



APA & MAP Country Guide 2019 – Hong Kong

CONNECTING THE DOTS OF INTERNATIONAL TAX CONTROVERSY



Hong Kong

APA Program

KEY FEATURES

Competent authority	Inland Revenue Department (IRD)
Relevant provisions	<p>The Inland Revenue (Amendment) (No. 6) Ordinance (the Amended Ordinance), which codifies the APA programme was enacted for the first time on July 13, 2018. APA provisions are summarized in Division 4 of Part 8AA of the Amended Ordinance, and applies to a year of assessment beginning on or after April 1, 2018.</p> <p>It is anticipated that the IRD will issue corresponding Departmental Interpretation and Practice Notes (DIPN) to replace the existing DIPN No. 48 which was issued in March 2012 and so now outdated. Certain procedures stated below will therefore be subject to new requirements of the new DIPN.</p>
Scope	<p>A Hong Kong resident person may make an application to the IRD to make an arrangement relating to how that person's income or loss is to be computed in respect of related party transactions under the arm's length's principle. A non-Hong Kong resident person may make an application to the IRD to make an arrangement relating to income or losses that is attributable to the permanent establishment of that person in Hong Kong. The IRD has the discretion to accept or reject an application.</p>
Key timing requests, deadlines	<p>The Taxpayer is required to submit an APA proposal and case plan no later than one month before a scheduled pre-filing meeting date; and the pre-filing meeting should commence at least six months prior to the commencement date of the APA.</p>

APA term limits	The Amended Ordinance provides that an APA is to be for a fixed term, but does not specify the accepted lengths of time. Before a new DIPN is published, it is expected that an APA will apply for three to five years.
Application fee	The IRD charges an application filing fee based on hourly rates for different levels of officers within the IRD, up to HKD500,000 (approx. USD64,000); plus (2) reimbursements of fees paid to independent experts and reasonable expenses incurred by the IRD.
Rollback availability	The IRD may decide to roll back the APA terms to prior years. Rollback cannot be used to increase tax liability after the expiry of the time limit in making a tax assessment or additional assessment under the Inland Revenue Ordinance (IRO). Rollback cannot be used to reduce the tax liability after the expiry of the time limits of the taxpayer's raising of an objection of a tax assessment or seeking relief or revision under the IRO or double taxation arrangements.
Collateral issues	Collateral issues such as tax treaty and tax avoidance issues will be addressed simultaneously with an APA, and may have to be resolved using a mutual agreement procedure.

PRE-FILING REQUIREMENTS

Overview

The applicant should first request for a pre-filing meeting by writing to the Senior Assessor (Tax Treaty) of the IRD.

The pre-filing meeting typically involves:

- identification of the nature and scope of the APA process;
- identification of the specific matters to be agreed; and
- a detailed discussion of the APA process.

The Taxpayer is also required to submit a draft APA case plan and an APA proposal one month before the pre-filing meeting that describes the specific issues for which certainty is sought in relation to the controlled transaction(s) and any collateral issues, together with supporting documentation outlining the scope of the APA and proposed transfer pricing methods.

APPLICATION REQUIREMENTS

Content of application

The formal APA application must be submitted before the agreed deadline and including:

- a functional analysis and industry analysis;
- details of the proposed TP method;
- the terms and conditions governing the application of the TP method including critical assumptions;
- data showing that the TP method will produce an arm's length result; and
- information and documentation as agreed in the pre-filing meeting.

Language	The documentation should be submitted in English or Chinese. All documents submitted in a language other than those two must be accompanied by an English translation.
SME provisions	No specific guidance.

OTHER PROCEDURAL CONSIDERATIONS

Monitoring & compliance

- The APA must specify the Taxpayer's obligations in preparing reports at the specified intervals to demonstrate the Taxpayer's compliance with the APA terms. The Taxpayer has the obligation to notify the IRD of any breach of critical assumptions within a reasonable period of time. The Taxpayer has the obligation to keep records and data used for applying and concluding the APA for seven years.
- If the IRD revokes an APA, the arrangement will be treated as having never been made. If the IRD cancels an APA, the arrangement will cease to apply from a date that the IRD determines. If the IRD revises an APA, the revision will take effect from a date that the IRD determines.

