

# In Practice

## Mutual Agreement Procedures in Turkey

*The author outlines the competent authority process in Turkey, explaining which taxpayers are eligible and describing common issues as well as how the process interacts with litigation.*

BY METIN DURAN, MAZARS DENGÉ

Turkish transfer pricing regulations effective in 2007<sup>1</sup> are expected to increase audits and, as a result, the number of applications for mutual agreement procedure cases. Until recently, application procedures were not clearly stated by the Turkish Revenue Administration (TRA). MAP guidelines published by the TRA's European Union and Foreign Relations Division (*Avrupa Birliği ve Dis İlişkiler Daire Başkanlığı*) July 31, 2009, however, should give taxpayers a better understanding of the requirements for obtaining a MAP, the types of issues appropriate for the procedure, and what remedies a taxpayer may seek in court without forfeiting its right to the competent authority process.<sup>2</sup>

Turkey to date has signed 71 income tax treaties. The MAP guidelines aim to explain the procedures in Turkey that apply to the MAP articles contained in Turkey's treaty network. Although the treaties have detailed and well-prepared provisions, double tax cases may arise from differing approaches by the tax authorities.

### Article 25

Article 25 of Organization for Economic Cooperation and Development Model Tax Convention and the double tax treaties signed by Turkey explain the procedures in the case of a disagreement about the implementation or the execution of tax laws:

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the

Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

As noted above, the OECD Model Tax Convention indicates a three-year period for application, but this clause can vary depending on the contracting states with which Turkey has treaties.

Article 25 further states:

The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

### Eligibility for MAP, Application

In Turkey, the competent authority is the European and International Relations Department of the TRA. Under the new MAP guidelines, to apply for competent authority assistance, the taxpayer must be a resident of one of the contracting states. However, a taxpayer also may apply to the country in which it is a citizen if applying for MAP under Article 24, titled "Non-Discrimination."

If a taxpayer changes its residency from one contracting state to another contracting state, it should apply to the one in which it resided when the conflict occurred.

The MAP guidelines provide some examples of topics that are appropriate for a competent authority case, but they stress that cases are not limited to these topics.

According to the guidelines, MAP applications fall into three categories. First, residents of one contracting state believe that tax treatment by one or both of the contracting states is not in line with one or more articles of the relevant treaty. In other cases, double taxation problems arise that are not covered by the treaties. Fi-

*Metin Duran was KPMG's global transfer pricing services partner in Turkey before joining Mazars Denge in April. He is based in Istanbul.*

<sup>1</sup> See 16 *Transfer Pricing Report* 760, 2/14/08.

<sup>2</sup> For prior coverage of the MAP guidelines, see 18 *Transfer Pricing Report* 653, 11/5/09.

nally, problems may arise from the implementation or observations of the treaties by the contracting states.

Beyond misinterpretation and misapplications of tax treaties, there may be other instances in which issues under current tax treaties are still awaiting resolution. Frequently encountered cases include those involving:

- those related to Article 7 (business profits) of the OECD Model Tax Convention;
- transfer pricing adjustments from differing treaty interpretations;
- disguised profits via transfer pricing;
- arm's-length pricing of related-party transactions under Article 9;
- permanent establishment;
- residency in the contracting states;
- royalty, interest, and dividend taxation; and
- problems due to the characteristics of provided services.

Resident taxpayers of either contracting states that are subject to unfair taxation, as well as the contracting states' competent authorities, are allowed to apply for MAP. Citizens regardless of their residency are also welcome to apply under the nondiscrimination principle within the tax treaties.

### Timing, Interaction with Courts

A MAP application timetable for each contracting state is contained in Attachment 1 to the guidelines. Time limitations generally should be considered according to the local legislation, unless otherwise stated in the tax treaties.

According to the guidelines, taxpayers cannot apply for MAP if they choose to take a case to the court. If a taxpayer already has submitted its case to the court, it must withdraw that submission before applying for MAP.

The MAP guideline states that if taxpayers are not satisfied with the TRA treatment of their case, they may go to court, invoke other domestic complaints procedures, or apply for a MAP. However, if a taxpayer goes to court and the court reaches a verdict, neither the tax-

payer nor the tax administration can appeal to any authority, including the Competent Authority, about the verdict.

According to the Turkish Administrative Procedure Act, taxpayers can apply to the tax court within 30 days and to the State Council (Supreme Court) within 60 days. The general statute of limitation in Turkish tax laws is five years. After five years, tax authorities cannot claim tax for a particular taxable transaction from the taxpayer. However, certain things can eliminate this five-year period—for instance, an application to the tax office for valuation.

In the case of a rejected application, the Competent Authority will give a reason for the rejection. Although there are exceptions, cases generally are concluded within two years of the initial application. Therefore, a period of limitation has been made a priority in the MAP guidelines and included in the guidelines as Attachment 2.

Taxpayers that are not satisfied with the result of a competent authority proceeding can apply to the courts as well regarding allegations of unfair tax treatment within the period of limitation under local legislation. However, as stated previously, the time limitation for applying to tax court is 30 days, and to the State Council is 60 days. Therefore, by the time the competent authority declares its decision, it is almost certain that the time frame for applying to court will be over.

To achieve solid results and accelerate the MAP, a third attachment to the guidelines—Information Form—should be attached to the application letter. Further documentation also may be required.

### Conclusion

As noted earlier, the transfer pricing regulations effective beginning in 2007 are expected to increase of transfer pricing audits and, as a result, MAP applications. The July 2009 guidelines should give taxpayers a better understanding of the eligibility requirements for obtaining a MAP as well as whether and how to seek redress in court at the same time.