

## Directorate-General for Tax and Customs Policy and Legislation

## International Tax Policy and Legislation Directorate

Decree of 29 September 2008, No. IFZ2008/ 248M

The State Secretary for Finance has resolved to provide further details of the mutual agreement procedure available under a bilateral tax treaty or the EU Arbitration Convention<sup>1</sup>.

## Contents

1	Intention and outline .....	2
1.1	Background to mutual agreement procedures .....	3
1.2	Intention of Netherlands' competent authority .....	3
1.2.1	<i>Start of bilateral consultations</i> .....	5
1.2.2	<i>Arbitration provision in tax treaties (obligation to achieve a result)</i> .....	6
1.3	Cases typically able to be resolved by mutual agreement procedures .....	7
1.4	Nature of consultations .....	5
1.5	Consultations in situations not specifically covered in a treaty .....	5
2	Taxpayer's request to start mutual agreement procedure .....	8
2.1	When to file the request .....	8
2.2	Time limit for filing request .....	8
2.3	When more than one treaty applies .....	7
2.4	Where to file the request .....	10
2.4.1	<i>Transfer pricing issues; corresponding adjustments outside mutual agreement procedures</i> .....	10
2.5	Conditions to be met by a request .....	11
3	When the Netherlands' competent authority will start a mutual agreement procedure .....	12
3.1	Standard or early procedure .....	12
3.1.1	<i>Standard mutual agreement procedure</i> .....	12
3.1.2	<i>Early mutual agreement procedure</i> .....	13
3.1.3	<i>Specific exceptions</i> .....	14
4	Assessment of the request .....	15
4.1	What the Netherlands will do .....	15
4.2	Assessing whether to process a request .....	16
4.2.1	<i>Request unfounded: why the competent authority may decide not (or not yet) to start a mutual agreement procedure.</i> .....	17
4.2.2	<i>Reasons why a request may be rejected or suspended.</i> .....	17
5	Course of mutual agreement procedure .....	18
5.1	Time frame for settling mutual agreement procedure .....	18
5.2	Procedure followed by Netherlands' competent authority within two-year time frame .....	19

<sup>1</sup> This document contains an unofficial English translation by the Netherlands' Ministry of Finance of Decree No. IFZ 2008/248M, officially published in Dutch on 29 September 2008. Rights can only be derived from the original Dutch text of the decree.

5.3	Indicative course of mutual agreement procedure .....	20
5.4	Netherlands' competent authority's position paper .....	20
5.5	Response from other competent authority: agreement or position paper ..	21
5.6	Indicative course of mutual agreement procedure if other treaty state makes the adjustment.....	21
5.7	If competent authorities disagree or continue to disagree: new exchange of written communications and possible meeting of competent authorities .....	21
5.8	Taxpayer's role .....	22
6	Outcome and implementation of mutual agreement procedure .....	22
6.1	Implementation of outcome; official reduction .....	23
7	What happens if agreement is not reached?.....	23
7.1	Arbitration under bilateral tax treaties .....	23
7.2	Arbitration under the EU Arbitration Convention .....	24
8	Additional consequences of processing request for mutual agreement procedure .....	24
8.1	Deferral of tax payment .....	24
8.2	Assessment and collection interest / Penalties .....	25
8.3	Exchange and confidentiality of information .....	25
8.4	Legal consequences and establishment of precedent .....	26
9	Relationship with other procedures (unilateral or multilateral APA/corresponding adjustments outside mutual agreement procedures) .....	26
10	When the decree will take effect.....	27
11	Repeal of previous decrees.....	27

## 1 Intention and outline

The Dutch Ministry of Finance's International Tax Policy and Legislation Directorate ('IFZ') is the competent authority for implementing tax treaties signed by the Netherlands and also the EU Arbitration Convention. In this capacity it assists taxpayers subjected to taxation that is not in accordance with the provisions of a tax treaty. The Directorate aims to eliminate such taxation as quickly and efficiently as possible. The Netherlands will consequently seek to initiate mutual agreement procedures (MAP) with treaty partners at an early stage.

The purpose of this decree is to outline *how* and *when* taxpayers can seek recourse to IFZ's assistance and to explain how a mutual agreement procedure works. The role played by the taxpayer is also clarified.

This section briefly outlines MAP and the line of approach of the Netherlands' competent authority. More specific information and instructions on how to proceed can be found hereinafter.

