSION
6. IMPLEMENTATION OF THE MAP PRONOUNCEMENT OR AGREEMENT
7. RELATIONSHIP BETWEEN THE MAP AND THE RESOURCES PROVIDED IN THE DOMESTIC LAW
8. TREATMENT OF INTERESTS AND ADMINISTRATIVE SANCTIONS

## 1. INTRODUCTION

This guideline aims at providing guidance to the taxpayer and other stakeholders with regard to the MAP established in double taxation agreements and preventing tax evasion and avoidance with respect to taxes on income and on capital (hereinafter DTAs) entered into by and between Peru and other States; therefore, it contains general definitions and characteristics of the procedure carried out by the Peruvian Competent Authority (hereinafter PCA), as it has been established in such agreements.

Besides, general concepts and characteristics detailed in this guideline consider in an illustrative manner the OECD Manual on Effective Mutual Agreement Procedure MEMAP<sup>1</sup>, OECD Model Tax Convention on Income and on Capital, version 2017 related to the comments on the article of the MAP<sup>2</sup>, as well as the profile of the country related to the MAP<sup>3</sup>.

In any case, this guideline does not intend to amend any provision of the DTAs signed by Peru or the domestic regulations of our country but only to facilitate its understanding. If any doubt arises between the guideline and the regulation applicable to the MAP, it will be solved according to the latter based on each specific case.

## 2. MUTUAL AGREEMENT PROCEDURE (MAP)

### 2.1. Definition

As established in the DTAs signed by Peru, the MAP is a procedure that will be carried out when a person<sup>4</sup> considers that measures adopted by one or both Contracting States imply or may imply a taxation that is not in conformity with the provisions of the DTA or warns on difficulties and doubts arising from the interpretation or application of a DTA regardless of the resources stated by the domestic law of these Contracting States.

Also, under the comments on Article to the MAP of the OECD Model Tax Convention on income and capital, version 2017<sup>5</sup>, the Contracting States designate powers to the competent authorities to solve through the MAP:

- Cases proposed by taxpayers in order to avoid a taxation that although arises from a domestic law, it does not meet the DTA,
- Difficulties or doubts proposing the interpretation or application of the DTA in concrete cases (for example, those related to a single taxpayer) and in a general manner (through the joint interpretation of a provision of an agreement applicable to a large number of taxpayers).

### 2.2. Current legal framework

Currently, the effective legal framework of the MAP is composed of eight (8) effective DTAs signed by Peru<sup>6</sup> which have been entered into with the following countries:

<sup>1</sup> <https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm>

<sup>2</sup> <https://www.oecd.org/publications/model-tax-convention-on-income-and-on-capital-condensed-version-20745419-es.htm>

<sup>3</sup> <https://www.oecd.org/tax/dispute/country-map-profiles.htm>

<sup>4</sup> Even though the MAP can be initiated by a taxpayer or the Tax Administration, this guideline refers to the first case.

<sup>5</sup> <https://www.oecd.org/publications/model-tax-convention-on-income-and-on-capital-condensed-version-20745419-es.htm>

<sup>6</sup> Available at:

[https://www.mef.gob.pe/es/?option=com\\_content&language=es-ES&Itemid=100878&lang=es-ES&view=article&id=302](https://www.mef.gob.pe/es/?option=com_content&language=es-ES&Itemid=100878&lang=es-ES&view=article&id=302)

- ✓ Republic of Chile.
- ✓ Canada.
- ✓ Federative Republic of Brazil.
- ✓ United Mexican States.
- ✓ Republic of Korea.
- ✓ Swiss Confederation.
- ✓ Portuguese Republic.
- ✓ Republic of Japan.

The MAP is regulated in article 24 of the DTA with the Federative Republic of Brazil, Republic of Korea, Swiss Confederation and Portuguese Republic, as well as in article 25 of the DTA with the Republic of Chile, Canada, United Mexican States and the Republic of Japan.

Also, the Convention is useful to standardize the tax treatment established in the agreements to avoid double taxation signed between the States that are part of the Framework Agreement of the Pacific Alliance which aligns tax treatments of pension funds and amends the DTAs signed with the Republic of Chile and the United Mexican States; including in Appendix I a Protocol applicable to the Republic of Peru and the Republic of Colombia which aligns the tax treatment of certain income obtained from pension funds as well as a provision of the MAP<sup>7</sup> <sup>8</sup>.

