

**Non-official translation -  
the German version is decisive**

Gert Müller-Gatermann  
Head of Sub-Department IV B

POSTAL ADDRESS Federal Ministry of Finance, 11016 Berlin.

Supreme tax authorities of the federal states

Federal Central Tax Office

**For information:**

National representatives of the federal states

Federal Finance Academy at the Federal Ministry  
of Finance

OFFICE ADDRESS Wilhelmstrasse 97, 10117 Berlin

TEL +49 (0) 18 88 6 82-0

FAX: +49 (0) 18 88 6 82-3260

E-MAIL [poststelle@bmf.bund.de](mailto:poststelle@bmf.bund.de)

TELEX 88 66 45

DATE 13 July 2006

FILE NO. **IV B 6 - B 1300 – 340/06**

DOC

(Please quote file no. and DOC in reply)

**Memorandum 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 supreme tax authorities of the federal states, the following memorandum applies to international mutual agreement and arbitration procedures in the field of taxes on income and capital.

**Contents**

**A General**

- 1 International mutual agreement and arbitration procedures in general
  - 1.1 Legal status and legal basis
  - 1.2 Mutual agreement provisions in double taxation agreements and the Arbitration Convention
  - 1.3 Subject and purpose of the procedure
  - 1.4 Responsibilities

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

- 2 Institution of the mutual agreement procedure

- 2.1 Application
- 2.2 Time limit for the application
- 2.3 Content of the application
- 2.4 Initiation of the mutual agreement procedure and legal protection
- 2.5 Initiation of the mutual agreement procedure by foreign tax authorities
  
- 3 Implementation of the mutual agreement procedure
  - 3.1 General procedural principles
  - 3.2 Clarification of the circumstances and reaching mutual agreement
  - 3.3 Involvement and rights of the party covered by the agreement
  - 3.4 Mutual agreement
  
- 4 Implementation of mutual agreements
  - 4.1 Force of law of advices and time barring
  - 4.2 Agreement of the applicant
  
- 5 Waiver of a mutual agreement procedure
  
- 6 Mutual agreement procedures and investigation
  
- 7 Mutual agreement procedures and the international exchange of information
  
- 8 Consequences of the failure of a mutual agreement procedure
  
- 9 Costs of the mutual agreement procedure under double taxation agreements

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

- 10 Preliminary proceedings under Article 5 of the Arbitration Convention
  
- 11 Institution of the mutual agreement procedure
  - 11.1 Application
  - 11.2 Time limit for the application
  - 11.3 Content of the application
  - 11.4 Institution of the mutual agreement procedure by an applicant in Germany
  - 11.5 Institution of the mutual agreement procedure by an applicant abroad
  
- 12 Implementation of the mutual agreement procedure
  - 12.1 General procedural principles
  - 12.2 Procedure for an application in Germany
  - 12.3 Procedure for an application abroad
  
- 13 Arbitration procedure
  - 13.1 General
  - 13.2 Appointment of the advisory committee
  - 13.3 Composition of the advisory committee
  - 13.4 Procedural principles

- 13.5 Statement by the advisory committee and decision by the responsible authorities
- 13.6 Notification of the decision of the advisory committee and decision by the responsible authorities
- 14 Costs of mutual agreement and arbitration procedures under the Arbitration Convention

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

**Appendix 1** Form for applying to the BZSt for institution of a mutual agreement procedure (c.f. paragraph 2.1.4)

**Appendix 2** Summary of double taxation agreements containing specific time limits for applicants in their mutual agreement provisions (c.f. paragraph 2.2.2)

### **List of abbreviations**

AO	[German] Tax Code
Art.	Article
BFH	[German] Federal Finance Court
BGBI.	Federal German Legal Gazette
BMF	[German] Federal Ministry of Finance
BStBl	[German] Federal Tax Gazette
BZSt	[German] Federal Central Tax Office
DBA	Double taxation agreement
ECJ	Court of Justice of the European Communities
EEC	European Economic Community
EGAHiG	EC Directive on Mutual Assistance
EStG	[German] Income Tax Act
EU OJ	Official Journal of the European Union
EU	European Union
FGO	[German] Tax Courts Order
OECD	Organization for Economic Cooperation and Development
OECD-MA	OECD Model Tax Convention
p.	Page
Para	Paragraph
s.	see

## **A General**

### **1 International mutual agreement and arbitration procedures in general**

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

1.1.1 International mutual agreement and arbitration procedures are international procedures for uniform application of double taxation agreements or 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 BGBl.1993 II p. 1308, BStBl 1993 I p. 818 and BGBl. 1995 II p. 84, BStBl 1995 I p. 166 - Arbitration Convention -).

1.1.2 The legal basis is provided by the mutual agreement provisions of the double taxation agreement (c.f. Art. 25 OECD-MA) or Art. 6 et seq of the Arbitration Convention. They contain provisions under which the responsible authority in Germany may communicate directly with the responsible authorities of other states in order to reach agreements affecting taxation in Germany or another state in individual cases. The Arbitration Convention only affects the apportionment of profit between affiliated enterprises and establishments. Under the mutual agreement clauses of the DBA, agreement may also be reached between the responsible authorities on general questions.

