

**International tax law**

Federal Ministry of Finance

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Highest revenue authorities  
of the *Länder*

**Guidance note**

**on international mutual agreement and arbitration procedures in the field of taxes on income and capital**

With reference to the outcome of the discussions with the representatives of the highest revenue authorities of the *Länder*, the following **guidance note** applies to international mutual agreement and arbitration procedures in the field of taxes on income and capital:

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### **List of abbreviations used**

BZSt	Bundeszentralamt für Steuern (Federal Central Tax Office)
ECJ	Court of Justice of the European Communities
EEC	European Economic Community
EU	European Union
EU OJ	Official Journal of the European Union
OECD	Organisation for Economic Co-operation and Development

### **List of German laws and publications mentioned**

Code of Procedure for Fiscal Courts	Finanzgerichtsordnung (FGO)
EU Mutual Assistance Act	EU-Amtshilfegesetz (EUAHiG)

Federal Law Gazette	Bundesgesetzblatt (BGBl.)
Federal Tax Gazette	Bundessteuerblatt (BStBl)
Fiscal Administration Act	Finanzverwaltungsgesetz
Fiscal Code	Abgabenordnung (AO)
Income Tax Act	Einkommensteuergesetz (EStG)
2007 Annual Tax Act	Jahressteuergesetz 2007

## **A. General**

### **1 General information on international mutual agreement and arbitration procedures**

#### **1.1 Legal status and legal basis**

1.1.1 International mutual agreement and arbitration procedures are international procedures for the uniform application of double taxation agreements or of the Arbitration Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) (see Federal Law Gazette 1993 II p. 1308, [Federal Law Gazette 1993 I p. 818](#) and Federal Law Gazette 1995 II p. 84, [Federal Law Gazette 1995 I p. 166](#) - Arbitration Convention -).

1.1.2 The legal basis is provided by the mutual agreement provisions of the double taxation agreement (see Article 25 of the OECD Model Tax Convention) or Articles 6 et seqq. of the Arbitration Convention. They contain provisions under which the competent authority in Germany may communicate directly with the competent authorities of other states in order to reach agreements relating to taxation in Germany or in another state in individual cases. The Arbitration Convention relates only to the allocation of profits between affiliated enterprises and the allocation of profits in the case of permanent establishments. Under the mutual agreement provisions in double taxation agreements, the competent authorities can also reach agreements on general questions.

1.1.3 The Arbitration Convention is applicable to relationships with Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Sweden, Slovakia, Slovenia, Spain and the UK (regarding its application to relations with Austria, Finland and Sweden, please see the Convention of 21 December 1995, OJ 96/C 26/01, Federal Law Gazette 1999 II, p. 1010 and Federal Law Gazette 2006 II, p. 575; regarding its application to relationships with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, please see the Convention of 8 December 2004, OJ 2005/C 160/1, Federal Law Gazette 2006 II, p. 554, Federal Law Gazette 2007 II p. 754 and Federal Law Gazette 2011 II, p. 952; regarding its application to relationships with Bulgaria and Romania, see Council Decision of 23 June 2008, OJ 2008/L 174/1; regarding its application to relationships with Croatia, see Council Decision of 19 December 2014, OJ 2014/L 358/19).

The protocol of 25 May 1999 amending the Arbitration Convention (see Federal Law Gazette 1999 II, p. 1082 and Federal Law Gazette 2005 II, p. 635) came into force on 1 November 2004. It extended the Arbitration Convention indefinitely with retrospective effect from 1 January 2000.

1.1.4 The mutual agreement provisions in double taxation agreements and the Arbitration Convention became directly applicable in German law by means of the approval legislation and

take precedence over German tax law in accordance with section 2 of the Fiscal Code.

## **1.2 Mutual agreement provisions in double taxation agreements and the Arbitration Convention**

1.2.1 As a rule, the mutual agreement provisions in double taxation agreements set out the following:

- A mutual agreement procedure (in the narrow sense) may be initiated if a party requests this and demonstrates that measures by one or both contracting states result in or will result in said party being taxed in a way that is not in line with the double taxation agreement and which cannot be remedied by measures taken by the state in question;
- Mutual agreement procedures may generally be initiated in order to remove difficulties or doubt arising from the interpretation or application of the agreement; this can be occasioned by an isolated case, e.g. if instructions or guidelines from the foreign tax authority would lead to taxation in breach of the agreement (consultation procedure);
- Mutual agreement procedures may also be initiated to address matters that are not regulated, e.g. to prevent double taxation in cases not covered by the relevant double taxation agreement. A mutual agreement procedure may also be initiated if an existing double taxation agreement does not make provision for a mutual agreement procedure of the appropriate type. The German Federal Ministry of Finance is responsible for making a decision on this.

It should be noted that mutual agreement provisions in double taxation agreements do not anticipate agreement in every case, unlike the procedure under the Arbitration Convention.

1.2.2 The mutual agreement provisions of the Arbitration Convention (Article 6) make provision for a mutual agreement procedure in the narrow sense only in relation to the allocation of profits between affiliated enterprises and the allocation of profits in the case of permanent establishments. If this mutual agreement procedure fails (first phase of the Arbitration Convention), an arbitration procedure starts automatically (second phase of the Arbitration Convention).

Procedures under the Arbitration Convention do not address the question of whether or not a permanent establishment exists.

## **1.3 Subject and purpose of the procedure**

1.3.1 This **guidance note** exclusively relates to mutual agreement procedures in the narrow sense under double taxation agreements and the Arbitration Convention (see no 1.2) that are initiated by measures taken by Germany or the other state. Claims of the two contracting states under international law that arise from the double taxation agreement or the Arbitration Convention form the subject of the procedure. These claims concern the tax treatment of the party covered by the double taxation agreement or Arbitration Convention. The purpose of the procedure is to realise the claim of the party covered by the agreement for taxation that is in line with said agreement, within the scope of both systems of law.