It should be noted that the mutual agreement procedure in this decree relates to taxation and not to social security contributions. Similarly, the decree does not seek to change, extend or restrict any

rights or obligations arising under tax treaties entered into by the Netherlands or the EU Arbitration Convention.

### **1.1 Background to mutual agreement procedures**

The Netherlands has signed tax treaties with some 80 countries and will be seeking in future to extend and improve its network of treaties further. The purpose of these treaties is to eliminate double taxation of taxpayers by agreeing with treaty partners on which state is entitled to tax specific forms of income. Despite such agreements, taxpayers may sometimes, however, be subjected to taxation that contravenes the provisions of a treaty.

All tax treaties signed by the Netherlands include a provision allowing the Netherlands to enter into consultations with the other treaty state in order to agree on a solution that will eliminate taxation that is not in accordance with the treaty. These consultations between states are referred to as a 'mutual agreement procedure'.

In the event of a transfer pricing adjustment between associated enterprises<sup>2</sup> established in EU member states, a mutual agreement procedure can also be conducted under the EU Arbitration Convention<sup>3</sup> in a situation in which a party fails to observe the principles of Article 4 of the Convention (i.e. that pricing should be set at arm's length).<sup>4</sup>

The general aim is to complete all mutual agreement procedures within two years. If the tax assessment in the Netherlands has been determined irrevocably, any subsequent adjustment of the assessment required on the Dutch side will be in the form of an official reduction ('reduction *ex officio*') (see section 6.1). In certain situations, taxpayers will automatically be granted deferral of payment for the amount of the taxation relating to the procedure (see section 8.1.). There are also statutory provisions that allow states involved in a mutual agreement procedure to reach a compromise on assessment and collection interest (see section 8.2 for more information).

### **1.2 Intention of Netherlands' competent authority**

The Netherlands' competent authority's intention is to:

---

<sup>2</sup> Or a transfer pricing adjustment between a 'head company' and permanent establishment.

<sup>3</sup> A treaty designed to eliminate double taxation in the event of profit adjustments between associated enterprises (90/436/EEC).

<sup>4</sup> In such cases the taxpayer can in principle choose between the EU Arbitration Convention or the applicable bilateral tax treaty (see section 2.5(e)). As the scope of the EU Arbitration Convention differs from that of the bilateral tax treaties, it may also be possible to seek recourse to both the Convention and a treaty. More information on how to proceed in the event of overlap between the Convention and a treaty can be found in section 2.3.

- eliminate as early as possible (see also section 1.2.1) taxation that is not in accordance with treaty provisions by initiating early consultations on a mutual agreement or arbitration procedure or by entering into bilateral or multilateral advance pricing agreements;<sup>5</sup>
- process all requests for a mutual agreement or arbitration procedure. If there is any reason why a mutual agreement or arbitration procedure is not appropriate (see below), the authority will consult with the taxpayer to see whether there is any other way of resolving the issue;
- seek to complete the mutual agreement or arbitration procedure within twenty-four months;<sup>6</sup>
- seek to limit the costs involved in a mutual agreement or arbitration procedure as far as possible (by, for example, deferral of payment of tax);
- ensure that the request and the mutual agreement or arbitration procedure are handled as transparently as possible and to inform the taxpayer as soon as possible in case of any unexpected changes in the course of the procedure.

The reason why it is not always possible to achieve these intentions is generally because:

- the other state takes a different view from the Netherlands on, for example, the time limits to be applied; or
- the other state does not co-operate to the desired degree and, for example, fails to respond or takes a long time to respond to the issues raised by the Netherlands; or
- the taxpayer provides insufficient information for the competent authority to establish its position on the correct application of the treaty (see section 2.5 for details of the information to be provided); or
- the desire to be transparent towards the taxpayer is at odds with the requirement under the treaty with the specific state for information to be treated confidentially.

Obviously there may be other circumstances and factors<sup>7</sup> that make it difficult or impossible for the Netherlands to meet its aim of completing the handling of requests within two years. The Netherlands' competent authority will, however, do its best to ensure that cases are handled as quickly as possible.

### **1.2.1 Start of bilateral consultations**

Taxation contravening the provisions of a treaty is normally caused by action taken by one of the treaty states. It generally involves an adjustment to an assessment in one of the states. How the mutual agreement or arbitration procedure operates in practice depends on which state has made the adjustment as it will be that state that is expected to set out its position on the issue first.

---

<sup>5</sup> An advance pricing agreement ('APA') gives advance approval of the commercial remuneration ('arm's-length remuneration') or the method to be used to determine such remuneration on cross-border transactions between associated enterprises or parts of the same entity.