1.1.3 The Arbitration Convention applies in relationships with Belgium, Denmark, France, Greece, Great Britain, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain, and, under the Treaty of 21 December 1995 (see BGBl. 1999 II p. 1010 and BGBl. 2006 II p. 575), also in relationships with Austria, Finland and Sweden.

Under Article 5 of the Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (EU OJ 2005 no. C 160, p. 1), signed by Germany on 8 December 2004, the Convention shall enter into force between those Contracting States which have ratified, accepted or approved it, on the first day of the third month following the deposit of the last instrument of ratification, acceptance or approval by those States (see also BGBl. 2006, p. 554).

The protocol of 25 May 1999 on amendment of the Arbitration Convention (see BGBl. 1999 II, p. 1082 and BGBl. 2005 II, p. 635) came into force on 1 November 2004. Accordingly, the Arbitration Convention was thus extended indefinitely with retrospective effect from 1 January 2000.

1.1.4 The mutual agreement provisions of double taxation agreements and the Arbitration Convention were implemented directly in domestic law by the implementation legislation and take precedence over German tax law under §2 AO.

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

1.2.1 The mutual agreement clauses of double taxation agreements usually make the following provisions:

- A mutual agreement procedure (in the narrower sense) may be instituted if a party makes application and demonstrates that measures by one or both Contracting States entail or will entail taxation being applied to said party which does not correspond to the double taxation agreement and which cannot be remedied by measures taken by the State in question;
- Mutual agreement procedures in general may be instituted in order to remove difficulties or doubt arising from the interpretation or application of the agreement; the occasion may be an isolated case or matter, e.g. if instructions or guidelines from a foreign tax authority exist which would lead to taxation contrary to the agreement (consultation procedure);
- Mutual agreement procedures may also be instituted on questions which are not covered by the agreement, e.g. to prevent double taxation in cases not covered by the respective double taxation agreement.

A mutual agreement procedure may also be instituted if an existing double taxation agreement does not make provision for a mutual agreement procedure of the appropriate type. The BMF is responsible for making a decision in this case.

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

1.1.2 The mutual agreement clauses of the Arbitration Convention (Article 6) make provision for a mutual agreement procedure in the narrower sense only in questions of the apportionment of profit between affiliated enterprises and establishments. Should this mutual agreement procedure fail (phase I of the Arbitration Convention), arbitration proceedings (phase II of the Arbitration Convention) will commence automatically.

The question of the existence of an establishment may not constitute the subject of proceedings under the Arbitration Convention.

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

1.3.1 This memorandum is exclusively concerned with the mutual agreement procedure in the narrower sense under double taxation agreements and the Arbitration Convention (see paragraph 1.2), invoked by measures taken in Germany or the other State. Claims by the two Contracting States under international law, derived from the double taxation agreement or the Arbitration Convention, form the subject of the procedure. They are directed at

tax treatment of the party covered by the double taxation agreement or Arbitration Convention pursuant thereto. The purpose of the procedure is to implement the right of the party covered by the agreement pursuant to said agreement within the scope of both systems of law.

- 1.3.2 The memorandum makes no specific provisions for the method of bi- or multilateral preliminary mutual agreement procedures on the basis of double taxation agreements for the purpose of issuing binding initial advance pricing agreements between internationally-affiliated enterprises and establishments.

## **1.4 Responsibilities**

The BMF has transferred execution of the duties of the authority responsible for mutual agreement and arbitration procedures under double taxation agreements and the Arbitration Convention to the BZSt (see BMF letter of 29 November 2004 - IV B 6 - p. 1300 - 320/04 -, BStBl I, p. 1144). The BZSt acts in agreement with the responsible supreme or commissioned state tax authority. The state tax authority is responsible for implementation of the mutual agreement or decision in Germany (c.f. paragraph 4).

The BMF reserves the right to institute a mutual agreement procedure itself.

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

The provisions of this section are applicable to applications for the institution of a mutual agreement procedure pursuant to the double taxation agreement (c.f. no. 1.1).

In addition to the provisions of this section, paragraphs 10 to 12 of section C are applicable to relationships with states to which the Arbitration Convention applies, provided that application is made for institution of a mutual agreement procedure pursuant to the double taxation agreement and that the procedure for which application is made involves questions of the apportionment of profit between affiliated enterprises or establishments.

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

### **2.1 Application**

- 2.2.1 The mutual agreement procedure in the narrower sense requires an application by the party covered by the agreement. If a mutual agreement procedure under a double taxation agreement is in prospect, the application must make it clear that it is based upon the mutual agreement clause 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 contrary to the agreement, e.g. in cases of liability.

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

If more than one taxpayer is 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, application for a mutual agreement procedure may be made:

- to the tax office with local responsibility for taxation of the party covered by the agreement. Said office makes a statement on the application, provided that German taxation is involved, and forwards it immediately (because of any action to be taken in respect of time-barring by the foreign state) to the BZSt through official channels for a decision on institution of a mutual agreement procedure.

Immediate forwarding of the application to the BZSt also takes place in cases in which no final statement can be made at the time at which the application is submitted, e.g. because the final result of a current external investigation must be awaited or because the taxpayer has decided to waive a mutual agreement procedure and initially pursue an appeal or litigation. In this case, the application will be sent to the BZSt using the form in Appendix 1 to this memorandum, which may also be downloaded from the BZSt website (<http://www.bzst.de>);

- to the BZSt. The BZSt sends the application to the state 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.