1.3.2 The **guidance note** makes no specific provisions for bilateral or multilateral advance pricing agreements on the basis of double taxation agreements for the purpose of issuing binding advance rulings between internationally associated enterprises and permanent establishments.

## **1.4 Responsibilities**

The Federal Ministry of Finance has tasked the BZSt with the duties of the competent authority in

the area of mutual agreement and arbitration procedures under double taxation agreements and the Arbitration Convention (see section 5 (1) no 5 of the Fiscal Administration Act), introduced by means of the 2007 Annual Tax Act (Federal Law Gazette I, p. 2878 and Federal Ministry of Finance Circular of 20 June 2011 - IV B 5 - O 1000/09/10507-04 -, [Federal Tax Gazette I, p. 674](#)). The BZSt acts in consultation with the highest tax authority of the *Land* in question or the authorised *Land* tax authority (competent *Land* tax authority). The *Land* tax authority is responsible for implementing the mutual agreement or decision in Germany (see no 4). The Federal Ministry of Finance reserves the right to conduct mutual agreement procedures itself in individual cases.

The contact details of the BZSt for applications and queries relating to mutual agreement and arbitration procedures are as follows:

Bundeszentralamt für Steuern

Verständigungsverfahren

An der Kuppe 1

53225 Bonn

Germany

Fax: +49 (0)228 406-3118

Tel.: +49 (0)228 406-0

## **B. Mutual agreement procedures in accordance with double taxation agreements**

The provisions set out in this section pertain to applications for the initiation of a mutual agreement procedure pursuant to the double taxation agreement (see no 1.1).

In addition to the provisions of this section, nos 10 to 12 of section C are applicable to relationships with states to which the Arbitration Convention applies, provided that an application is made for the initiation of a mutual agreement procedure pursuant to the double taxation agreement and that the requested procedure relates to the allocation of profits between affiliated enterprises and the allocation of profits in the case of permanent establishments.

### **2 Initiation of the mutual agreement procedure**

#### **2.1 Application**

2.1.1 The mutual agreement procedure in the narrow sense requires an application by the party covered by the agreement. If a mutual agreement procedure under a double taxation agreement is possible, the application must specify that it is based on the mutual agreement provisions of the applicable double taxation agreement.

2.1.2 The application may also be made by a party other than the party covered by the agreement if said party is affected by taxation in breach of the agreement, e.g. in cases of liability.

2.1.3 The application must be submitted to the competent authority of the state of residence. In cases of discrimination, the application must be submitted to the competent authority of the state whose national is covered by the agreement (see sub-paragraph 1g of Article 3 of the OECD Model Tax Convention).

If multiple taxpayers are affected (e.g. a parent company and a subsidiary), the application should be submitted in the state of the higher-ranking taxpayer, for practical purposes.

2.1.4 In Germany, applications for a mutual agreement procedure may be submitted to:

- the tax office with local jurisdiction for taxation of the party covered by the agreement. Provided that German taxation is involved, the tax office makes a statement on the application and, having regard to any actions that need to be taken towards the other state by certain deadlines, forwards the application to the BZSt through official channels as soon as possible for a decision on whether a mutual agreement procedure should be initiated.

The tax office must also forward the application to the BZSt as soon as possible in cases in which no final statement can be made at the time at which the application is submitted, for example because the result of an ongoing field audit has not yet been received or because the taxpayer has decided to suspend the mutual agreement procedure and pursue an appeal or litigation first. In this case, the application must be sent to the BZSt using the form in the Annex to this **guidance note**, which can also be downloaded from the BZSt website (<http://www.bzst.de>).

- the BZSt (see no 1.4 for the address), which forwards the application to the *Land* tax authority responsible for taxation of the party covered by the agreement through official channels for a statement, provided that German tax measures are involved.

In its statement, the *Land* tax authority must consider the deadline (see no 2.2), the points set out in no 2.3.3, and the taxation in breach of the agreement asserted by the party covered by the agreement (see nos 2.3.1 and 2.3.2).

2.1.5 The fact that an appeal may be pending or that the possibilities of legal redress have not yet been exhausted under German law or the law of the other state does not preclude an application for the initiation of a mutual agreement procedure. However, it should be noted that domestic law in some states does not permit the implementation of a mutual agreement whose outcome diverges from a national court ruling. The party covered by the agreement should therefore consider which procedure it wishes to pursue.

The OECD database “Country Profiles on Mutual Agreement Procedures”, which can be found using the search function on <http://www.oecd.org>, contains useful information on competent authorities and procedural rules in other states.

2.1.6 The mutual agreement procedure does not replace the procedure for refunding or reducing foreign tax deducted at source. An application for the refund or reduction of foreign tax deducted at source can be the subject of a mutual agreement procedure only if it has been definitively refused by the foreign tax authority or if the application is at least two years old. No 2.1.7 applies accordingly.

2.1.7 If double taxation arises as a result of a failure to observe procedural rules (e.g. deadlines), this does not constitute taxation in breach of the agreement that could occasion a mutual agreement procedure.

## **2.2 Application deadline**

2.2.1 The application should be submitted as soon as possible after notification of a German or foreign tax measure that has resulted in taxation in breach of the agreement. If this taxation is based on tax measures by the German and foreign tax authority, the time of receipt of the most recent assessment notice is decisive.

2.2.2 Most agreements include an application deadline in their provisions on mutual

agreement. The majority of agreements specify that applications must be submitted within three years of the first notification of the action resulting in taxation that is not in accordance with the agreement. At present, agreements with Belgium, Canada, Indonesia, Italy, Pakistan, Portugal and Venezuela feature shorter deadlines of two years. The agreement with the United States of America specifies a longer deadline of four years.