<sup>6</sup> See sections 5.2 and 5.3 for an indicative outline of the course of the procedure.

<sup>7</sup> Foreign tax investigations or a more complex combination of different tax issues.

### **1. Mutual agreement or arbitration procedure after adjustment by the Netherlands**

In this situation a mutual agreement or arbitration procedure with the other treaty partner will normally only start once no further remedies are available in domestic law (see section 3.1.1). This means it can take quite some time for the procedure to start, particularly if a party first wants to use all the opportunities available in domestic law to contest the assessment(s). In other words, filing an objection, followed by an administrative or judicial appeal. In addition, the various domestic options do not guarantee that the double taxation will be eliminated, given that they involve only two of the three interested parties (i.e. the other country's tax authority is not involved).

This is why the Netherlands' competent authority offers the opportunity to request *early* consultations with treaty partners on a mutual agreement or arbitration procedure. In other words, before the taxpayer completes the remedies available in domestic law. In the vast majority of cases, initiating an 'early start-up' will eliminate double taxation at a much earlier stage. See section 3.1.2 and subsequent sections for more information.

This decree has been primarily designed from the perspective of situations involving an adjustment by the Netherlands. Although the provisions will in principle apply by analogy to adjustments made abroad, there are also some differences. More information on the main differences can be found in point 2 below and also in section 5.6.

### **2. Mutual agreement or arbitration procedure after adjustment abroad**

The important issue in this respect is the moment at which the other state is able to substantiate the issue sufficiently. If a taxpayer is subjected to an adjustment abroad and files a request for a mutual agreement or arbitration procedure with the Netherlands' competent authority, the initial steps taken will in principle be as follows. Within four weeks<sup>8</sup> of receiving a full request, the Netherlands' competent authority will forward the request to the other state and request that state to compile a position paper. The other state will generally respond in the form of a position paper or by indicating when such a paper will be made available. The Netherlands' competent authority will in principle agree to this. If, however, there are indications that the relevant assessment in the other state has since become irrevocable and the Netherlands has not yet received the other state's position paper, the Netherlands will actively request a position paper and – if this is not received within a reasonable period – will press for consultations. In exceptional cases, the Netherlands will actively request the other state to participate in consultations at an earlier stage (see section 3.1.3).

In the event of an adjustment being made by a foreign state, the Netherlands is prepared to start bilateral consultations with that state as soon as it receives a sufficiently substantiated position paper. This also applies if the relevant assessment in the Netherlands has not yet been determined irrevocably.

In some cases, consultations will also take place with the tax inspector in the Netherlands on the same or a related issue. If, for example, the same issue is also the subject of an investigation in the Netherlands or recourse has also been sought to a domestic remedy (e.g. a request for amendment of the assessment, an objection or appeal) for the same issue. In such cases, the request will be handled in accordance with the conditions applying to adjustments imposed by the Netherlands. More information on this can be found in point 1 above.

### **3. Other forms of bilateral consultations**

Bilateral consultations are also possible in the phase before a mutual agreement or arbitration procedure can be started. Such consultations involve asking the tax inspector to give approval in advance of transfer prices to be applied internationally. This approval will be in the form of a unilateral, bilateral or multilateral Advance Pricing Agreement ('APA'), as referred to in the Decree of 11 August 2004 No. IFZ2004/124M. An APA gives advance certainty as to what will constitute arm's-length remuneration in a specific situation. It is also possible to request that an APA apply retroactively ('rollback') to previous years. In certain cases, therefore, an APA can be a way of achieving a swift resolution of investigations or (proposed or) actual adjustments by the Netherlands or the other countries involved in the relevant transactions. The conditions with which APAs have to comply and the procedures involved differ from those applying in respect of mutual agreement or arbitration procedures. More information on these requirements can be found in the decree referred to above.

#### **1.2.2 Arbitration provisions in tax treaties (obligation to achieve a result)**

In most Dutch tax treaties, the mutual agreement procedure does not compel competent authorities to actually reach an agreement and resolve the tax dispute. Instead, the parties simply undertake to perform to the best of their abilities. In some of its existing tax treaties, the Netherlands has supplemented the clause on mutual agreement procedures by including an arbitration provision. In contrast to the EU Arbitration Convention, which came into force in 1995, these arbitration provisions do not compel parties to submit to arbitration if they fail to resolve the issue in a mutual agreement procedure. Essentially the arbitration provisions in the tax treaties require both competent authorities first to agree on seeking arbitration (see sections 7.1 and 7.2). And in practice, authorities' willingness to agree to arbitration has proved limited. This can mean the mutual agreement procedure failing to produce a satisfactory solution for the taxpayer. The Netherlands consequently chose to be actively involved in devising an arbitration provision for the OECD Model Tax Convention.<sup>9</sup> The OECD provision that is now in place stipulates mandatory arbitration if the competent authorities fail to reach a comprehensive solution. The Netherlands intends to include similar provisions for mandatory arbitration in all its new and existing tax treaties.