The statement by the responsible state tax authority considers the time limit (c.f. paragraph 2.2) and the points in paragraph 2.3.3, and the taxation contrary to the agreement asserted by the party covered by the agreement (c.f. paragraphs 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 will not obstruct an application for institution of a mutual agreement procedure. However, it should be noted that the domestic law of some states does not permit the implementation of a mutual agreement which produces a result which differs from a decision by a national court. The party covered by the agreement may therefore wish to consider which procedure it wishes to pursue.

The OECD database "Country Profiles on Mutual Agreement Procedures", which can be searched at <http://www.oecd.org>, contains useful information on responsible authorities and procedural rules of foreign 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 fundamentally only be the subject of a mutual agreement procedure if it has been finally refused by the foreign tax authority or if the application is at least two years old. Paragraph 2.1.7 applies accordingly.
- 2.1.7 Should double taxation arise from a failure to observe procedural rules (e.g. the expiry of exclusion limits), no taxation contrary to the agreement will be identified which could occasion a mutual agreement procedure.

## **2.2 Time limit for the application**

- 2.2.1 The application should be submitted as soon as possible after notification of a German or foreign tax measure entailing taxation contrary to the agreement. If said taxation is based upon tax measures by the German and foreign tax authority, publication of the most recent advice will be decisive.
- 2.2.2 The mutual agreement provisions of many agreements contain specific limits for submission of applications. Appendix 2 to this memorandum contains a summary of the agreements with specific limits.

If the application is made in Germany, the date of its receipt by the locally-responsible tax office or by the BZSt will be decisive.

- 2.2.3 If the applicable double taxation agreement does not specify a time limit for applications, the German tax authority will not consent to the institution of a mutual agreement procedure if the taxpayer has allowed a period greater than four years to elapse between notification of the tax measure in question and the application, and no particular circumstances have precluded earlier assertion.
- 2.2.4 Should it not be possible to implement a mutual agreement procedure under the law of a foreign state immediately, this must be observed when the application is made (see BMF letter of 30 June 1997 in relation to Switzerland - IV C 6 - p. 1301 Schz - 34/97 -, BStBl I, p. 651).

## **2.3 Content of the application**

- 2.3.1 The application for institution of the mutual agreement procedure is only admissible if it is asserted that taxation contrary to the agreement is being applied or is imminent. This need not be substantiated, unless the agreement anticipates such substantiation.

Should it merely be possible that a tax measure will entail double taxation which by its nature should be avoided by the double taxation agreement (c.f. e.g. paragraph 2.4.2), this will provide a basis for the application, without establishment of which state bears a contractual obligation to eliminate the double taxation.

### 2.3.2 Examples of taxation which does not comply with the double taxation agreement:

- Income which is not taxable in the other state under a double taxation agreement is assessed for tax there;
- Income taxable in the other state is not apportioned correctly on the common basis of the double taxation agreement. In accordance with the German interpretation of the agreement, this will apply to internationally-affiliated enterprises on the arm's length principle even in the absence of specific provisions in the double taxation agreement;
- Taxation in the other state infringes a prohibition of discrimination in the double taxation agreement;
- The other state has been remiss in granting tax relief pursuant to the double taxation agreement in a way disadvantageous to rights under the agreement;
- A qualifications conflict leads to double taxation, which should be avoided by its nature by the double taxation agreement.

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

- Name, address (registered office), tax number and locally-responsible tax office of the party covered by the agreement;
- Detailed information on the facts and circumstances relevant to the case;
- Details of the tax period affected by the application;
- Copies of the tax advices, the investigation 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 significant documents;
- Details of any out-of-court appeals or litigation, and any court judgements affecting the case in Germany or abroad;
- The details and documents mentioned in paragraph 11.3.2, in cases involving the apportionment of profit between affiliated enterprises and establishments;
- A statement by the party covered by the agreement of the extent to which, in its own opinion, German or foreign taxation does not comply with the agreement;
- The application by the party covered by the treaty.

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

### 2.4.1 Prior to institution of the mutual agreement procedure, it must be examined whether the substance of the application from the party covered by the

agreement can be remedied by German domestic measures. If necessary, the German tax authorities will take the necessary measures ex officio.

2.4.2 A mutual agreement procedure should usually not be instituted until a Contracting State has taken measures which entail or will entail taxation contrary to the double taxation agreement. However, in isolated cases, a procedure may be instituted if such a measure is specifically imminent. This may be the case, for example, if the foreign tax authority announces certain taxation measures during an investigation or has made a binding statement on the question.

2.4.3 Should the investigation by the BZSt find that the substantive requirements for the mutual agreement procedure have been stated sufficiently, it will institute the procedure.

Should an application for institution of a mutual agreement procedure be rejected by the BZSt, it will inform the party covered by the double taxation agreement and the responsible state tax authority of this decision immediately.

2.4.4 If the application for institution of a mutual agreement procedure is made before notification of the tax advice, the tax assessment may be issued in the interim, provided that it is uncertain whether the circumstances for tax liability have arisen (§165 AO).

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

If a foreign tax authority institutes a mutual agreement procedure, the BZSt will examine the formal requirements. It will forward the letter instituting proceedings from the foreign tax authority to the responsible supreme state tax authority immediately.