If the application is made in Germany, the date of receipt by the tax office with local jurisdiction or by the BZSt is decisive in determining whether the deadline has been met.

2.2.3 If the applicable double taxation agreement does not specify an application deadline, the German revenue administration will not consent to the initiation of a mutual agreement procedure if the taxpayer has allowed a period of more than four years to elapse between notification of the tax measure in question and the application, unless there are special circumstances that prevented the taxpayer from applying sooner.

2.2.4 If it is not possible under the law of a foreign state to implement a mutual agreement procedure without time limits, this must be taken into account when the application is made (see Federal Ministry of Finance Circular of 30 June 1997 in relation to Switzerland - IV C 6 - p. 1301 Schz - 34/97 -, [Federal Tax Gazette I, p. 651](#)).

### **2.3 Content of the application**

2.3.1 The application for the initiation of a mutual agreement procedure is admissible only if it is asserted that taxation in breach of the agreement exists or is imminent. This need not be substantiated, unless the agreement provides for such substantiation.

If there is a possibility that a tax measure might entail double taxation which by its nature should be avoided by the double taxation agreement (see e.g. no 2.4.2), this constitutes a basis for the application in and of itself; it is not necessary to have established which state is contractually obliged to eliminate the double taxation.

2.3.2 Examples of taxation that is not in line with the double taxation agreement:

- Income that is not taxable in the other state under a double taxation agreement is nevertheless taken into account for tax purposes in that state;
- Income that is taxable in the other state is not allocated correctly on the common legal basis of the double taxation agreement. According to the German interpretation of the agreement, this applies to internationally associated enterprises under the arm's length principle even in the absence of specific provisions in the double taxation agreement;
- Taxation in the other state infringes non-discrimination rules in the double taxation agreement;
- The other state has been remiss in granting tax relief pursuant to the double taxation agreement in a way that has a lasting impact on rights under the agreement;
- A qualification conflict leads to double taxation that by its nature should be avoided by the double taxation agreement.

2.3.3 In order to accelerate the procedure, the application for initiation of a mutual agreement procedure should usually contain the following:

- Name, address (registered office), tax number and tax office with local jurisdiction of the party covered by the agreement;
- Detailed information on the facts and circumstances relevant to the case;



- Details on the tax periods covered by the application;
- Copies of the assessment notices, the audit report or comparable documents which have led to the alleged double taxation (e.g. contracts, applications for refunds/reductions of foreign tax deducted at source) and other relevant documents;
- Details of any out-of-court appeals or litigation, and any court rulings on the case in Germany or abroad;
- The details and documents mentioned in no 11.3.2, in cases involving the allocation of profits between associated enterprises and permanent establishments;
- A statement by the party covered by the agreement outlining the way in which, in its view, German or foreign taxation is not in line with the agreement;
- The application by the party covered by the agreement.

## **2.4 Initiation of the mutual agreement procedure and legal protection**

2.4.1 Prior to the initiation of the mutual agreement procedure, it must be examined whether the claim of the party covered by the agreement can be remedied by German domestic measures. If necessary, the German tax authorities take the necessary measures in an official capacity.

2.4.2 As a rule, a mutual agreement procedure should not be initiated until a contracting state has already taken measures that result in or will result in taxation in breach of the double taxation agreement. However, in individual cases, a procedure may be initiated if such a measure is actually imminent. This may be the case, for example, if the foreign tax authority announces certain taxation measures during an audit or has issued a binding ruling on the question.

2.4.3 If the BZSt's examination finds that the substantive requirements for the mutual agreement procedure have been demonstrated sufficiently, it initiates the procedure.

If the BZSt rejects the application for initiation of a mutual agreement procedure, it informs the party covered by the agreement and the competent *Land* tax authority of this decision without delay.

2.4.4 If the application for initiation of a mutual agreement procedure is made before receipt of the assessment notice, the tax assessment may be made on a provisional basis, provided that it is uncertain whether the circumstances for tax liability apply (section 165 of the Fiscal Code).

## **2.5 Initiation of the mutual agreement procedure by foreign tax authorities**

If a foreign tax authority initiates a mutual agreement procedure, the BZSt examines the formal requirements. It forwards the letter initiating proceedings from the foreign tax authority to the competent highest *Land* tax authority.

## **3 Implementation of the mutual agreement procedure**

### **3.1 General procedural principles**

3.1.1 The BZSt conducts the mutual agreement procedure in direct consultation with the competent authority of the other state, in accordance with international practice. The details depend on the circumstances of the individual case, based on the principle of expediency. The general procedural principles apply.

3.1.2 Any information acquired by the German revenue administration as part of a mutual agreement procedure is subject to tax secrecy (section 30 of the Fiscal Code). If necessary, the BZSt ensures appropriate protection of such information under the law of the foreign state, e.g. by



obtaining assurances from that state. Any confidentiality obligation enshrined in the double taxation agreement itself remains unaffected in cases in which information has been provided as part of the mutual agreement procedure pursuant to international administrative assistance provisions.

3.1.3 The BZSt informs the competent highest tax authority of the *Land* in question or the authorised *Land* tax authority of the content and progress of the procedure. The competent highest or authorised *Land* tax authority informs the BZSt of developments in the tax case if they are relevant to the mutual agreement procedure.

3.1.4 Communications from foreign tax authorities are translated into German by the BZSt. However, straightforward letters in English and their annexes are not translated into German, unless necessary in an individual case.

## **3.2 Clarification of the circumstances and reaching mutual agreement**

3.2.1 If required by the objective of the mutual agreement procedure (see no 1.3), the circumstances must be determined officially pursuant to the provisions of the Fiscal Code. Responsibility lies with the local tax offices. The applicant is obliged to cooperate (section 90 of the Fiscal Code).

