



Manual Mutual Agreement Procedure

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Manual Mutual Agreement Procedure

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Manual – Mutual Agreement Procedure

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Introduction

Brazil's International Conventions and Agreements to Avoid Double Taxation on Income and Prevent Tax Evasion (DTA) provide for Mutual Agreement Procedure (MAP).

In general terms, the conditions, persons and taxes covered by the MAP depend on the text of the DTA applicable in each case.

Nevertheless, the interpretation and application of MAP is substantially informed by international administrative practice, by the understandings expressed in the comments to the Model Conventions and in the framework of the MAP / OECD Forum. In general, the conditions, persons and taxes covered by MAP depend on the text of the DTA applicable in each case.

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Introduction

The purpose of this manual is to provide relevant information to taxpayers and other interested parties about how to request the mutual agreement procedure with the Secretariat of the Federal Revenue of Brazil (RFB).

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The mutual agreement procedure consists of a means of settling tax disputes according to the DTAs signed by Brazil.

It is an independent mechanism of ordinary appeals in the legal order, whereby the competent authorities of the Contracting States, as defined in these instruments, can resolve differences or difficulties regarding the interpretation or application of a DTA.

The mutual agreement procedure is not contentious by its nature and is not regulated by the legislation applicable to the administrative tax proceedings. It is an instrument of dialogue between the competent authorities of the Contracting States for the settlement of tax situations not in accordance with the DTA provisions. In these terms, the competent authorities of the Contracting States shall be parties to the mutual agreement procedure.

Under Paragraph 9 of the Comments on Article 25 of the UN Model Convention (which reproduces part of the Comments of the OECD Model Convention): “(...) the mutual agreement procedure is clearly a special procedure set out in domestic law.”

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Therefore, the MAP does not:

- suspend or interrupt the counting down of the expiring legal deadline;
- preclude the need to request taxes refunding, as such request must be done separately, once it is suspended during the analysis of the MAP;
- comply with the deadlines set forth in domestic legislation for the administrative tax process.

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The request to open a mutual agreement procedure is allowed when:

- there is support for a DTA¹; and
- a person covered by a DTA considers that the actions taken by Brazil and / or the other Contracting State lead or may lead to taxation that is not in accordance with the provisions of the DTA.

¹ The countries with which Brazil has a DTA can be verified at the electronic address: <http://idg.receita.fazenda.gov.br/acesso-rapido/legislacao/acordos-internacionais/acordos-para-evitar-a-dupla-tributacao/acordos-para-evitar-a-dupla-tributacao>

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A mutual agreement procedure can be opened when:

- taxpayers and the tax authorities do not agree on the interpretation and application DTA provisions;
- a taxpayer is deemed to be resident in both States;
- transfer pricing adjustment affecting associated companies resident in the Contracting States can be made;
- taxpayer and the tax authorities do not agree on how to comply with the conditions for the application of an anti-abuse provision of a DTA.

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Who may request the opening of a MAP

Who may request the opening of a mutual agreement procedure:

- a Brazilian resident, as defined in the applicable DTA, who considers that the actions taken by Brazil and / or the other Contracting State lead or may lead to taxation not in accordance with the provisions of the DTA

In cases of transfer pricing adjustments affecting associated companies resident in different jurisdictions, it is recommended for each of these companies to submit a request for the opening of a mutual agreement procedure to the competent authority of the State of which they are resident.

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Who may request the opening of a MAP

Who may request the opening of a mutual agreement procedure:

- A Brazilian resident, as defined in the applicable DTA², who considers that the actions taken by Brazil and / or the other Contracting State lead or may lead to taxation not in accordance with the provisions of the DTA

² The following DTAs provide this possibility: South Korea, Finland, Mexico, Trinidad and Tobago, Turkey and Ukraine.

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Who may request the opening of a MAP

Who may request the opening of a mutual agreement procedure:

- resident of the other Contracting State, when provided for in the DTA³, considers that the actions taken by Brazil and / or by the other Contracting State lead or may lead to taxation not in accordance with the provisions of the DTA

³ The following DTA provides for this possibility: Argentina.

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Who may request the opening of a MAP

Who may request the opening of a mutual agreement procedure:

- the nonresident individual may request the opening of a mutual agreement procedure if he was a Brazilian resident at the time of the actions considered not in accordance with the DTA.

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Who may request the opening of a MAP

Normative Instruction RFB No. 1846, of November 28, 2018, provides for the opening of mutual agreement procedure by the competent authorities.