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

### **3.1 General procedural principles**

3.1.1 The BZSt will conduct the mutual agreement procedure in direct contact with the responsible authority of the other state directly, in accordance with international practice. The details will depend upon the circumstances of the individual case and the necessity of expediency. The general principles of the procedure apply.

3.1.2 Any information which the German tax authority acquires within the scope of a mutual agreement procedure is subject to tax secrecy (§30 AO). The BZSt will ensure appropriate protection of such information under local law abroad, e.g. by obtaining guarantees, as far as may be necessary. Any confidentiality obligation enshrined in the double taxation agreement itself will remain unaffected in cases in which information has been provided within the scope

of the mutual agreement procedure pursuant to the provisions of international administrative assistance.

- 3.1.3 The BZSt will inform the responsible supreme or commissioned state tax authority of the content and progress of the procedure. The responsible supreme or commissioned state tax authority will inform 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 will be translated into German by the BZSt. However, stock letters in English and their appendices will not be translated into German, unless necessary in the individual case.

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

- 3.2.1 Should the objective of the mutual agreement procedure (c.f. paragraph 1.3) make it necessary, the circumstances must be determined ex officio, pursuant to the provisions of the AO. Local tax offices are fundamentally responsible. The applicant is obliged to cooperate (§90 AO).
- 3.2.2 The result of the investigation of the circumstances by the tax authorities in the other state must also be obtained within the scope of the mutual agreement procedure.
- 3.2.3 By agreement with the responsible authority of the other state, certain agents may be commissioned 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 necessary estimates.

The report should be notified to the taxpayer involved before it is discussed by the responsible authorities so that the former may make a statement. A report may be waived if the matter can be concluded in a different way by mutual agreement with the taxpayer.

- 3.2.4 Should contradictions emerge in the determination of the circumstances by the German and foreign tax authorities, the circumstances may be clarified by reconciled 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 responsible authority of the other state;
  - A special committee may be formed from representatives of the responsible authorities for the purpose of such an exchange of opinions;

- An individual may be selected on the basis of particular experience to promote agreement, e.g. by means of an assessor's report.

3.2.6 An agreement on the acceptance of specific circumstances and their specific treatment is admissible under the applicable general requirements (c.f. Statutory Instrument of 15 July 1998 for Application of the Tax Code - BStBl I, p. 630 on §88 AO, Principle of examination).

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

3.3.1 Only the responsible authorities of the Contracting States participate in the mutual agreement procedure. The party covered by the agreement is responsible for contributing to the procedure by disclosure of its circumstances, description and, if necessary, provision of its 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;
- have itself represented by an agent.

The BZSt will inform the party covered by the agreement of the result of the procedure.

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

### **3.4 Mutual agreement**

Mutual agreement usually takes place in writing (e.g. by a final exchange of correspondence). It is usually subject to the applicant having declared its agreement thereto and any pending appeals having been completed (see also paragraph 4.2).

## **4 Implementation of mutual agreements**

### **4.1 Force of law of advices and time barring**

The mutual agreement procedure may be implemented under §175a AO, notwithstanding the force of law of German tax advices. The limit for assessment thus does not end until a year has elapsed after the mutual agreement has become effective. Making application to a German tax authority for institution of a mutual agreement procedure interrupts the time limit for assessment subject to §171, sub-paragraph 3 AO, if simultaneous application is made for amendment of the tax advice.

## **4.2 Agreement of the applicant**

When implementing the mutual agreement procedure, the locally responsible tax office must ensure, within the scope of reservation of consent (c.f. paragraph 3.4, sentence 2) that

- the applicant declares its agreement to implementation in writing;
- any pending appeals are completed, and:
- following notification of the advice implementing the mutual agreement, the applicant waives an appeal, provided that the results of the mutual agreement are correspondingly implemented thereby (partial waiver).

Reference is made to §354, sub-paragraph 1a and §362, sub-paragraph 1a AO, and to §50, sub-paragraph 1a and §72, sub-paragraph 1a FGO. The BZSt must be informed of any difficulties or doubt arising.

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

A party covered by the agreement may declare that it will not apply for institution of a mutual agreement procedure, to accelerate and simplify its taxation process (e.g. to avoid delays and costs arising from the involved determination of circumstances otherwise necessary for the purposes of any mutual agreement procedure). In cases of establishments and affiliated enterprises, action must be taken to secure German taxation by the foreign enterprise to which the establishment belongs and also to ensure that the affiliated foreign enterprise waives application for the institution of a mutual agreement procedure.

However, waiver of a mutual agreement procedure declared to the responsible German tax authority by a party covered by the agreement is not binding upon the foreign state. Nevertheless, if such agreement exists, the German tax authority will not usually consent to the conduct of a mutual agreement procedure. This only applies in cases of establishments and affiliated enterprises if a declaration of waiver by the foreign enterprise to which the establishment belongs or a declaration by both the German and foreign affiliated enterprises is available.