3.2.2 As part of the mutual agreement procedure, the outcome of the determination of circumstances by the tax authorities of the other state must also be taken into account.

3.2.3 In consultation with the competent authority of the other state, officials may be tasked by the German or foreign tax authority to issue a joint report which:

- Contains a joint assessment of the circumstances;
- Assesses the circumstances jointly; and
- Proposes key data for any necessary estimates.

The report must be notified to the taxpayers involved before it is discussed by the competent authorities so that the former may make a statement. A report is not necessary if the matter can be resolved in a different way by mutual agreement with the taxpayer.

3.2.4 If contradictions emerge in the determination of the circumstances by the German and foreign tax authorities, the circumstances may be clarified by means of coordinated investigations by both authorities or by mutual agreement discussions.

3.2.5 In order to determine the circumstances and bring about a mutual agreement:

- A verbal exchange of opinions may take place with the competent authority of the other state;
- A special committee may be formed featuring representatives of the competent authorities for the purpose of such an exchange of opinions;
- An individual may be selected on the basis of special experience to help reach an agreement, e.g. by issuing an expert opinion.

3.2.6 An agreement on the assumption of specific circumstances and their specific treatment is admissible under the applicable general requirements (see the ordinance on the application of the Fiscal Code of 15 July 1998 – [Federal Tax Gazette I, p. 630](#) on section 88 of the Fiscal Code, principle of examination).

## **3.3 Involvement and rights of those covered by the agreement**

3.3.1 The participants of the mutual agreement procedure are the competent authorities of the

contracting states. The party covered by the agreement must contribute to the procedure by disclosing its circumstances and by describing and, if necessary, providing documentary substantiation. The BZSt should inform the party covered by the agreement of the status and progress of the procedure. The party covered by the agreement may:

- submit applications;
- comment on the facts and points of law relevant to mutual agreement;
- authorise a representative.

The BZSt informs the party covered by the agreement of the outcome of the procedure.

3.3.2 The party covered by the agreement is not obliged to comment on the extent to which it is prepared to withdraw any appeals and objections until it has been informed of a mutual agreement proposal.

### **3.4 Mutual agreement**

Mutual agreement is usually reached in writing (e.g. in the form of a final exchange of correspondence). It is usually subject to the applicant's consent and to any pending appeals having been concluded (see also no 4.2).

## **4 Implementation of mutual agreements**

### **4.1 Entry into force of notices and limitation period**

The mutual agreement procedure may be implemented under section 175a of the Fiscal Code independently of the entry into force of German assessment notices. Thus, the assessment period does not end until a year after the mutual agreement has become effective. Applying to a German tax authority for initiation of a mutual agreement procedure interrupts the assessment period subject to section 171 (3) of the Fiscal Code if simultaneous application is made for amendment of the assessment notice.

### **4.2 Consent of the applicant**

When implementing the mutual agreement, the tax office with local jurisdiction must ensure, as part of the necessary consent of the applicant (see no 3.4, second sentence), that

- the applicant has consented in writing to the implementation;
- any pending appeals have been concluded, and
- after receiving the notice implementing the mutual agreement, the applicant has waived an appeal, provided that the notice implements the results of the mutual agreement correctly (partial waiver).

Reference is made to section 354 (1a) and section 362 (1a) of the Fiscal Code, and to section 50 (1a) and section 72 (1a) of the Code of Procedure for Fiscal Courts. The BZSt must be informed of any difficulties or doubt that may arise.

## **5 Waiver of a mutual agreement procedure**

Access to a mutual agreement procedure or an arbitration procedure is a taxpayer's right that is enshrined in law; it may not be obstructed by the tax administration.

In cases where, due to the actual facts being difficult to determine, a mutual agreement on certain facts to be used for assessing taxes (Federal Ministry of Finance circular of 30 July 2008, [Federal Tax Gazette I, p. 831](#)) has been concluded (for example, to avoid a situation where a

disproportionately large amount of effort is required to determine the facts), it is generally no longer possible to retroactively establish the facts within a subsequent mutual agreement procedure or arbitration procedure in a way that possesses evidentiary value.

For this reason, it is appropriate, in the event that the taxpayer has applied for a mutual agreement on facts, to make the conclusion of such an agreement dependent on the taxpayer waiving the right to make the substance of such an agreement the subject of an arbitration procedure.

In cases involving associated enterprises, efforts should be made, with the aim of avoiding contradictory determinations of facts, to ensure that the associated foreign enterprise also waives the right to make the substance of such an agreement the subject of an arbitration procedure.

If a waiver declaration for the right to conduct an arbitration procedure has been provided, the German tax administration consents to the initiation of a mutual agreement procedure. However, due to the binding nature of a mutual agreement on facts (on the basis of the legal principle of good faith), the German tax administration will not accept any deviation from the facts established in the mutual agreement on facts during the arbitration procedure, and it will not conduct any arbitration procedure on this issue in the event that no agreement is reached in the mutual agreement procedure.

In cases involving associated enterprises, the above only applies if waiver declarations have been provided by both the German enterprise and the associated foreign enterprise.

## **6 Mutual agreement procedure and audit**

6.1 In a mutual agreement procedure during an audit, the provisions of nos 1.2.2. to 1.2.6 of the Principles of Administrative Procedure in particular must be applied (see Federal Ministry of Finance circular of 23 February 1983 - IV C 5 - p. 1341 - 4/83 -, Federal Tax Gazette I, p. 218). They must be applied accordingly to the allocation of profits between permanent establishments of companies that operate internationally.

