



The International Mutual Agreement Procedure (MAP)

§ 1. Introduction

The international mutual agreement procedure (MAP) is a consultation procedure between the competent authorities of states that are party to a tax treaty or internal regulations applicable within the Kingdom of the Netherlands. Where further in this document reference is made to a tax treaty, the internal regulations applicable within the Kingdom of the Netherlands are also referred to. The purpose is to resolve disagreements about the application of the tax treaties and to eliminate situations where actions of the tax administrations result or will result in taxation not in accordance with the relevant tax treaty. Under the bilateral double taxation arrangements, a request may also be submitted for the conclusion of a bilateral or multilateral transfer pricing agreement (BAPA or MAPA).

The purpose of these guidelines is to arrive at a clear procedure for the application, assessment and processing of all requests for an MAP, based on the tax treaties. These guidelines are in line with recent developments, including the establishment of an international minimum standard for dispute resolution in Action Plan 14 of the Base Erosion and Profit Shifting project of the Organization for Economic Co-operation and Development and the establishment of the Multilateral Convention to implement tax treaty measures to prevent base erosion and profit shifting.

It is the intention of the Curaçao competent authority to deal promptly with such requests, with the aim of removing taxation in which is not in accordance with the tax treaty as soon as possible. Naturally, this also depends on the attitude of the other competent authority.

An increasing number of tax treaties also include a provision for mandatory and binding arbitration for cases where taxation not in accordance with the treaty has not or not completely been removed in the mutual agreement procedure. This may be regulated in the applicable tax treaty by providing for arbitration in the provision regulating the mutual agreement procedure. In the case of mandatory and binding arbitration, the interested party is guaranteed that a solution will be offered to his dispute. There are no administrative or legal dispute resolution procedures in Curaçao that restrict or deny access to arbitration. However, tax treaties that contain an arbitration scheme may restrict access to arbitration. An arbitration scheme in a tax treaty is the result of negotiations between the states involved. This means that arbitration regulations differ, since states bilaterally agree on the further conditions in a competent authorities' agreement. This applies, among other things, to the manner in which, under which



conditions and the terms based on which a request for arbitration can be submitted, but also to how the arbitration committee is established and what terms apply for issuing the advice. These guidelines do not further elaborate on the terms and conditions and rules of procedure for arbitration proceedings.

It should be noted that these guidelines relate to taxation and not to social security contributions. Furthermore, these guidelines do not intend to change, expand or limit rights and obligations arising from bilateral arrangements concluded by Curaçao.

§ 2. Situations in which the proceedings may be applied

A MAP request may be submitted when a person believes that the actions of the tax authorities of either state result or will result in taxation that is not in accordance with the relevant tax treaty. The individual may request assistance from the Competent Authority (CA) under the MAP to prevent this.

The taxpayer must approach the CA of the state of which he is a resident to request double tax relief under a tax treaty. If any adjustment affects related parties in both states, it is advisable for each taxpayer to submit a separate request for assistance to the CA of their state of residence.

Before submitting a MAP request, it is recommended that the person or company conduct discussions with the CA to determine if the problem can be resolved using the mutual agreement process. The Curaçao CA offers advice and guidance in choosing the right procedure.

Examples

The mutual agreement procedure instrument is intended for cases in which taxation has arisen or is likely to arise not in accordance with the tax treaty. Examples of cases where the mutual agreement procedure can provide a solution are:

- an interested party has worked abroad for some time and both states believe they have a right to tax;
- an interested party receives a pension from abroad and both states believe they have a tax right;
- an interested party is considered a resident by two states. The worldwide income of the interested party is taxed by both states;
- a state is of the opinion that the income of an interested party should be corrected (for example as a result of the application of an anti-abuse provision included in the tax treaty)



or national legislation) as a result of which both states believe they are allowed to levy on a particular item of income.

In some cases, a mutual agreement procedure can be avoided simply by the interested party by filing a (corrected) tax return. For example, an interested party who lives abroad and works in Curaçao must comply with his filing obligation in both states. If this is not met, a situation of taxation not in accordance with the tax treaty may arise. In such a case, filing a tax return may be sufficient to remove taxation not in accordance with the tax treaty.