## **6 Mutual agreement procedure and investigation**

- 6.1 In a mutual agreement procedure during an investigation, the provisions of paragraphs 1.2.2. to 1.2.6 of the Principles of Administrative Procedure are particularly applicable (c.f. BMF letter dated 23 February 1983 - IV C 5 - p. 1341 - 4/83 -, BStBl I, p. 218). They must be applied analogously to the apportionment of profit between establishments of internationally-active enterprises.
- 6.2 In respect of a possible mutual agreement procedure, corrections in the investigation report must be presented so precisely that the BZSt is placed in a

position, on the basis of the information in the investigation documents and files, to reconstruct the circumstances, legal basis and justification for the correction and its amount (c.f. also paragraph 6.2.1 of the Principles of Apportionment of Income between Associated Parties with Cross-Border Business Relationships in terms of duties of investigation, cooperation, correction, mutual agreement and EU arbitration procedures [Principles of administrative procedure, BMF letter dated 12 April 2005, IV B 4 - p. 1341 - 1/05 -, BStBl I p. 570]).

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

The information provisions of double taxation agreements and those of the Act implementing the EC Directive on Mutual Assistance in the field of Direct Tax and VAT Matters (EGAHiG) are also applicable to the mutual agreement procedure. If permitted by the information provisions of the applicable double taxation agreement or EGAHiG, all the necessary information may be exchanged in the mutual agreement procedure. The principles of the "Memorandum on international administrative assistance by the exchange of information in tax matters" (BMF letter of 25 January 2006 - IV B 1 - p. 1320 - 11/06 -, BStBl I, p. 26) must be observed.

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

- 8.1 Should the mutual agreement procedure fail, the BZSt will inform the party covered by the agreement and the responsible state tax authority of this decision immediately.
- 8.2 The locally-responsible tax office must examine whether double taxation can be avoided under the conditions of §163 AO from the aspect of substantive inequity. The particular responsibility stipulations and involvement of the BMF in equitable measures must be observed.

An equitable measure is expressly waived if the taxpayer has failed to observe procedural rules (c.f. paragraph 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 clarification of the circumstances) or
- the taxpayer has made false statements in a fiscal or other administrative procedure (e.g. in work permit proceedings) (e.g. bogus domicile)

and is thus responsible for the double taxation arising. This also applies if deduction of foreign tax under §34c, sub-paragraph 3 EStG is precluded by §34c, sub-paragraph 6, sentence 5 EStG, with effect from the 2000 assessment period, because the foreign taxation of income in Germany has its origin in an arrangement for which there are no financial or other significant reasons.

- 8.3 The BZSt proposes the introduction of an arbitration procedure, if anticipated by the respective double taxation agreement and if indicated by the status of the mutual agreement negotiations.

Under Article 25, sub-paragraph 5 of the double taxation agreement between Germany and Austria, the party covered by the agreement has the possibility of placing the Contracting States under an obligation to bring the matter before the ECJ in the form of arbitration proceedings, once three years have elapsed since the procedure was instituted.

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

The Contracting States bear the costs arising from the mutual agreement procedure themselves. The costs incurred by the party covered by the agreement will not be refunded.

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

The provisions of this section are applicable to applications for the institution of a mutual agreement procedure pursuant to Article 6, sub-paragraph 1 of the Arbitration Convention (see paragraph 1.1).

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

- 10.1 Should the tax authority intend to correct the profit of an enterprise pursuant to Article 4 of the Arbitration Convention, it must notify the enterprise in good time and grant it an opportunity to inform the affected affiliated enterprises in the other Contracting States. The other enterprises then have an opportunity to discuss the matter with the responsible tax authorities, to obtain a counter-correction.

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

## **11 Institution of the mutual agreement procedure**

### **11.1 Application**

- 11.1.1 Under Article 6, sub-paragraph 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 apportionment of establishment profits under Article 2, no. 4 of the Arbitration Convention is in question. For the purposes of the Arbitration Convention, the establishment is deemed to be an enterprise of the other Contracting State (Article 1, sub-paragraph 2 of the Arbitration Convention).

11.1.3 In the case of a domestic application, application for the mutual agreement procedure must be made to the BZSt.

11.1.4 Paragraph 2.1.5 applies analogously (but see paragraphs 13.1.3 and 13.1.4).

## **11.2 Time limit for the application**

11.2.1 Under Article 6, sub-paragraph 1, sentence 2 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 within the meaning of Article 1 of the Arbitration Convention. This period will commence on communication of the first advice entailing double taxation (e.g. amended tax advice).

In the case of an application made in Germany, receipt by the BZSt will be crucial to observance of the period.

11.2.2 Paragraph 2.2.1 applies analogously.

## **11.3 Content of the application**

11.3.1 The application will only be admissible if it is asserted that the principles stated in Article 4 of the Arbitration Convention have not been observed (Article 6, sub-paragraph 1, sentence 1 of the Arbitration Convention).

11.3.2 The application must contain the following information and documents:

1. Name, address (registered office) and locally-responsible tax office 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. Information on the tax periods affected by the application;
4. Copies of the tax advices, the investigation report or comparable documents which have led to the alleged double taxation;
5. Detailed information on any out-of-court or court appeals instituted by the enterprise or other parties involved in the transactions in question and any court judgements relevant to the case;

6. A presentation by the enterprise of the extent to which, in its opinion, 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 by a responsible authority and make the necessary documents available to the responsible authorities.