6.2 With a view to a possible mutual agreement procedure, any corrections in the audit report must be presented so precisely that the BZSt is able to reconstruct the circumstances, legal basis and justification for the correction and its amount on the basis of the information contained in the audit documents and files (see also no 6.2.1 of the principles of income allocation between related parties with cross-border business relationships in terms of duties of investigation, cooperation, correction, mutual agreement and EU arbitration procedures [principles of administrative procedure, Federal Ministry of Finance circular letter of 12 April 2005, IV B 4 - p. 1341 1/05 -, [Federal Tax Gazette I, p. 570](#)]).

## **7 Mutual agreement procedures and the international exchange of information**

The information provisions of double taxation agreements and the provisions of the EU Mutual Assistance Act are also applicable to the mutual agreement procedure. To the extent permitted by the information provisions of the applicable double taxation agreement or by the EU Mutual Assistance Act, all the necessary information may be exchanged in the mutual agreement procedure. The principles set out in the **guidance note** on international administrative assistance through the exchange of information on tax matters ([Federal Ministry of Finance circular of 23 November 2015 - IV B 6 - p. 1320 - 07/10004 -, Federal Tax Gazette I, p. 928](#) – last updated on 1 January 2013) must be observed.

## **8 Consequences of the failure of a mutual agreement procedure**

8.1 If a mutual agreement procedure fails, the BZSt informs the party covered by the agreement and the competent *Land* tax authority of this decision without delay.

8.2 The tax office with local jurisdiction must examine whether double taxation can be avoided under the conditions set out in section 163 of the Fiscal Code on the grounds of substantive inequity. The relevant rules pertaining to competences and the involvement of the Federal Ministry of Finance in equitable measures must be observed.

However, an equitable measure is not taken if the taxpayer has failed to observe procedural rules (see no 2.1.7) and in cases in which the taxpayer

- has failed to meet its domestic or foreign fiscal obligations sufficiently (e.g. a lack of cooperation in the clarification of the circumstances) or
- has provided incorrect information in a fiscal or other administrative procedure (e.g. in work permit proceedings by providing a bogus domicile)

and thus bears some of the responsibility for the double taxation. This also applies if deduction of foreign tax under section 34c (3) of the Income Tax Act is precluded under section 34c (6), fifth sentence, of the Income Tax Act because the foreign taxation of income in Germany is based on an arrangement for which there are no economic or other substantial reasons.

8.3 The BZSt proposes the initiation of an arbitration procedure if this is envisaged by the relevant double taxation agreement and appropriate based on the status of the mutual agreement negotiations.

Under Article 25 (5) of the double taxation agreement between Germany and Austria, the party covered by the agreement has the right, once three years have elapsed since the procedure was initiated, to place the contracting states under an obligation to bring the matter before the ECJ in the form of arbitration proceedings.

## **9 Costs of the mutual agreement procedure under double taxation agreements**

The contracting states themselves bear the costs incurred by them as a result of the mutual agreement procedure. The costs incurred by the party covered by the agreement are not refunded.

## **C. Mutual agreement and arbitration procedures under the EU Arbitration Convention**

The provisions of this section pertain to applications for the initiation of a mutual agreement procedure pursuant to Article 6 (1) of the Arbitration Convention (see no 1.1).

### **10 Preliminary steps under Article 5 of the Arbitration Convention**

10.1 If the tax authority intends to adjust the profits of an enterprise in accordance with Article 4 of the Arbitration Convention, it must notify the enterprise in good time and grant it an opportunity to inform the associated enterprises affected in the other contracting states. These other enterprises then have an opportunity to discuss the matter with the revenue authorities responsible for them in order to obtain a counter-adjustment.

10.2 If the revenue authorities and enterprises involved agree to the correction and counter-adjustment, no mutual agreement or arbitration procedure will be considered.

### **11 Initiation of a mutual agreement procedure**

#### **11.1 Application**

11.1.1 Under Article 6 (1) of the Arbitration Convention, the mutual agreement procedure requires an application from the enterprise involved. The application should make it clear that the enterprise is citing the Arbitration Convention.

11.1.2 For practical purposes, the application should be made in the state of the higher-ranking taxpayer. The same applies if the allocation of profits of a permanent establishment under Article 4 (2) of the Arbitration Convention is in question. For the purposes of the Arbitration Convention, the permanent establishment is deemed to be an enterprise of the other contracting state (Article 1 (2) of the Arbitration Convention).

11.1.3 If the application is made in Germany, the application for the mutual agreement procedure must be submitted to the BZSt.

11.1.4 No 2.1.5 applies accordingly (but see nos 13.1.3 and 13.1.4).

## **11.2 Application deadline**

11.2.1 Under Article 6 (1), second sentence, of the Arbitration Convention, the application must be made within three years of initial communication of the measures which have resulted or could result in double taxation as described in Article 1 of the Arbitration Convention, for example as a result of a transfer pricing adjustment. This period commences on receipt of the first notice entailing double taxation (e.g. amended assessment notice).

If the application is made in Germany, the date of receipt by the BZSt is decisive in determining whether the deadline has been met.

11.2.2 No 2.2.1 applies accordingly.

## **11.3 Content of the application**

11.3.1 The application is admissible only if it is asserted that the principles set out in Article 4 of the Arbitration Convention have not been observed (Article 6 (1), first sentence, of the Arbitration Convention).