### **2.3. MAP Competent Authority (CA)**

The CA is the expression used in the DTA signed by Peru to identify the authority that participates as representative of the Contracting State and particularly who exercises the MAP duties.

#### **(i) Peruvian Competent Authority (PCA)**

By Ministry's Resolution 383-2021-EF/10 published on 12.31.2021<sup>9</sup>, the national superintendent of the National Superintendency of Customs and Tax Administration was designated as authorized representative of the Ministry of Economy and Finance to exercise such duty established in the effective DTA, as well as those becoming effective after the publication of such resolution.

Currently the organizational unit of SUNAT in charge of MAP duties is the National Intendency of Strategies and Risks which has a multidisciplinary team that is responsible for the evaluation of this type of requests.

#### **Personal details of the MAP Competent Authority**

Name: Mr. Luis Enrique Vera Castillo  
Position: National Superintendent of SUNAT  
E-mail: [map-peru@sunat.gob.pe](mailto:map-peru@sunat.gob.pe)

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<sup>7</sup> <https://busquedas.elperuano.pe/normaslegales/convencion-para-homologar-el-tratamiento-impositivo-previsto-convenio-internacionales-2178012-1/>

<sup>8</sup> <https://busquedas.elperuano.pe/normaslegales/entrada-en-vigor-de-la-convencion-para-homologar-el-tratamiento-convenio-entrada-en-vigor-2178014-1/>

<sup>9</sup> Available at: <https://busquedas.elperuano.pe/normaslegales/designan-al-superintendente-nacional-de-aduanas-y-de-adminis-resolucion-ministerial-n-383-2021-ef10-2026825-1/>

### **MAP Contact Point**

Name: Mr. Carlos Octavio Rojas Chávez

Position: Supervisor of the National Intendency of Strategies and Risks

E-mail: [map-peru@sunat.gob.pe](mailto:map-peru@sunat.gob.pe)

#### **(ii) Competent Authority of other Contracting State (ACE)**

The article referred to general definitions of the DTA signed by Peru describes the CA of the other Contracting State for Agreement purposes, indicating, in some cases, an authorized representative to whom the MAP duties can be appointed.

Contact details of the ACE of the nine (9)<sup>10</sup> States with which Peru has signed a DTA can be found at the web site of the OECD.

<https://www.oecd.org/tax/beps/country-map-profiles.htm>

## **2.4. Matters that can be subject to a MAP**

For illustration purposes but not limiting, as stated in the comment to the article of the MAP of the OECD Model Tax Convention, version 2017<sup>11</sup>, among the matters that can be subject to the MAP since it has been considered that its application generates international double taxation or a result that is not in conformity with the DTA provisions, we find among others:

- Conflicts of residence.
- Withholding at source applied to several income.
- Determination of the existence of a permanent establishment.
- Transfer pricing adjustments.

## **2.5. MAP modalities**

### **(i) Unilateral<sup>12</sup>**

In case there is a MAP request to the PCA and such authority considers that as a result of its evaluation it may find a solution for the case, it will issue a pronouncement for which the MAP will be solved without involving the Contracting States, granting or not (total or partial) relief to international double taxation claimed by the taxpayer without prejudice to notifying the pronouncement to the Contracting States.

Similarly, when the ACE find the solution to the MAP within its jurisdiction, it will adopt unilaterally a solution and issue the corresponding pronouncement.

### **(ii) Bilateral<sup>13</sup>**

In case there is a MAP request to the PCA and such authority considers as a result of its evaluation that it cannot find a solution for this case, it will be informed to the ACE by enclosing the corresponding documentation; thus, starting the bilateral stage of the MAP.

<sup>10</sup> Made up of eight (8) DTAs signed between Peru and Colombia based on the Convention Protocol.

<sup>11</sup> Model Tax Convention on Income and on Capital (Full Version) | OECD iLibrary (oecd-ilibrary.org).

<sup>12</sup> Paragraph 32 of the comments on article 25° of the OECD Model Tax Convention.

<sup>13</sup> Paragraph 33 of the comments on article 25° of the OECD Model Tax Convention.