11.3.3 A written application should be submitted in triplicate, to prevent delays.

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

#### **11.4 Institution of the mutual agreement procedure by a domestic applicant**

11.4.1 The BZSt will forward the enterprise's application to the responsible supreme state tax authority and the tax office with local responsibility for taxation of the enterprise immediately, and confirm receipt of the application to the enterprise within one month. At the same time, the BZSt will inform the responsible authorities of the other Contracting States involved in the case of receipt of the application, by sending them a copy of the enterprise's application.

11.4.2 The BZSt will examine whether the information necessary under paragraph 11.3.2 for institution of a mutual agreement procedure is available and may request the enterprise to send the missing or any additional information within two months of receipt of the application. Reference is made to paragraph 13.1.2.

The BZSt is at liberty to request additional information at a later date.

11.4.3 If the substance of the request of the enterprise can be remedied by internal German measures, the responsible German tax authorities will take the necessary measures *ex officio*. The BZSt will inform the enterprise and the responsible authorities of the other Contracting States of this decision without delay, but no later than the date stated in paragraph 11.4.4.

11.4.4 Should the investigation reveal that the application is admissible and sufficiently justified, and should the responsible German tax authorities be unable to bring about a satisfactory solution, the BZSt will institute the mutual agreement procedure pursuant to Article 6, sub-paragraph 2 of the Arbitration Convention with the responsible 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 tax advice by which the decision on the increase in income is or was established, or
- b) The date on which the application by the enterprise and the information under paragraphs 11.3.2 and 11.4.2, sentence 1 are available to the BZSt.

- 11.4.5 The BZSt will inform the applicant enterprise of institution of the mutual agreement procedure and of whether the application was submitted in good time and of the date on which the two-year limit under Article 7, sub-paragraph 1 of the Arbitration Convention commenced.

## **11.5 Institution of the mutual agreement procedure by a foreign applicant**

If the responsible authority of another Contracting State informs the BZSt of receipt of an application for institution of a mutual agreement procedure or if the responsible authority of another Contracting State institutes the mutual agreement procedure, the BZSt will examine the formal requirements and, if necessary, request the responsible authority of the other Contracting State to send the information and documents under paragraph 12.2.2, sentence 1. The BZSt will send the letter from the foreign tax authority to the responsible supreme state tax authority and to the tax office with local responsibility for taxation of the enterprise.

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

### **12.1 General procedural principles**

- 12.1.1 If the application for institution of a mutual agreement procedure is made in Germany, the BZSt will inform the enterprise of major developments. Information on legal interpretations expressed or received (e.g. in position papers) will not be disclosed.
- 12.1.2 Paragraphs 3, 4, 5, 6 and 7 apply analogously.
- 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, sub-paragraph 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 are intended to establish whether it has committed a punishable tax offence by actions resulting in an adjustment of profits under Article 4 of the Arbitration Convention.

If such an offence is detected, the obligation to institute a mutual agreement procedure or appoint a consultative committee lapses, under Article 8, sub-paragraph 1 of the Arbitration Convention.

## 12.2 Procedure for an application made in Germany

### 12.2.1 Adjustment of profit by the German tax authority

If the measure which has led or could lead to double taxation within the meaning of Article 1 of the Arbitration Convention was taken by a German tax authority, the BZSt will normally send the responsible authorities of the other Contracting States involved in the case a position paper, no later than the date specified in paragraph 11.4.4. It must contain the following information and documents:

- A confirmation that the case has been raised within the period specified in Article 6, sub-paragraph 1 of the Arbitration Convention;
- Notification of commencement of the two-year period pursuant to Article 7, sub-paragraph 1 of the Arbitration Convention (c.f. paragraphs 13.1.2 and 13.1.3 for the two-year limit);
- Statement of the case by the applicant;
- Assessment of the circumstances by the BZSt, e.g. the reason why double taxation has been applied or could probably occur;
- Proposal of how the case could be resolved in respect of eliminating double taxation, including a comprehensive explanation of the proposed solution;
- Complete justification of the tax assessment or adjustments;
- Enclosure of documents of fundamental importance to the statement of the point of view;
- List of all additional documents used to make the adjustment.

In order to issue the position paper, the responsible state tax authority will send the BZSt a corresponding statement with the necessary documents and a proposed solution no later than three months after the later of the dates stated in paragraphs 11.4.4 a and b.

### 12.2.2 Adjustment of profit by the German tax authority

If the measure which has led or could lead to double taxation within the meaning of Article 1 of the Arbitration Convention was taken by a foreign tax authority, the BZSt will enclose the following information and documents with its letter instituting the mutual agreement procedure (paragraph 11.4.4) to the responsible authorities of the other Contracting States involved in the case:

- The information under paragraphs 11.3.2 and 11.4.2;
- A confirmation that the case has been raised within the period specified in Article 6, sub-paragraph 1 of the Arbitration Convention;
- Notification of commencement of the two-year period pursuant to Article 7, sub-paragraph 1 of the Arbitration Convention.