11.3.2 The application must contain the following information and documents:

1. Name, address (registered office), tax number and tax office with local jurisdiction of the enterprise making the application in the contracting state and other participants in the transactions in question;
2. Detailed information on the facts and circumstances relevant to the case (including details of relationships between the enterprise and other parties involved in the transactions in question);
3. Details on the tax periods covered by the application;
4. Copies of the assessment notices, the audit report or comparable documents which have led to the alleged double taxation;
5. Details of any out-of-court appeals or litigation initiated by the enterprise or other parties involved in the transactions in question and any court rulings on the case;
6. A statement by the enterprise outlining the way in which, in its view, the principles laid down in Article 4 of the Arbitration Convention have not been observed;
7. A commitment by the enterprise to respond as quickly and comprehensively as possible to any enquiries made by a competent authority and to make the necessary documents available to the competent authorities.

11.3.3 To avoid delays, a written application should be submitted in triplicate.

11.3.4 Further information on the standard information and documents to be submitted with the application can be found on the BZSt website at <http://www.bzst.de>.

#### **11.4 Initiation of a mutual agreement procedure by means of an application made in Germany**

11.4.1 The BZSt forwards the enterprise's application without delay to the competent highest *Land* tax authority and the tax office with local jurisdiction for taxation of the enterprise, and confirms receipt of the application to the enterprise within one month. At the same time, the BZSt informs the competent authorities of the other contracting states involved in the case by sending them a copy of the enterprise's application.

11.4.2 The BZSt checks whether the information required under no 11.3.2 for the initiation of a mutual agreement procedure has been provided and may ask enterprise to send any missing or, if necessary, additional information within two months of receipt of the application. Please also see no 13.1.2.

The BZSt retains the right to request additional information at a later date.

11.4.3 If the claim of the enterprise can be remedied by German domestic measures, the competent German revenue authorities take the necessary measures in an official capacity. The BZSt informs the enterprise and the competent authorities of the other contracting states of this decision without delay, but no later than the date specified in no 11.4.4.

11.4.4 If the BZSt's checks show that the application is admissible and sufficiently justified, and if the competent German revenue authorities are unable to bring about a satisfactory solution, the BZSt initiates the mutual agreement procedure pursuant to Article 6(2) of the Arbitration Convention with the competent authorities of the other contracting states involved, no later than four months after the later of the two following dates:

- a) The date of the assessment notice by which the decision on the increase in income is or was established, or
- b) The date on which the BZSt receives the enterprise's application and the information specified in nos 11.3.2 and 11.4.2, first sentence.

11.4.5 The BZSt informs the applicant enterprise of the initiation of the mutual agreement procedure and of whether the application was submitted on time and of the date on which the two-year deadline under Article 7 (1) of the Arbitration Convention commenced.

#### **11.5 Initiation of a mutual agreement procedure by means of an application made outside Germany**

If the competent authority of another contracting state informs the BZSt that it has received an application for initiation of a mutual agreement procedure, or if the competent authority of another contracting state initiates the mutual agreement procedure, the BZSt checks the formal requirements and, if necessary, asks the competent authority of the other contracting state to send the information and documents set out in no 12.2.2, first sentence. The BZSt forwards the letter from the foreign tax authority to the competent highest *Land* tax authority and to the tax office with local jurisdiction for taxation of the enterprise without delay.

## **12 Implementation of the mutual agreement procedure**

### **12.1 General procedural principles**

12.1.1 If the application for initiation of a mutual agreement procedure is made in Germany, the BZSt informs the enterprise of major developments. Information on legal interpretations expressed or received (e.g. in position papers) are not disclosed.

12.1.2 Nos 3, 4, 5, 6 and 7 apply accordingly.

12.1.3 The contracting states are bound by the arm's length principle of Article 4 of the Arbitration Convention. This corresponds to the arm's length principle of Article 9 of the OECD Model Tax Convention.

12.1.4 Under Article 8 (2) of the Arbitration Convention, a mutual agreement or arbitration procedure may be suspended if court or administrative proceedings are pending for one of the enterprises involved, and if these proceedings are intended to establish whether the enterprise has committed a tax offence that is subject to serious penalty by actions resulting in an adjustment of profits under Article 4 of the Arbitration Convention.

If such an offence is detected, the obligation to initiate a mutual agreement procedure or appoint an advisory commission no longer applies, under Article 8 (1) of the Arbitration Convention.

## **12.2 Procedure for an application made in Germany**

### **12.2.1 Adjustment of profits by the German tax authority**

If the measure which has resulted or could result in double taxation as described in Article 1 of the Arbitration Convention was taken by a German tax authority, the BZSt sends the competent authorities of the other contracting states involved in the case a position paper no later than the date specified in no 11.4.4. This contains the following information and documents:

- A confirmation that the case has been presented within the period specified in Article 6 (1) of the Arbitration Convention;
- Notification of commencement of the two-year term pursuant to Article 7 (1) of the Arbitration Convention (see nos 13.1.2 and 13.1.3 for the two-year deadline);
- Presentation of the case by the applicant;
- Assessment of the circumstances by the BZSt, e.g. the reason why double taxation exists or is likely to occur;
- Proposal of how the case could be resolved and double taxation eliminated, including a comprehensive explanation of the proposed solution;
- Complete justification of the tax assessment or adjustments;
- Enclosure of documents of fundamental importance to the presentation of the case;
- List of all additional documents used to make the adjustment.

To enable this position paper to be produced, the competent *Land* tax authority sends the BZSt a statement with the necessary documents and a proposed solution no later than three months after the later of the dates specified in nos 11.4.4 a) and b).

### **12.2.2 Adjustment of profits by the foreign tax authority**

If the measure which has resulted or could result in double taxation as described in Article 1 of the Arbitration Convention was taken by a foreign tax authority, the BZSt encloses the following information and documents with its letter initiating the mutual agreement procedure (no 11.4.4) to the competent authorities of the other contracting states involved in the case:

- The information under nos 11.3.2 and 11.4.2;
- A confirmation that the case has been presented within the period specified in Article 6 (1)



- of the Arbitration Convention;
- Notification of commencement of the two-year term pursuant to Article 7 (1) of the Arbitration Convention.