- Examples of typical transfer pricing situations: the situation in which, in the context of taxation, the price for the supply of goods or services between affiliated companies is corrected by the Curaçao tax authorities or the foreign tax authorities;
- situations pertaining to the profit attribution to a permanent establishment.

§ 3. The legal framework for MAP is laid down in the internal regulation for the Kingdom of the Netherlands (applicable between Curaçao, Aruba and Sint Maarten), the internal regulation between the Netherlands and Curaçao and the tax treaties concluded by Curaçao and which are available at:

<https://verdragenbank.overheid.nl/nl>

§ 4. Acceptance of a MAP request

There are no administrative or legal dispute resolution procedures in Curaçao that restrict access to MAP. The tax due based on assessments made or determined can be suspended during normal appeal procedures until the MAP is resolved. Taxpayers should consider whether entering into legal or administrative dispute settlement procedures with other tax authorities will prevent bilateral MAP discussions and consider whether this will increase the risk of double taxation.

The intention of the Curaçao competent authority is to:

- to eliminate at the earliest possible stage any taxation that is not in accordance with the provisions of a tax treaty through the early initiation of mutual agreement procedures;
- deal with all requests for mutual agreement procedure it has received. If there are one or more specific reasons that make an agreement impossible, it will be examined in



consultation with the taxpayer whether other solutions may be conceivable for the submitted issue;

- to strive to settle the mutual agreement procedure within a period of 24 months. However, the likelihood that a mutual agreement procedure will be completed within this period is also determined by the attitude of the other competent authority or authorities involved and also by the cooperation of the taxpayer;
- to strive to limit as much as possible the costs associated with conducting the mutual agreement procedure (for example, by granting deferment of payment);
- to ensure that the handling of the request and the mutual agreement procedure are as transparent as possible, and to inform the taxpayer as soon as possible about any unexpected changes in the course of the procedure;
- although the mutual agreement procedure is a matter from government to government in which the taxpayer is not directly involved in that sense, to inform the taxpayer as fully as possible throughout the entire procedure. The aim is to take into account as much as possible the view of the situation given by the taxpayer;
- guarantee the confidentiality of exchanged data.

§ 5. Refusal of MAP applications

In cases where, according to Curaçao, a MAP request from the taxpayer is unfounded or unjustified, Curaçao will notify the other CA in writing of the reasons why Curaçao believes the request is invalid and invite the other CA to submit its opinion before deciding to reject the application.

The Curaçao CA declares the request unfounded and will not process it if:

- the request was not submitted to the correct CA;
- it has not become plausible that there is or will be "double" taxation or that action has been taken in violation of a provision of a bilateral tax treaty;
- the request was not submitted on time, so that it is no longer likely that the mutual agreement procedure with the other treaty partner (s) can still be successfully started.

The competent authority shall not further consider the request or suspend further processing if:

- the information and documents provided are insufficient to be able to assess the request or to conduct the mutual agreement procedure and the applicant has not taken the opportunity to complete the required information within a reasonable period of time;
- In the exceptional case where an interested party makes a request under a tax treaty in relation to the same dispute previously submitted by him, but which request has been withdrawn by the interested party, and there are no new facts or changed circumstances, the CA also decides to reject the (repeated) request. The same applies to a request in relation to a dispute that has been



previously submitted where, after the competent authorities have reached a solution, the interested party has rejected the outcome offered and there are no new facts or circumstances.

§ 6. How to make a MAP request

In Curaçao there is no set form of presentation of a MAP request. Sufficient information and documentation is required to allow the CA to fully assess the request for MAP.

However, specific tax treaties may require certain information to be disclosed. It is therefore advisable to consult the relevant tax treaty and, if in doubt, contact the CA to seek guidance on the information and documentation to be provided.

A request must be submitted in writing by post or e-mail in Dutch or English. The mutual agreement procedure is generally conducted in English. To limit administrative burdens, documents can be submitted in English. The Curaçao CA may ask the interested party to provide documents in English. There is no formal requirement, but the request must be signed and contain at least the information listed in Annex A. The interested party must also indicate if this is a request submitted for protection of the treaty term ("Protective MAP"). This may be desirable, for example, if an interested party chooses to (exhaustively) use national remedies first. The request will not be processed further by the Curaçao CA until the interested party informs the CA that the request for mutual agreement will be continued.