Should the investigation 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 foreign tax authority on the solution proposed in the latter's written response, the BZSt will inform the responsible authorities of the other Contracting States involved in the case within six months of receipt of the written response. Paragraph 2.4.1, sentence 2 applies analogously;
- b) does not exist or is not imminent, or there is no agreement with the foreign tax authority on the solution proposed in the latter's written response, the BZSt will send a position paper to the responsible authorities of the other Contracting States involved in the case, no later than six months after receipt of the written response from the other state. In this letter, the BZSt will propose a non-binding timetable for the further handling of the case. If applicable, the BZSt will simultaneously propose a deadline for a mutual agreement meeting, to take place no later than 18 months after the later of the two dates specified in paragraphs 11.4.4.a and b.

In order to issue the position paper, the responsible state tax authority will send the BZSt a corresponding statement with the necessary documents and a proposed solution no later than one month after the date stated in sentence 2.

### **12.3. Procedure for a foreign application**

#### 12.3.1 Adjustment of profit by the German tax authority

If the measure which has led or could lead to double taxation within the meaning of Article 1 of the Arbitration Convention was taken by a German tax authority, the BZSt will send the responsible authorities of the other Contracting States involved in the case a position paper, following institution of the mutual agreement procedure by the foreign state. It will contain the information and documents specified in paragraph 12.2.1, insofar as they are not evident from the letter from the foreign state instituting the procedure. The position paper will be sent within four months of the later of the following dates:

- The date of the tax advice by which the increase in income tax is or was established;
- Receipt of the institution of the mutual agreement procedure by the responsible authority of the other Contracting State and receipt of the information in accordance with paragraph 12.2.2, sentence 1 by the BZSt.

In order to issue the position paper, the responsible state tax authority will send the BZSt a corresponding statement with the necessary documents and a proposed solution no later than one month after the date stated in the preceding sentence.

#### 12.3.2 Adjustment of profit by the foreign tax authority

If the measure which has led or could lead to double taxation within the meaning of Article 1 of the Arbitration Convention was taken by a foreign tax authority and should it emerge after the investigation 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 foreign tax authority on a solution proposed in the latter's written response, the BZSt will inform the responsible authorities of the other Contracting States involved in the case. Notification will take place within six months of the later of the two following dates:
  - The date of the tax advice by which the increase in income tax is or was established;
  - Receipt of the statement by the foreign tax authority and receipt of the information in accordance with paragraph 12.2.2., sentence 1 by the BZSt;
  
- b) does not exist or is not imminent, or there is no agreement with the foreign tax authority on the solution proposed, the BZSt will send a position paper to the responsible authorities of the other Contracting States involved in the case, no later than the date stated under a of this paragraph. In this letter, the BZSt will propose a non-binding timetable for the further handling of the case. If applicable, the BZSt will simultaneously propose a deadline for a mutual agreement meeting, to take place no later than 18 months after the later of the two dates specified in paragraphs 11.4.4a and b.

In order to issue the position paper, the responsible state tax authority will send the BZSt a corresponding statement with the necessary documents and a proposed solution no later than one month after the date stated under a of this paragraph.

## **13 Arbitration procedure**

### **13.1 General**

- 13.1.1 Should the mutual agreement procedure not produce agreement within two years, the responsible authorities of the Contracting States involved will be obliged to appoint an advisory committee and obtain its opinion (Article 7 of the Arbitration Convention). The responsible authorities may extend this two-year limit by agreement with the enterprises involved (Article 7, sub-paragraph 4 of the Arbitration Convention).
  
- 13.1.2 The two-year limit specified in Article 7, sub-paragraph 1, will commence on the day on which the case is first notified to one of the responsible authorities (the BZSt or the responsible authority of the other Contracting State, in the case of an application to a foreign tax authority). The case will be deemed to have been notified on the later of the two following dates:

- The date of the tax advice by which the increase in income tax is or was established;
- The date of receipt of all the information and documents by the responsible authority and of any additional information requested by the responsible authority within two months of receipt of the application from the enterprise.

13.1.3 If the tax case is submitted to a court within the scope of an appeal, the two-year period specified in Article 7, sub-paragraph 1 of the Arbitration Convention will not begin until the date on which the judgement delivered in the last instance within the scope of domestic legal remedy has become non-appealable (Article 7, sub-paragraph 1 of the Arbitration Convention).

13.1.4 Should a Contracting State be unable to deviate from decisions of the tax 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, sub-paragraph 3 of the Arbitration Convention). This restriction does not apply in Germany, as, under §175a AO, tax advices of which the legality has been confirmed non-appealably by the courts may be amended due to the decision in the arbitration procedure (§110, sub-paragraph 2 FGO).

## **13.2 Appointment of the advisory committee**

13.2.1 In the absence of any agreement to the contrary by the responsible authorities of the Contracting States involved in the case, the Contracting State which issued the first tax advice, i.e. the definitive decision of the tax authority on the increase in income or an equivalent measure which has led or could lead to double taxation within the meaning of Article 1 of the Arbitration Convention, will take the initiative of appointing the advisory committee and organising its meetings in agreement with the responsible authorities of the other Contracting States involved in the case.

13.2.2 The location at which the advisory committee meets and that at which it must deliver its opinion may be specified in advance by the responsible authorities of the Contracting States involved in the case.

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

## **13.3 Composition of the advisory committee**

13.3.1 The advisory committee will usually consist of an independent chairman, two representatives of each responsible authority and an even number of independent individuals (usually two) (Article 9, sub-paragraph 1 of the Arbitration Convention). The members of the advisory committee will be

subject to the confidentiality stipulations of Article 9, sub-paragraph 6 of the Arbitration Convention.