If the checks to be conducted after receipt of the response from the foreign tax authority reveal that double taxation

- a) exists or is imminent, and if there is agreement with the solution proposed by the foreign tax authority in its written response, the BZSt informs the competent authorities of the other contracting states involved in the case within six months of receipt of the written response. No 2.4.1, second sentence, applies accordingly.
- b) does not exist or is not imminent, or there is no agreement with the solution proposed by the foreign tax authority in its written response, the BZSt sends a position paper to the competent authorities of the other contracting states involved in the case. This is sent no later than six months after receipt of the written response from the other state. In this response, the BZSt proposes a non-binding timetable for the further handling of the case. If appropriate, the BZSt simultaneously proposes a date for a mutual agreement meeting, to take place no later than 18 months after the later of the two dates specified in nos 11.4.4 a) and b).

To enable this position paper to be produced, the competent *Land* tax authority sends the BZSt a statement with the necessary documents and a proposed solution no later than one month prior to the date specified in the second sentence.

### **12.3 Procedure for an application made outside Germany**

#### **12.3.1 Adjustment of profits by the German tax authority**

If the measure which has resulted or could result in double taxation as described in Article 1 of the Arbitration Convention was taken by a German tax authority, the BZSt sends the competent authorities of the other contracting states involved in the case a position paper following the initiation of the mutual agreement procedure by the foreign state. It contains the information and documents specified in no 12.2.1, unless these are already contained in the letter from the foreign state initiating the procedure. The position paper is sent within four months of the later of the following dates:

- The date of the assessment notice by which the decision on the increase in income is or was established;
- Receipt of the initiation of the mutual agreement procedure by the competent authority of the other contracting state and receipt of the information specified in no 12.2.2, first sentence, by the BZSt.

To enable this position paper to be produced, the competent *Land* tax authority sends the BZSt a statement with the necessary documents and a proposed solution no later than one month prior to the date specified in the previous sentence.

#### **12.3.2 Adjustment of profits by the foreign tax authority**

If the measure which has resulted or could result in double taxation as described in Article 1 of the Arbitration Convention was taken by a foreign tax authority, and if it emerges after the checks to be conducted following receipt of the statement by the foreign tax authority that double taxation

- a) exists or is imminent, and if there is agreement with the solution proposed by the foreign tax

authority in its statement, the BZSt informs the competent authorities of the other contracting states involved in the case. This is done within six months of the later of the two following dates:

- The date of the assessment notice by which the decision on the increase in income is or was established;
  - Receipt of the statement by the foreign tax authority and receipt of the information specified in no 12.2.2., first sentence, by the BZSt;
- b) does not exist or is not imminent, or there is no agreement with the solution proposed by the foreign tax authority in its statement, the BZSt sends a position paper to the competent authorities of the other contracting states involved in the case. This is sent no later than the date specified under a) above. In this letter, the BZSt proposes a non-binding timetable for the further handling of the case. If appropriate, the BZSt simultaneously proposes a date for a mutual agreement meeting, to take place no later than 18 months after the later of the two dates specified in nos 11.4.4 a) and b).

To enable this position paper to be produced, the competent *Land* tax authority sends the BZSt a statement with the necessary documents and a proposed solution no later than one month prior to the date specified under a) above.

## **13 Arbitration procedure**

### **13.1 General**

13.1.1 If the mutual agreement procedure does not produce an agreement within two years, the competent authorities of the contracting states involved are obliged to appoint an advisory commission and obtain its opinion (Article 7 of the Arbitration Convention). The competent authorities may extend this two-year term with the agreement of the enterprises involved (Article 7 (4) of the Arbitration Convention).

13.1.2 The two-year term specified in Article 7 (1) commences on the day on which the case is first presented to one of the competent authorities (the BZSt or the competent authority of the other contracting state, in the case of an application to a foreign tax authority). The case is deemed to have been presented on the later of the two following dates:

- The date of the assessment notice by which the decision on the increase in income is or was established;
- The date of receipt of all the information and documents specified in no 11.3.2 by the competent authority and of any additional information requested by the competent authority within two months of receipt of the application from the enterprise.

13.1.3 If the tax case is presented to a court as part of an appeal, the two-year term specified in Article 7 (1) of the Arbitration Convention does not begin until the date on which the ruling of the final court of appeal was delivered (Article 7 (1) of the Arbitration Convention).

13.1.4 If a contracting state is not permitted to deviate from decisions of the fiscal courts in the arbitration procedure, the arbitration procedure requires that the enterprise withdraw or waive legal remedy insofar as it relates to the subject of the arbitration procedure (Article 7 (3) of the Arbitration Convention). This restriction does not apply in Germany, as, under section 175a of the Fiscal Code, tax notices that have been definitively confirmed by a court may be amended on the basis of decisions in arbitration procedures (section 110 (2) of the Code of Procedure for Fiscal Courts).

## **13.2 Appointment of the advisory commission**

13.2.1 Unless the competent authorities of the contracting states involved in the case agree otherwise, the contracting state which issued the first assessment notice, i.e. the definitive decision of the tax authority on the increase in income or an equivalent measure which has resulted in or could result in double taxation as described in Article 1 of the Arbitration Convention, takes the initiative of appointing the advisory commission and organising its meetings in consultation with the competent authorities of the other contracting states involved in the case.

13.2.2 The location where the advisory commission meets and the location where it must deliver its opinion may be specified in advance by the competent authorities of the contracting states involved in the case.

13.2.3 Before the first meeting of the advisory commission, the BZSt sends it all the documents and information relevant to the case, particularly documents, reports, correspondence and conclusions from the mutual agreement procedure.