The information listed in Annex A is necessary to assess whether a request can be processed. If the required information is not submitted, the request may be rejected. However, an interested party will first be given twice the opportunity to complete the missing information within a reasonable period of time.

§ 7. Time limits for submitting a MAP request

To initiate a MAP, a request must be made within three years of the first notification of the action that results in or is likely to result in double taxation.

Determining the moment of first notification is important to be able to assess whether a request has been submitted on time. Curaçao takes the position that the request is in any case submitted in time if the request is received within three years after the date of the assessment giving rise to the dispute, and in transfer pricing cases the assessment in which the correction has been processed, or the moment the correction is motivated for example by means of an audit report, if this is later.



§ 8. Early or regular request

Since national legal remedies against a position of the Curaçao tax authority can take a long time, the taxpayer can choose to submit an early MAP request. An early mutual agreement procedure exists if the Curaçao CA actively initiates the mutual agreement procedure with the competent authority of the other contracting state concerned during the period when national remedies are still open. When a request is submitted on the basis of a tax treaty, while the assessment has not yet been irrevocably established, the Curaçao CA is prepared to actively approach the other competent authority. If an objection has been lodged against the assessment, the Curaçao CA will, if applicable, ask the interested party to agree in writing to suspend the decision on the objection for the duration of the mutual agreement procedure and any subsequent arbitration procedure. In the situation in which a request to enter into the mutual agreement procedure is only submitted after the Inspector has made a decision on the objection and in which the interested party has lodged an appeal against the decision on the objection to the court, the following applies. Even then, for procedural reasons, the interested party may be asked to choose between continuing with either the mutual agreement procedure or the appeal procedure and to suspend the other procedure. The Curaçao CA may suspend the mutual agreement procedure in this case, until written notice is received from the interested party that the legal procedure is being suspended or has ended. The Curaçao CA may decide to adhere to the mutual agreement procedure in the situation in which the interested party has not fulfilled his information obligations towards the Inspector. This applies both when the request is submitted in addition to the objection procedure and when it is submitted in addition to the legal procedure.

When a request to initiate a mutual agreement procedure is submitted by an interested party who has used national legal remedies abroad, the Curaçao CA will consult with the other CA in order to determine the continuation of the mutual agreement procedure.

It is possible that the other CA involved is not willing to cooperate in the early initiation of the mutual agreement procedure, for example because this CA takes the position that the existence of international double taxation has not (yet) been established with sufficient certainty. If this situation arises, the Curaçao CA will immediately report this to the relevant taxpayer and the Inspector. The Inspector will then make a decision on the outstanding objection and the taxpayer can then use the national legal remedies that are still open. The starting point is then that the mutual agreement procedure - at the request of the taxpayer - can be initiated after the assessment has been irrevocably established (regular request). The basis in such a case is the original request of the taxpayer.



There is a regular mutual agreement procedure if the Curaçao CA actively initiates the mutual agreement procedure after the possibilities within the Curaçao legal system to assess the assessments to which the mutual agreement procedure pertains (objection, appeal, cassation) have been completely exhausted or can no longer be used. The assessment is then irrevocably established. The mutual agreement procedure therefore takes place in the period in which no legal remedies are available in Curaçao.

In the case of the settlement of a regular mutual agreement procedure, if there is reason to do so, a corresponding correction will be made by an ex officio reduction of the, in principle, already irrevocable assessment or by imposing an additional assessment.

The adjustment of assessment is generally limited to a period of five years. The tax treaties concluded by Curaçao contain a provision requiring the outcome of a mutual agreement procedure to be carried out regardless of national limitation periods. In these cases, therefore, the adjustments can also be done outside the five-year period.

§ 9. Access to the mutual agreement procedure in specific situations

In practice it is possible that the interested party concludes a settlement agreement with the Inspector. Consider, for example, establishing the facts and making corrections as a result of a due diligence. If the interested party submits a request to initiate a mutual agreement procedure on the same matter as the matter for which the interested party has concluded a settlement agreement with the Inspector, access to the mutual agreement procedure will not be refused. In the mutual agreement procedure, the Curaçao CA is not bound by the agreements in the settlement agreement. The corrections or other agreements and possibly also the facts will be included in the framework of the mutual agreement procedures will be reviewed and (part of) the settlement agreement could be cancelled.