MAP Program

KEY FEATURES	
Competent authority	IRD
Relevant provisions	<p>MAP provisions are summarized in Division 1 of Part 2 and Division 3 of Part 8AA of the Amended Ordinance, and applies to a year of assessment beginning on or after April 1, 2018.</p> <p>The IRD has issued the Guidance on Mutual Agreement Procedure in February 2019.</p>
Acceptance criteria	MAP is available to residents of Hong Kong or a jurisdiction with which Hong Kong has entered into a Double Taxation Agreement/Arrangement (DTA).
Key timing requests, deadlines	<p>MAP should be initiated within the time limit from the first notification of the actions giving rise to taxation not in accordance with the provisions of the DTA, which usually commence from the date on which the relevant notice of assessment or loss computation is required by the IRD or the equivalent notification is issued by the tax authority of the other DTA jurisdiction.</p> <p>In general, the time limit is specified in the MAP article of the relevant DTA and in most cases is three years of the first notification of the action which results or is likely to result in double taxation. Failure to observe the time limit may result in the rejection of MAP request by the IRD.</p> <p>MAP should only be initiated when double taxation has occurred or is almost certain to occur.</p>

APPLICATION REQUIREMENTS

Content of application

MAP applications can be made by completing Form IR1454. The applicant must provide the following information and documents specified in the Form IR1454:

- the treaty partner concerned and details of its tax authority;
- the Taxpayer's particulars including name, address, telephone number, business registration number/ Hong Kong identity card number and the taxpayer's file number in the IRD;
- issues for MAP including a summary of the facts, description and analysis of the issues, actions giving rise to the issues with the date of first notification, years or periods concerned and the applicant's views and proposed basis for resolving the issues;
- whether any notice of objection, notice of appeal, refund claim, or comparable document has been submitted by the applicant to either the IRD or the tax authority of the treaty partner;
- whether a prior request has been made to the tax authority of Hong Kong or the treaty partner on the same or related issues;
- whether the MAP application involves issues that are currently or were previously considered by the IRD or the tax authority of the treaty partner as part of an APA, advance ruling, or similar proceedings;
- whether any settlement or agreement has been reached with the IRD or the tax authority of the treaty partner which may affect the MAP application;
- details of the taxpayer's authorized representative with a copy of the authorization letter;
- a copy of the first notification of action giving rise to the issues for MAP;

	<ul style="list-style-type: none"> • a copy of the MAP application and the associated documents filed, or to be filed, with the tax authority of the treaty partner, if applicable; • a schedule of any time limitations under domestic laws of the treaty partner in respect of the years/ periods for which relief is sought, if applicable; • a copy of transfer pricing documentation, if applicable; • a statement agreeing that all documents and information submitted may be provided to the competent authority of the treaty partner for processing the MAP application; and • a statement declaring that all documents and information provided in the MAP application are true, complete and accurate.
Language	The documentation should be submitted in English or Chinese. All documents submitted in a language other than those two must be accompanied by an English translation.

OTHER PROCEDURAL CONSIDERATIONS

Interaction with domestic proceedings	No specific guidance.
Arbitration	A number of DTAs to which Hong Kong is signatory contain an arbitration provision in the relevant MAP article.

STATISTICS

APA	The IRD aims to conclude an APA within 18 months from the acceptance of the formal application, with a possible extension of six months.
MAP	The IRD aims to resolve a MAP case within 24 months from receiving the complete request.

Double Taxation Treaty Network

The following treaties include MAP provisions which are the basis for bilateral and multilateral APA negotiations:

Austria	Italy ^{(I), (IV)}	Portugal ^(VI)
Belarus ^(IV)	Japan ^(I)	Qatar ^(IV)
Belgium	Jersey ^{(I), (IV)}	Romania ^(IV)
Brunei	Korea (Republic of) ^(IV)	Russia ^(IV)
Canada ^{(I), (IV)}	Kuwait ^(IV)	Saudi Arabia ^(IV)
China ^(IV)	Latvia ^(IV)	South Africa ^(IV)
Czech Republic	Liechtenstein ^(I)	Spain
Finland ^(IV)	Luxembourg ^(I)	Switzerland ^(I)
France	Malaysia	Thailand
Guernsey ^{(I), (IV)}	Malta	United Arab Emirates ^(IV)
Hungary	Mexico ^(IV)	United Kingdom
India ^(IV)	Netherlands ^(I)	Vietnam
Indonesia	New Zealand	
Ireland	Pakistan ^{(I), (IV)}	

NOTES

- I denotes treaties with MAP arbitration provisions.
- II denotes treaties with the USSR that remain applicable until a separate tax treaty is concluded.
- III denotes treaties between the countries' representative office in Taipei and the Taipei Economic and Cultural Office in the relevant country.
- IV denotes treaties that became effective within the last five years.
- V denotes treaties that are awaiting ratification.
- VI denotes MAP provisions identical to para 3, art 25 of the OECD Model Convention with respect to Taxes on Income and on Capital.
- VII arbitration is to be conducted under the statutes of the ECJ.
- VIII arbitration is to be conducted under the statutes of the ICJ.

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