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Mark Martin and Thomas Bettge

What changes are on the horizon for US MAP and APA procedures?

Mark Martin and Thomas Bettge of KPMG in the US discuss the inclusion of updates to the US Internal Revenue Service's (IRS) mutual agreement procedure (MAP) and advance pricing agreement (APA) revenue procedures in its priority guidance plan, and consider how successor guidance could further improve the MAP and APA programmes.

The 2021–22 priority guidance plan from the IRS and Treasury Department included updates to two key revenue procedures, which govern the IRS' MAP and APA programmes, as well as other transfer pricing (TP) guidance, as discussed in a previous article.

Perhaps unsurprisingly, given the high number of priority projects on the plan and the emergence of new regulatory issues connected with litigation, the MAP and APA revenue procedure updates were not released prior to June 30 2022, when the plan year ended. However, the updates were included on the most recent quarterly update to the 2021–22 plan, and will likely be carried over into the priority guidance plan for 2022–23. Although the timing is unclear, we believe that successor guidance to the MAP and APA revenue procedures remains a priority item for the IRS and Treasury.

Background

What will be included in the successor guidance is less clear. The priority guidance plan is characteristically terse, listing only “[g]uidance updating Rev. Proc. 2015-40, providing the procedures for requesting and obtaining assistance from the U.S. competent authority under U.S. tax treaties” via MAP and “[g]uidance updating Rev. Proc. 2015-41, providing the procedures for requesting and obtaining advance pricing agreements and guidance on the administration of executed advance pricing agreements.”

We understand that one purpose of the update may be to streamline the requirements for filing MAP and APA requests, which under the highly structured frameworks of Rev. Procs. 2015-40 (MAP) and 2015-41 (APA) can result in taxpayers

compiling voluminous submissions with information that is not actually relevant to the case at hand. One significant update could be the permanent elimination of the requirement to file physical copies of submissions, which has been suspended during the COVID-19 pandemic.

Rationalising the MAP and APA filing requirements would be welcome, but the IRS would miss an opportunity if it did not also adopt substantive improvements. The IRS' advance pricing and mutual agreement function (APMA) is a leader in tax certainty, and its MAP and APA programmes can serve as models for much of the world.

The latest statistics (discussed in prior articles on MAPs and APAs) show that the US MAP and APA programmes are highly successful, but challenges – particularly with regard to case processing times – remain. Moreover, increasing demand for tax certainty makes it imperative that tax authorities continue to hone dispute resolution and prevention mechanisms, like MAPs and APAs.

Potential areas for improvement

Certain aspects of the current revenue procedures could be improved in successor guidance. For one thing, Rev. Proc. 2015-40 applies a burdensome annual notification requirement for protective claims (which extend the statute of limitations for claiming a refund of US tax) and treaty notifications (which are required under a small number of US treaties, including the treaties with Canada and Mexico). The annual notification requirement is to be found nowhere in the regulation that governs claims for refund or in the text of the tax treaties that require notification. It adds to compliance burdens and poses a significant trap for the unwary, potentially imperiling effective MAP relief for taxpayers that – despite having filed a timely protective claim or treaty notification – miss a subsequent annual notification. Ideally, the annual notification requirement would be eliminated in successor guidance.

In the APA space, a significant issue that is raised – but not resolved – by the current guidance is to what extent a complete APA application satisfies the section 6662 TP documentation requirements for the years when the APA request is pending. Rev. Proc. 2015-41 states that the “submission of a complete APA request . . . will be a factor taken into account in determining whether the taxpayer has met the documentation requirements,” but this is so indefinite that it provides scant comfort.

The APA guidance could be improved by specifying what (if anything) is required in addition to a complete APA application

in order to satisfy the documentation requirements and receive protection from transfer pricing penalties.

Welcome news

The inclusion of updates to the US MAP and APA guidance on the priority guidance plan is welcome news, and speaks to the IRS' ongoing commitment to tax certainty. Streamlined filing requirements would be welcome, especially since the due diligence phase of MAP and APA cases allows APMA to collect additional relevant information as needed on a case-by-case basis.

Substantive changes to the guidance, such as those noted above, would also play an important role in further improving the MAP and APA programmes, delivering benefits for taxpayers and tax administrations alike.

Mark Martin

Principal, KPMG

E: mrmartin@kpmg.com

Thomas Bettge

Manager, KPMG

E: tbettge@kpmg.com

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