Each CA will express its position with regard to the case subject to dispute of the MAP, initiating the technical discussions and negotiations, if applicable and they could conclude the procedure with an agreement, or a non-agreement granting (total or partial) relief to the international double taxation claimed by the taxpayer or not granting it.

It may be the case that the matter subject to the MAP affects not only two contracting states but more involved Contracting States; therefore, a multilateral agreement could be carried out.

### 3. MAP REQUEST

In conformity with the DTA signed by Peru, the MAP request shall be submitted to the CA of the State where the taxpayer resides; therefore, the Peruvian taxpayer should address the PCA of the MAP and shall submit, based on the suggestion for illustrative purposes, in the orientation guidelines on information and documentation to be submitted through a MAP request developed by the OECD<sup>14</sup>:

- (i) Identification details of the taxpayer submitting the request, and if appropriate, of the legal representative (name and/or business name and/or corporate name, tax domicile, e-mail, phone number and/or mobile, among others), date of request and signature of the taxpayer requesting the MAP and/or its legal representative.
- (ii) The specific article(s) of the DTA that you consider are not duly applied or interpreted by one or both Contracting States; all relevant facts of the case, including any information and/or documentation supporting such facts, involved tax periods, involved amount, identification of parties related to the transactions subject to dispute, date of notification of administrative acts under dispute, if applicable, analysis of the dispute subject to MAP including an approach on the application and/or interpretation of specific articles of DTA and documentation supporting such analysis.

If submitting documentation in a language different than Spanish, it is necessary to enclose the unofficial translation into Spanish.

- (iii) Information on complaints, administrative or legal resources filed by the taxpayer or related parties, if applicable, on the subject of dispute of the MAP, as well as any administrative and/or legal resolution.
- (iv) Copy of the MAP request filed before the ACE by the related party of the Peruvian taxpayer with regard to the same matters subject to the MAP before the PCA, including all the submitted documentation, if applicable.
- (v) Any other information and/or documentation required by the CA on a full and timely basis.

All the information obtained or generated during a MAP will be protected by the provisions on confidentiality established in the DTA, specifically those established in the article on exchange of tax information.

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<sup>14</sup> Guidance on Specific Information and Documentation Required to be Submitted with a Request for MAP Assistance: <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf> (pages 78 to 80).

For any communication and/or coordination with the team of the National Intendency of Strategies and Risks in charge of MAP duties, it is possible to contact the following e-mail: [map-peru@sunat.gob.pe](mailto:map-peru@sunat.gob.pe).

### **3.1 Deadline for submission**

In the case of DTA signed with United Mexican States, the Republic of Korea, Portuguese Republic, Swiss Confederation, Republic of Japan and the Republic of Colombia<sup>15</sup> the request shall be filed within the three (3) years following the first notification of the measure implying a taxation that is not in conformity with DTA provisions.

Since it concerns the DTA signed with Canada, a term of two (2) years has been established following the first notification of the measure which implies a taxation that is not in conformity with the DTA provisions for the submission of the MAP request.

On the other hand, in the DTA signed with the Federal Republic of Brazil, the MAP request shall be submitted in conformity with the deadlines established in the corresponding domestic law; and in the DTA signed with Chile, no term has been established for filing a MAP request before the CA<sup>16</sup>.

It is worth mentioning that when the Multilateral Convention becomes effective and applicable to apply the measures related to tax treaties to prevent the base erosion and profit shifting (Multilateral Convention or MLI), some DTA signed by Peru will amend the provisions referred to the MAP, particularly those referred to the term to file the MAP request<sup>17</sup>.

Finally, such term will not be applicable when it concerns a MAP request of general scope, that is, when the taxation that is not in conformity with the DTA arises from general administrative acts or general application acts.

### **3.2 Taxpayer's role**

The taxpayer is not part of the MAP since it is a procedure carried out by the CA of the Contracting States; therefore, it will not be reported with regard to the terms of negotiation exchanged during the processing. However, since the taxpayer requests the beginning of the MAP, he can request a meeting (physically or virtually) with the PCA or the contact point of the MAP when deemed necessary.