The position of the Curaçao CA is that the presence of a criminal offense should in principle not prevent a request for a mutual agreement procedure from being processed or to continue a mutual agreement procedure once started. This is also in line with the aforementioned minimum standard for dispute resolution established under BEPS Action 14, under which a tax treaty request must be processed if the conditions are met. The Curaçao CA believes that criminal offenses should be addressed by applying criminal law and not by maintaining double taxation.



§ 10. Withdrawal of a request

An interested party may withdraw his request during the mutual agreement procedure by means of a written notice to the Curaçao CA.

§ 11. The course of a MAP process

Taxation not in accordance with the tax treaty is usually caused by action of one of the contracting states. As a rule, this will involve a correction in the declaration in one of the States concerned. The State in which the correction has been made is important for the practical course of the mutual agreement procedure, since that State is considered to be the first to formulate a position on the matter. First of all, an assessment is made as to whether the request meets the requirements.

Pre-consultation phase: One-sided solution by Curaçao CA

If the Curaçao CA comes to the conclusion that an action by the Curaçao tax authorities has resulted in taxation that is not in accordance with the tax treaty (and that the MAP request is valid and justified), the Curaçao CA will first assess whether the issue can be resolved on unilateral basis. In this case, the Curaçao CA may provide an exemption based on the provisions of the tax treaty without the need to enter into bilateral discussions with the other CA.

Consultation phase: Position paper: Discussion of matter with CA of the other state (s) involved

If the Curaçao CA cannot resolve the problem unilaterally, the competent authorities are under an obligation to make an effort to resolve the taxation not in accordance with the treaty. The Curaçao CA will then inform the CA of the other state or states concerned about the matter as soon as possible, but no later than four months after the commencement date of the 24-month period, in the form of a position paper with the following content:

- - substantive assessment by the Curaçao CA with regard to the question to what extent there is a taxation that is not in accordance with the provisions of a tax treaty;
- - proposed solution or solution direction;
- - other relevant underlying documents.

Consent or Non-Consent by CA of the other state: position paper response

The other competent authority can, in principle, react in two ways after receiving the position paper. It agrees with the content of the proposed solution, and informs the Curaçao CA. Or it



does not agree, and answers in the form of a so-called position paper response, a substantive response to what has been put forward by Curaçao in its position paper.

The mutual agreement procedure is an interstate matter which is dealt with by the competent authorities of the states concerned. The interested party is therefore not directly involved in the exchange of views between the competent authorities. This means that the interested party will not be provided with copies of correspondence between the CA's involved. The interested party may be asked for further information during the consultation.

Consent or non-consent by Curaçao CA with the response position paper from CA of the other state

If the Curaçao CA agrees with the CA's response position paper of the other state and therefore concludes that the position of the other CA is justified and is in accordance with the tax treaty, the Curaçao CA will follow the position of the other CA, possibly by making adjusting of the Curaçao correction.

If the CA's hereby concludes that the primary adjustment of the CA of the other state was excessive (for example, a non-arm's length amount), they agree that the primary adjustment will be reduced and the remainder a deduction to avoid double taxation will be granted in accordance with the arm's length principle.

If the competent authorities (continue to) disagree, new rounds of written position papers can take place and Curaçao will focus on additional consultation by e-mail, telephone and joint meetings.

Consent or non-consent of taxpayer with results of MAP procedure

As part of a MAP process, in which an agreement is concluded between the relevant CA's, the taxpayer is notified in writing of the decision and will receive an explanation of the outcome.

The interested party will be informed of the outcome of the mutual agreement procedure as soon as possible. The possible outcomes are as follows:

- Taxation not in accordance with the treaty completely resolved.
- Taxation not in accordance with the treaty partially resolved.
- Taxation not in accordance with the treaty not resolved.
- No taxation established which is not in accordance with the treaty.