Competent authorities may open mutual agreement procedure in order to resolve difficulties between DTA parties over the interpretation or application of a DTA provisions that can be of taxpayers' concern. In other cases, the competent authorities may clarify DTA legal terms or propose amendments to DTA provisions or solve difficulties caused by changes in domestic tax laws.

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Forms and where to file

The request for the opening of a mutual agreement procedure must be presented to the RFB unit of the tax domicile of the applicant by means of the form Request for Mutual Agreement Procedure that can be obtained in Annex I of RFB Normative Instruction No. 1846 of November 28, 2018.

In the event that the mutual agreement procedure involves a tax credit in Brazil that can be refunded, in addition to the application form, a request for refunding of the credit must also be submitted by means of the form in Annex III of RFB Normative Ruling No. 1846, of November 28 2018.

The applicant, his attorney or legal representative must adhere to the Electronic Tax Domicile (DTE) prior to filing the application.

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Forms and where to file

Both forms of request for opening MAP and for Tax Credit refund must be in Portuguese.

The other documents may be in English or in Spanish. In case of the use of another language, all documents must be accompanied by a Portuguese version, processed through diplomatic channels or signed by a sworn translator.

The forms must be dated and signed by the taxpayer or his legal representative.

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Deadline for submission

The request for opening a MAP must be presented within the deadline provided by the DTA that supports the request.

If the DTA does not provide for a deadline, a deadline of five years to submit the request shall be applied.

The initial term shall be the date of the first notification of actions taken by one or both of the Contracting States that lead or may lead to taxation not in accordance with the DTA.

For example, whenever a resident person or legal entity of another Contracting State exports to an associated company resident in Brazil and that transaction is subject to a transfer price assessment, the initial term will begin when the taxpayer is notified of any action that may lead to taxation not in accordance with the DTA .

The countdown of the period to open MAP cannot be interrupted or suspended

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Deadline for submission

Annex II of RFB Normative Instruction No. 1846, of November 28, 2018, sets forth the applicable term for each of the DTA signed by Brazil.

Agreement or convention	Period	Agreement or convention	Period	Agreement or convention	Period
South Africa	05 years	Spain	05 years	Norway	05 years
Argentina*	02 years	Philippines	05 years	Netherlands	05 years
Austria	05 years	Finland	03 years	Peru	05 years
Belgium	02 years	France	05 years	Portugal	02 years
Canada	05 years	Hungary	05 years	Sweden	05 years
Chile	05 years	India	05 years	Trinidad and Tobago	05 years
China	03 years	Israel	05 years	Turkey	05 years
South Korea	05 years	Italy	05 years	Ukraine	05 years
Denmark	05 years	Japan	05 years	Venezuela	05 years
Ecuador	02 years	Luxembourg	05 years		
Slovakia and Czech Republic	05 years	Mexico	05 years		

* Regarding the DTC signed with Argentina, the deadline will be 03 years from January 2019, due to the new wording conferred to Article XXV by the Amending Protocol to the Convention (Decree No. 9,482 of August 27, 2018).

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- identification of the applicant:
 - in the case of a legal entity or equivalent: name, address, phone number, electronic address (e-mail or Electronic Mail Box), a copy of the articles of incorporation and their last amendment, authenticated or accompanied by the original, Corporate Taxpayer ID (registration number with the Cadastro Nacional de Pessoa Jurídica - CNPJ) or in with the Cadastro Específico (CEI) (Specific Registry) of Instituto Nacional do Seguro Social - INSS (Social Security - CEI) and branch of activity;
 - in the case of an individual: name, address, telephone number, electronic address (e-mail or Electronic Mail Box), professional activity and registration number in the Cadastro de Pessoa Física - CPF (Tax File Number); and
 - an identification of the legal representative or attorney-in-fact, by means of a copy of a document that contains a photo and signature, authenticated in a notary's office or by RFB's server having presented the original, accompanied by the respective power of attorney.

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- the periods to which the request refers, except in the case of an action that may lead to taxation not in accordance with the DTA;
- taxes involved;
- an identification of the foreign tax administration involved or, where applicable, identification of the regional or local tax administration whose actions have led or may lead to taxation not in accordance with the DTA;

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- a description of the actions taken by one or both of the Contracting States and a demonstration that they have led or may lead to taxation not in accordance with the DTA;
- an indication of the tax legislation provisions, if any, that led to or could lead to taxation not in accordance with the DTA
- an indication of infringement of DTA provisions;

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- an identification of the direct⁴ and final⁵ controller, in the case of request filed by a legal entity, as well as their respective countries of residence for tax purposes, if the subject of the application involves them;

⁴ A direct controller is an individual or legal entity who individually or jointly holds the rights of a member or shareholder that permanently assures them a predominance of their social decisions and the power to elect a majority of their managers.