## **4. CAUSES TO NOT ACCEPT THE MAP**

The MAP request will not be accepted due to the following reasons:

- (i)** When there is no applicable DTA.
- (ii)** When the request is filed outside the term established in the DTA, if applicable.
- (iii)** When the matter subject to the MAP does not correspond to a dispute in the application of DTA provisions.

<sup>15</sup> Such deadline is applicable with respect to income tax levying income obtained from pension funds recognized as per Protocol between the Republic of Colombia and the Republic of Peru to avoid double taxation and prevent tax evasion of the Convention.

<sup>16</sup> The domestic legislation does not set deadlines for filing the MAP request. In this respect, in the case of the above mentioned DTAs, the CA would not demand filing the MAP request within a specific period.

<sup>17</sup> Available at: <https://www.oecd.org/tax/treaties/beps-mli-position-peru.pdf>

## 5. MAP CONCLUSION

With regard to the Unilateral MAP modality, it concludes with the pronouncement of the PCA granting or not (total or partial) relief to the international double taxation claimed by the taxpayer.

With regard to the bilateral MAP modality<sup>18</sup>, it concludes with an agreement or non-agreement, granting (total or partial) relief to the international double taxation claimed by the taxpayer, or not granting it as a result of the negotiation carried out between CA of the Contracting States.

Among the different forms of conclusion of the MAP, we have the following:

- (i) Non-acceptance of the MAP.
- (ii) The CA of the Contracting States reach an agreement granting relief (total or partial) on the international double taxation claimed by the taxpayer.
- (iii) The CA of the Contracting States does not reach an agreement.
- (iv) It is not possible to give judgment because the matter of the dispute of the MAP no longer exists.
- (v) The taxpayer has ceased the request during the MAP proceedings.
- (vi) The taxpayer obtained relief (total or partial) on the international double taxation claimed by means of an internal resource.
- (vii) Among others.

## 6. IMPLEMENTATION OF THE MAP PRONOUNCEMENT OR AGREEMENT<sup>19</sup>

Once a pronouncement has been issued unilaterally solving the MAP or an agreement has been reached between the CA of the Contracting States, the taxpayer shall provide express consent to such judgment and/or agreement adopted by the CA(s).

Once the taxpayer has accepted such judgment and/or agreement and without any administrative or judicial resource on the matter of dispute solved through the MAP, we proceed with the implementation. If non-acceptance is stated or express acceptance is not provided, the agree will not be implemented.

In certain DTA signed by Peru, it has been established that such implementation will be applicable regardless of the terms established in the domestic law of Contracting States.

In this regard, it is necessary to mention that once the MLI becomes effective and applicable, certain DTAs signed by Peru, will amend the provisions referred to the MAP, specifically the one related to the implementation of the judgment or agreement regardless of the limitation periods established in the domestic law<sup>20</sup>.

## 7. RELATIONSHIP BETWEEN THE MAP AND THE RESOURCES PROVIDED IN THE DOMESTIC LAW

The DTAs signed by Peru state that it is possible to file a MAP request regardless of the resources provided in the domestic law of the Contracting States. In that sense, the same

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<sup>18</sup> With respect to the DTA entered into between Chile and Canada, competent authorities may agree to submit the case to arbitration if both competent authorities agree; thus, the procedure will be established in an exchange of notes between Contracting States.

<sup>19</sup> Paragraph 2 of comments on article 25 of the OECD Model Tax Convention.

<sup>20</sup> Available at: <https://www.oecd.org/tax/treaties/beps-ml-position-peru.pdf>



dispute can alternatively become subject to the MAP, as well as to the contentious-administrative proceedings (claim or appeal).

On the other hand, as stated in the MAP profile of Peru<sup>21</sup>, the PCA of the MAP shall refrain from continuing with the evaluation if the dispute subject to MAP is being discussed in the Judiciary, as well as when a court resolution of mandatory compliance has been issued.

## **8. TREATMENT OF INTERESTS AND ADMINISTRATIVE SANCTIONS**

If the MAP pronouncement or agreement implies adjustments to the determination of the tax obligation, it will be possible to reduce interests and administrative sanctions provided that such interests and administrative sanctions are directly related to the matter subject to the MAP.

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<sup>21</sup> Available at: <https://www.oecd.org/tax/dispute/country-map-profiles.htm>