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If the early consultation leads to a solution that is acceptable to both competent authorities involved, then the taxpayer will normally have the option of accepting or not accepting the outcome found. At that point, he can therefore still choose to reject the outcome and, for example, opt for the use of national legal remedies. If he wishes to accept the outcome found, the taxpayer will be asked to agree to the content of a settlement agreement, in which he declares that he will not use (open) national legal remedies in the states concerned insofar as it concerns points for which the mutual agreement has provided a solution. Once the taxpayer has accepted the agreement, written confirmation of the agreement is exchanged between the administrations and provided to the taxpayer.

When a solution or mutual agreement is reached, it will be applied, with the consent of the taxpayer, despite national legal provisions.

If the CA's have not reached an agreement, the interested party will also be informed. At the request of the taxpayer, arbitration can then be initiated, provided that the relevant tax treaty contains an arbitration article. In addition, the taxpayer could still use national remedies in the event of an early request.

§ 12. Legal consequences mutual agreement procedure

A mutual agreement procedure between competent authorities generally concerns a one-off valuation of (a combination of) facts and circumstances in certain years in the light of the legal rules that apply at that time. This means that the outcome of a mutual agreement and / or arbitration procedure only applies to that one special case and only for that period for which the relevant procedure for mutual agreement and / or arbitration has been followed.

§ 13. Bilateral and Multilateral APA's

An APA provides certainty in advance about the determination of a business remuneration (an "at arm's length" remuneration) or about the method for determining such remuneration for cross-border transactions between affiliated entities and the attribution of profits at permanent establishments of entities. An APA can be agreed unilaterally between a tax authority and an interested party, but also bilaterally or multilaterally between several states. On the basis of Curaçao tax treaties, international mutual agreement can take place about obtaining certainty in advance by means of a BAPA / MAPA.



When accepting a request for a BAPA or MAPA, the Curaçao CA (or Inspector) applies the same conditions as the conditions that apply for entering into preliminary consultations to obtain certainty in advance as included in the Ministerial Regulation on Profit Tax Ruling Practice. In a bi- or multilateral agreement, the competent authorities may, at the request of the interested party, agree that the tax treatment as agreed in the BAPA or MAPA also applies to transactions that have already taken place ("rollback"). For this it is important that the relevant facts and circumstances in the period that have already passed are comparable with the facts and circumstances on which the BAPA (or MAPA) request is based. With BAPAs and MAPAs, a rollback is possible provided that the other states are willing to act in the same way and this does not lead to a situation with regard to these transactions in which part of the profit is ultimately not taxed in any state.

§ 14. MAP application must be addressed to:

The competent authority for Curaçao is the Minister of Finance. The Fiscal Affairs Sector of the Ministry of Finance has been given the mandate to perform the task of competent authority. MAP requests should be sent to:

Mrs. R. Sillé, LL.M
Director Fiscal Affairs
Ministry of Finances
Telephone: 4328180
E-mail: runela.sille@gobiernu.cw
stating "mutual agreement procedure".

§ 15. MAP corporate tiebreaker procedure for non-natural persons and BAPA/MAPA

Tax treaties may contain a provision that stipulates that for the purposes of the tax treaty, the domicile of non-natural persons is determined by mutual agreement (the so-called "corporate tiebreaker procedure").

In Curaçao, the Tax Inspector is under mandated to handle requests based on a MAP corporate tiebreaker procedure and furthermore handles BAPA or MAPA requests. A request in this respect can be addressed to:

Mrs. J. Isenia, LL.M
Tax Inspector
Tax Inspectorate
Telephone: 7342651
E-mail: jamila.isenia@gobiernu.cw



§ 16. Postponement of payment

For cases in which Curaçao is the state causing the double taxation (for example, by making an adjustment to the income declared by an interested party), upon request of the interested party, the recipient will be granted a deferment of payment for the part of the tax due related to double taxation. In principle, deferment of payment will be granted until such time as the national and international procedures for resolving the dispute have been completed.

When submitting the request for a mutual agreement procedure, the interested party concerned can submit a substantiated and quantified request for moderation of the collection interest charged. In cases where Curaçao has charged collection interest in connection with the matter that is the subject of the mutual agreement procedure and there is no culpable act by the interested party, the Curaçao CA will be willing to moderate this interest on the basis of the principles of reasonableness and fairness. In the calculation of the moderation, therefore, in principle, a link will be made with the interest rate used in the other state for an actual refund. It is conceivable that the quantification of the interest will only be possible when the outcome of a mutual agreement procedure is known. In this case, the request must be completed within three weeks after a solution for the double taxation is presented to the interested party.