⁵ A final controller is considered to be an individual who ultimately controls the applicant legal entity, or the legal entity in the same position, if such legal entity has its shares traded in a stock exchange abroad, or if no one is characterized as its direct parent company, as defined above.

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- an identification of the nonresident related persons involved, when applicable, and their countries of residence for tax purposes;
- a copy of any document or application received from the foreign administration, as well as the information forwarded in response;

⁶ The term “related persons” reaches persons linked according to art. 23 of Law No. 9,430, of December 27, 1996, as well as that in the sole paragraph of art. 83 of Law No. 12,973, of May 13, 2014, and dependent parties pursuant to article 25 of Law No. 12,973 of 2014.

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- an evidence that the matter has been submitted to a judicial or administrative review in Brazil or in the other Contracting State, together with a copy of the application and the corresponding reply, if applicable, and other documents concerning the handling of the case at the time of filing of the application;
- a copy of the documents submitted by the applicant or related person to the competent authority of the other Contracting State for the opening of a MAP;

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The request for opening a mutual agreement procedure should contain the following information:

- a copy of any agreement or adjustment made with any foreign tax administration related to the request (including advance pricing arrangement (APA), tax consultation proceeding, specific interpretation by the foreign tax administration, ruling or similar proceedings);
- an explicit statement confirming the accuracy and completeness of the information presented and of the documents provided, as well as the commitment to promptly inform the competent Brazilian authority of any changes in the information provided or of any new information, including new decisions issued by the competent authority of the other Contracting State by means of administrative or judicial proceedings about the matter;

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Requirements

The request for opening a mutual agreement procedure should contain the following information:

- the file number concerning the previous application if the applicant has already submitted an application for refunding of the tax credit.

In addition, the applicant may submit other documents that he deems relevant for the mutual agreement procedure.

In case of a request not in accordance with Article 5 of Normative Instruction RFB n°. 1846, of 2018, the applicant will be required to provide the necessary changes within 30 (thirty) days. Failure to meet the legal requirements will lead to the denial of the request.

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Cost of submission

Taxpayers are not charged to submit mutual agreement procedure request.

Privacy policy

Information obtained from and exchanged with the competent authority of the other Contracting State are protected under tax secrecy.

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Taxes covered

MAP only applies to:

- Income Tax;
- Social Contribution on Net Income;
- existing taxes in the Contracting State covered by the DTA.

An application covering other taxes may be admitted if the DTA provides for a non-discrimination clause that may be applicable to them.

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Receiving

Once the application has been submitted, the RFB will acknowledge receipt by protocol.

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Previous analysis

Upon receipt of the request, the RFB will carry out a preliminary analysis, verifying, among other points, its timeliness, the legitimacy of the applicant/petitioner, whether the case can be resolved under the MAP, if the legal instruments under which the request is presented are effectively applicable, and if the information and documentation provided are accurate and complete.

The applicant shall be notified:

- if additional information or documents are required, the applicant shall be required to submit them within 30 days; or
- if the conditions established in the legislation are not observed, the taxpayer will be notified of the non-admission of the application, with the corresponding justification.

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Previous analysis

At this stage, the following are some of the hypothesis that may lead to the non-admission of the request:

- the absence of an applicable agreement;
- the filing of a request for a belated MAP opening (Annex II of RFB Normative Instruction No. 1846, of November 28, 2018) or by an applicant with no legitimacy to request;
- when the application relates to the same subject and period and for which a resolution has already been obtained in an earlier procedure or from which the applicant has expressed his / her withdrawal;
- when the applicant does not respect the legal deadline to provide additional information requested by competent authorities.

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Unilateral phase

Once the requirements for the MAP opening request have been met, it will then be assessed whether the objections of the applicant are justified and whether there is a possibility of a unilateral resolution of the case by the Brazilian competent authority.

The applicant shall be notified of the result, which may be:

- the admission of the application, with an indication of the unilateral resolution of the case; or
- the admission of the application, indicating the impossibility of unilateral resolution by the Brazilian competent authority, and communication of the beginning of the MAP bilateral phase, in which a dialogue will be take place with the competent authority of the other Contracting State; or
- the denial of the application, with a corresponding justification.

The Brazilian competent authority shall inform the competent authority of the Contracting State about the application to open the MAP.

The Brazilian competent authority may exchange information with the other Contracting State to determine its conviction concerning the solution to be adopted.