## **13.3 Composition of the advisory commission**

13.3.1 The advisory commission usually consists of an independent chair, two representatives of each competent authority and an even number of independent persons (usually two) (Article 9 (1) of the Arbitration Convention). The members of the advisory commission are subject to the confidentiality rules set out in Article 9 (6) of the Arbitration Convention.

13.3.2 The advisory commission is supported by a secretariat provided by the contracting state that appointed the advisory commission, unless otherwise agreed by the contracting states involved in the case. To ensure independence, the secretariat reports to the chair of the advisory commission. The members of the secretariat are also subject to the confidentiality rules set out in Article 9 (6) of the Arbitration Convention.

## **13.4 Procedural principles**

13.4.1 The procedure before the advisory commission is conducted in the official language(s) of the contracting states involved, unless otherwise agreed by the competent authorities of the contracting states involved in the case, taking the wishes of the advisory commission into account. Declarations and documents must be translated into this language or these languages if necessary.

13.4.2 The advisory commission may request that the competent authorities of the contracting states involved in the case appear before the advisory commission.

13.4.3 The enterprises affected have a right to a hearing or representation (Article 10 (2) of the Arbitration Convention). They may make a statement to the advisory commission on the factual and legal circumstances, and submit any evidence and documents which they consider necessary (Article 10 (1) of the Arbitration Convention). On request by the advisory commission, the enterprises affected are obliged to disclose information or documents and to appear or be represented before the commission. Statements and documents issued or submitted for the first time in the arbitration procedure by an affected enterprise must be translated into the language(s) of the procedure by the latter in accordance with no 13.4.1.

13.4.4 The advisory commission may also examine witnesses or experts to prepare its decision.

## **13.5 Opinion of the advisory commission and decision by the competent authorities**

13.5.1 The advisory commission must adopt an opinion within six months. It is bound by the

arm's length principle of Article 4 of the Arbitration Convention (Article 11 (1) of the Arbitration Convention). The opinion can be adopted by a simple majority of the members (Article 11 (2) of the Arbitration Convention).

13.5.2 The deadline for adoption of the statement commences on the date on which the chair confirms that the members of the commission have received all the relevant documents and information in accordance with no 13.2.3 from all the contracting states involved in the case.

13.5.3 The advisory commission's opinion should contain the following:

- a) The names of the members of the advisory commission;
- b) The names and addresses of the enterprises involved;
- c) The competent authorities involved;
- d) A description of the circumstances underlying the case under dispute;
- e) A clear and unambiguous statement of what the applicant is requesting;
- f) A brief summary of the procedure;
- g) The arguments and methods on which the decision outlined in the opinion is based;
- h) The opinion;
- i) Place and date of the opinion;
- j) The signatures of the members of the advisory commission.

13.5.4 Once the advisory commission has adopted its opinion, the competent authorities of the contracting states involved in the case have a further six months in which to reach an agreement. They may deviate from the opinion of the advisory commission provided that double taxation is avoided. If they are unable to agree on a different resolution, they are bound by the opinion of the advisory commission as an arbitration decision (Article 12 (1) of the Arbitration Convention).

### **13.6 Communication of the advisory commission's opinion and the competent authorities' decision**

13.6.1 Once the competent authorities of the contracting states involved in the case have made a decision on the avoidance of double taxation, the competent authority to which the case was presented forwards the decision of the competent authorities and the opinion of the advisory commission to each of the enterprises affected.

13.6.2 If the competent authorities of the contracting states consent to publication of the decision and opinion, all the enterprises involved must first confirm in writing to the competent authority to which the case was presented that they have no objections to publication of the decision and opinion (Article 12 (2) of the Arbitration Convention). Subject to the consent of the enterprises involved, the competent authorities of the contracting states involved in the case may also agree to publish the decision and the opinion without naming the enterprises involved, anonymising all further details which could identify the enterprises involved.

13.6.3 The advisory commission's opinion is issued in three originals, of which two are sent to the competent authorities of the contracting states involved in the case and one to the European Commission for archiving. If more than two contracting states are involved in the case, additional originals of the advisory commission's opinion are issued. If there is agreement on publication of the opinion, it is published on European Commission's website (<http://www.ec.europa.eu/>) in the original language(s).

13.6.4 No 4 applies accordingly to the implementation of the decision.

## **14 Costs of mutual agreement and arbitration procedures under the Arbitration Convention**

14.1 No 9 applies accordingly to the costs of the mutual agreement procedure.

14.2 The costs of the advisory commission procedure are shared equally by the contracting states involved (Article 11 (3) of the Arbitration Convention). These include the administrative costs of the advisory commission and the fees and expenses of the independent persons.

14.3 Unless otherwise agreed by the competent authorities of the contracting states involved in the case,

- a) The refundable expenses of the independent persons are limited to the expenses usually refunded to senior civil servants of the contracting state appointing the advisory commission; and
- b) The gross fee for an independent person is € 1,000 per meeting day of the advisory commission. The chair receives a fee 10% higher than that of the other independent persons.

14.4 Unless otherwise agreed by the contracting states involved in the case, the contracting state that appointed the commission is responsible for processing the refunding of costs of the advisory commission procedure.

14.5 Costs incurred by the enterprises affected in connection with the mutual agreement or arbitration procedure are not refunded (Article 11 (3) of the Arbitration Convention).

### **D. Rules on use and publication**

This [guidance note](#) replaces the [guidance note](#) of 13 July 2006 -IV B 6 - p. 1300 - 340/06 -, [Federal Tax Gazette I 2006, p. 461](#). The Federal Ministry of Finance circular of 5 April 2017- IV B 5 - p. 1304/0-04 -, [Federal Tax Gazette I 2017, p. 707](#) is repealed; its provisions have been included in this circular.