If a mutual agreement procedure is conducted in which the imposed fine is also under discussion, as in the case of an objection procedure, the Curaçao CA will assess whether the amount of the fine should be adjusted, depending on the outcome of a mutual agreement procedure.

§ 17. Exchange and confidentiality of data

As part of a mutual agreement procedure, the Curaçao CA will provide a description of the facts and circumstances relevant to the consultation to the other relevant competent authority. Tax information and personal data are also provided. This provision of information to another competent authorities takes place in accordance with the rules of the international exchange of information, as regulated in the provision on exchange of information in a tax treaty and in the National Ordinance on international assistance for collection of taxes. This means that confidentiality and purpose limitation for the use of the information are guaranteed. Under these rules, data received from abroad will be treated just as confidentially as information processed in the national situation.

International correspondence, including the exchange of views, between the competent authorities is confidential in nature and is not shared directly with the interested party. However, the scope of that correspondence can be communicated to the interested party. The same applies



to discussions between competent authorities. Where the mutual agreement procedure between the CA's authority takes place at the request of an interested party, the provision of data in that context by the Curaçao CA to the other CA concerned can in principle be considered to always take place with the knowledge and consent of the interested party concerned.

§ 18. Legal consequences and precedent effect

A mutual agreement procedure between competent authorities generally concerns a one-off valuation of (a combination of) facts and circumstances in certain years in the light of the legal rules that apply at that time. Moreover, the outcome of a mutual agreement procedure is a result of negotiation with a competent authority of the other state.

This means that the outcome of a mutual agreement and / or arbitration procedure only applies to that one special case and only to that period or periods for which the relevant procedure for mutual agreement and / or arbitration has been followed.

If the mutual agreement procedure (and / or arbitration) relates to transfer pricing adjustments between affiliated companies, there is under certain circumstances the possibility, following the outcome of a mutual agreement procedure, to establish an (bilateral or multilateral) APA that pertains to the years following the years to which the mutual agreement procedure relates.

§ 19. Withdrawal of previous MAP guidelines

All previous guidelines are hereby deemed to have been repealed.

The Director of Fiscal Affairs,
the mandated competent authority

Mrs. R. Sillé, LL.M

Willemstad, December 1st 2020



Annex A: Information requirements for a request to enter into mutual agreement (MAP)

- information (such as name, address, tax identification number, date of birth) of the interested party submitting the request and of the other (foreign) parties involved;
- information about the relevant facts and circumstances of the matter submitted (including information about the relationship between the interested party and the other parties);
- the other state or states to which the request relates;
- an explanation from the interested party about the reasons why taxation is not in accordance with the tax treaty;
- the chosen treaty basis for the request;
- information about the tax periods in question;
- information about the tax authorities involved;
- copies of tax assessments, the report of any investigation by the tax authorities or other measures that could result in double taxation;
- where applicable, information about the legal remedies that the interested party or the other parties to the relevant transactions have used and information about the legal remedies that are still available in Curaçao or the other state concerned against the relevant assessments; information about court decisions related to the case;
- a statement confirming by the interested party that all information and documentation provided in the MAP request is accurate and that the interested party will assist the competent authority in resolving the issue (s) identified in the MAP request presented, by responding as soon as possible to all reasonable requests from a competent authority and by providing any other information or documentation that the competent authority requires;
- a choice as to the desired type of mutual agreement procedure to be started (regular, early);
- if there is an early mutual agreement procedure letter signed by the taxpayer requesting the inspector to postpone the decision on the notice of objection, for the duration of the mutual agreement procedure and any subsequent arbitration procedure;
- (only if double taxation is caused by Curaçao) copy request for deferment of payment addressed to the Tax Collector for the part of the tax due that is related to the double taxation;
- where applicable, a statement as to whether the MAP request has also been submitted to the other competent authorities concerned and, if so, whether it is submitted on the same basis;
- whether the MAP request has also been submitted to another authority under a different treaty-law basis that provides a mechanism to resolve treaty-related disputes;
- where appropriate, information whether the matter submitted has been previously addressed.