- 13.3.2 The advisory committee will be supported by a secretariat provided by the Contracting State appointing the advisory committee, in the absence of any other agreement between the Contracting States involved in the case. The secretariat will be responsible to the chairman of the Advisory Committee, for reasons of independence. The members of the secretariat will also be subject to the confidentiality stipulations of Article 9, sub-paragraph 6 of the Arbitration Convention.

#### **13.4 Procedural principles**

- 13.4.1 The procedure before the advisory committee will be conducted in the official language(s) of the Contracting States involved, in the absence of any other agreement by the responsible authorities of the Contracting States involved in the case, allowing for the wishes of the advisory committee. Declarations and documents must be translated into this language or these languages if necessary.
- 13.4.2 The advisory committee may request the responsible authorities of the Contracting States involved in the case to appear before the advisory committee.
- 13.4.3 The enterprises affected have a right to a hearing or representation (Article 10, sub-paragraph 2 of the Arbitration Convention). At their discretion, they may make a statement to the advisory committee on the factual and legal position, and submit the evidence and documents which they consider necessary (Article 10, sub-paragraph 1 of the Arbitration Convention). On request by the advisory committee, the enterprises affected will be obliged to disclose information or documents and to appear or be represented before the committee. Statements and documents delivered 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 paragraph 13.4.1.
- 13.4.4 The advisory committee may also examine witnesses or specialists to prepare its decision.

#### **13.5 Statement by the advisory committee and decision by the responsible authorities**

- 13.5.1 The advisory committee must issue its decision within six months. It is bound by the arm's length principle of Article 4 of the Arbitration Convention (Article 11, sub-paragraph 1 of the of the Arbitration Convention). The statement may be issued by simple majority of the members (Article 11, sub-paragraph 2 of the Arbitration Convention).

13.5.2 The period for submission of the statement will commence on the date on which the chairman confirms that the members of the committee have received all the relevant documents and information in accordance with paragraph 13.2.3 from all the Contracting States involved in the case.

13.5.3 The statement by the advisory committee should contain the following:

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

13.5.4 Following delivery of the statement preventing double taxation by the advisory committee, the responsible authorities of the Contracting States involved in the case have a further six months in which to reach agreement. They may deviate from the statement by the advisory committee, provided that double taxation is avoided. Should they be unable to agree on a differing settlement, they will be bound by the statement of the advisory committee as an arbitral award (Article 12, sub-paragraph 1 of the Arbitration Convention).

### **13.6 Notification of the decision of the advisory committee and decision by the responsible authorities**

13.6.1 Following delivery of the statement preventing double taxation to the Contracting States involved in the case by the advisory committee, the responsible authority to which the case was submitted will notify each of the enterprises affected of the decision by the responsible authorities and the statement by the advisory committee.

13.6.2 If the responsible authorities of the Contracting States consent to publication of the decision and statement, publication will not take place until all the enterprises involved have notified the responsible authority to which the case was submitted in writing that they have no objections to publication of the decision and statement (Article 12, sub-paragraph 2 of the Arbitration Convention). If the enterprises involved agree, the responsible authorities of the Contracting States involved in the case may also agree to publish the decision, without naming the enterprises involved, anonymising all further details which could identify the enterprises involved.

13.6.3 The statement by the advisory committee will be prepared in three originals, of which two will be sent to the responsible authorities of the Contracting States involved in the case and one to the European Commission for archiving. Should more than two Contracting States be involved in the case, additional

originals of the statement by the advisory committee will be prepared. Should there be agreement on publication of the statement, it will be published on the website of the European Commission (<http://www.ec.europa.eu>) in the original language(s).

13.6.4 Paragraph 4 applies analogously to implementation of the decision.

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

14.1 Paragraph 9 applies analogously to the costs of the mutual agreement procedure.

14.2 Each Contracting State will bear an equal proportion of the procedural costs of the advisory committee (Article 11, sub-paragraph 3 of the Arbitration Convention). These include the administrative costs of the advisory committee and the fees and disbursements of the independent individuals.

14.3 In the absence of any other agreement by the responsible authorities of the Contracting States involved in the case:

- a) The refund of costs for the independent individuals will be restricted to the amount of the usual refund of costs for senior civil servants of the Contracting State appointing the advisory committee; and
- b) The gross fee for an independent person will be €1,000 per day of meeting of the advisory committee. The chairman will receive a fee 10% greater than that of the other independent individuals.

14.4 The procedural costs of the advisory committee will be refunded by the Contracting State appointing the committee, in the absence of any other agreement by the Contracting States involved in the case.

14.5 Costs incurred by the affected enterprises in connection with the mutual agreement or arbitration procedure will not be refunded (Article 11, sub-paragraph 3 of the Arbitration Convention).

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

This memorandum replaces the memorandum of 1 July 1997 - IV C 5 - S 1300 - 189/96 -, BStBl I 1997 p. 717.

The memorandum will be published in Part I of the Federal Tax Gazette. It may be found on the Federal Ministry of Finance website (<http://www.bundesfinanzministerium.de>) under Steuern -> Veröffentlichungen zu Steuerarten -> Internationales Steuerrecht.

By appointment  
Müller-Gatermann