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Bilateral phase

The bilateral phase will be opened whenever the Brazilian competent authority considers that the applicant's arguments are reasonable but the same authority cannot resolve the case unilaterally and satisfactorily.

At this stage, the competent Brazilian authority shall endeavor to reach an agreement within two years, by means of dialogue with the competent authority of the Contracting State, in order to avoid non-compliance with DTA.

It should be noted, however, that there is no requirement in the DTA for the Contracting States to reach an agreement for opening the MAP, and in certain cases it is possible that negotiations between the competent authorities do not reach a solution. Under paragraph 6 of the comments on Article 25 of the UN Model Convention: "the requirement that the competent authorities "shall endeavour" to resolve the case does not entail an obligation to reach a resolution and acknowledges that certain factors may affect the ability of a competent authority to reach a mutual agreement to provide relief".

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Bilateral phase

If a solution is reached with the competent authority of the other Contracting State, or if all possibilities for reaching an agreement have been exhausted, the applicant shall be notified of the result reached at the bilateral phase.

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Appeals

In no case shall a request for reconsideration or appeal be made under the mutual agreement procedure.

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Withdrawal

The applicant may withdraw, at any time, from the application, by presenting a request for withdrawal.

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Closing

The mutual agreement procedure will be closed when:

- the applicant is notified of the outcome of his or her application, either in unilateral phase or in the bilateral one.
- the applicant withdraws the application.

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Solution implementation

The solution reached, whether unilateral or bilateral, will be implemented only if there is explicit written acceptance of the applicant and, when applicable, of related persons domiciled abroad, involved in the solution.

The explicit acceptance must be made according to the model of Annex IV of the Normative Instruction RFB nº 1.846, of November 28, 2018.

Implementation will also depend on the explicit and irrevocable withdrawal of appeals or administrative appeals and legal proceedings in the country and abroad, which have the same object of the mutual agreement procedure, as well as the waiver of any claim of right over which the same objections, appeals or actions merge.

The explicit acceptance and proof of withdrawal must be made within 30 (thirty) days, counted from the notification of the result of the mutual agreement procedure. Failure to comply with the legal provisions ends the procedure by withdrawal of the applicant and prevents the admission of a new MAP request with the same object.

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Administrative and judicial proceedings

The presentation of the MAP application is not impaired by the existence of lawsuits or administrative appeals involving the taxpayer concerning the same subject matter of the mutual agreement procedure.

There is no need to give up administrative or judicial proceedings to request the opening of MAP.

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Administrative and judicial proceedings

However, at the time of the filing of the request, the applicant must indicate on the form that the matter has been submitted for judicial or administrative examination in Brazil or in the other Contracting State, and must attach a copy of the petition and reply, when applicable.

In addition, during the course of the MAP, the applicant must keep the competent Brazilian authority regularly informed regarding the filing of any legal action, impugnation or administrative appeal to discuss the subject matter of the MAP, and indicate whether, in these proceedings, a decision was rendered.

In addition, at the time of the implementation of the solution, the applicant must prove the explicit and irrevocable withdrawal of the appeals or administrative appeals and legal actions that have the same object of the mutual agreement procedure.

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Administrative and judicial proceedings

In the examination of the matter submitted to the mutual agreement procedure, the RFB shall observe the administrative or judicial decisions rendered in the case records on behalf of the applicant for the same purpose or in proceedings on behalf of third parties whose effects extend to the applicant.

In case of an administrative or judicial decision affecting matters that are the subject of the MAP, before its conclusion the Brazilian competent authority shall inform the competent authority of the Contracting State of that decision and that it is bound by it, requesting it to consider to take the necessary actions to avoid double taxation.

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Suspension of the tax credit

Article 151 of Law 5,172 of October 25, 1966 (National Tax Code) does not provide for MAP as a hypothesis of suspension of a tax credit claim. Thus, the MAP on its own neither suspends the due tax credit nor does it allow the request for refunding of tax credit.

Inspection procedures

The MAP can occur regardless of the inspection procedures carried out by the RFB. Therefore, the taxpayer may request the opening of the MAP when the taxation not in accordance with the DTA results from a tax assessment by the RFB tax auditor or when it is caused by a tax credit voluntarily regularized by the taxpayer.

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- Law No. 5,172, of October 25, 1966 - National Tax Code;
- Conventions and Agreements to Avoid Double Taxation and Prevent Fiscal Evasion In relation to Income Tax;
- Normative Instruction RFB nº 1.846, of November 28, 2018.

Contact

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