---

<sup>8</sup> See also section 4.2.

<sup>9</sup> Article 25(5), OECD Model Tax Convention 2008.

### **1.3 Cases typically able to be resolved by mutual agreement procedures**

There are various situations in which a mutual agreement procedure is an effective way of eliminating taxation that is not in accordance with a treaty. These typically include situations where:

- a taxpayer has worked abroad for a period of time and both states believe they are entitled to levy tax;
- a taxpayer receives a pension from abroad and both states claim they are entitled to tax it;
- a taxpayer is regarded as a resident by two states and both states claim the right to tax the individual's worldwide income;
- different states classify a legal entity or income generated differently;
- there is a question about the existence of a permanent establishment to which profits can be attributed.

The following are examples of typical transfer pricing situations:

- situations in which the Dutch or foreign tax authorities adjust the price at which goods or services are transferred between associated enterprises;
- situations involving the way profits are attributed between a head company and a permanent establishment;
- situations in which a foreign tax authority adjusts the taxable base of a subsidiary company because of the fee charged by the Dutch head office for services that it provides to the subsidiary.

### **1.4 Nature of consultations**

The mutual agreement and arbitration procedure is in principle a government-to-government process. This means that the consultations are generally held without the relevant taxpayer being involved. Taxpayers can choose to make known their views on the type of solution they are seeking either orally or in writing. The Netherlands' competent authority will seek to be as transparent as possible on developments in all phases of the mutual agreement and arbitration procedure. The Netherlands' competent authority will also strive to ensure that the taxpayer makes an optimal choice between a mutual agreement and arbitration procedure and using the remedies available in domestic law.

### **1.5 Consultations in situations not specifically covered in a treaty**

Article 25(3) of the OECD Model Tax Convention provides for consultations in situations that are not specifically covered in a treaty. The Netherlands' competent authority seeks to use this possibility to find a generic solution to bottlenecks in a bilateral treaty. To date this has resulted in several generic

mutual agreements, including the agreement that Germany and the Netherlands reached in 2002 regarding Dutch flower traders (IFZ 2002/715M).<sup>10</sup>

This Article can also provide a solution in individual cases. Under the residence article in tax treaties it is possible in, for example, the case of a permanent establishment of a party residing in a third state to formally ask whether direct consultations are possible between the state in which the permanent establishment is based and the other treaty state involved. Under the specific provision, the Netherlands' competent authority can adopt a pragmatic approach by disregarding the residency issue and entering into direct consultations.

## **2 Taxpayer's request to start mutual agreement procedure**

A taxpayer who believes that action by one or more states results or will result in taxation that is not in accordance with a tax treaty signed by the Netherlands or the principles of Article 4 of the EU Arbitration Convention may file a request for a mutual agreement procedure.

The basic principle is that the Netherlands' competent authority will process all requests it receives for a mutual agreement procedure, unless there is a reason why such a procedure is not appropriate (see section 4.2.2).

### **2.1 When to file the request**

Taxpayers can file a request for a mutual agreement or arbitration procedure as soon as they have a *reasonable suspicion* that they are or will be subjected to taxation that is not in accordance with a tax treaty signed by the Netherlands. In principle, therefore, they can file a request even before they receive an assessment. Bilateral consultations will only, however, be started once the assessment has been irrevocably determined or, in the event of a request for an early mutual agreement procedure, the final assessment has been imposed. The Netherlands will approach the other country once the final assessment has been imposed. The interim period will be used for preparations, which will in any event include the steps<sup>11</sup> outlined in section 4.2.

### **2.2 Time limit for filing request**

Article 25 of the OECD Model Tax Convention states that requests for competent authority assistance must be presented within three years from the first notification of the action resulting in international double taxation. Article 6 of the Arbitration Convention contains a similar clause. Neither the commentary on Article 25 of the OECD Model Tax Convention and the Arbitration Convention, nor the text of the articles themselves, make it clear what exactly is meant by the term "first notice". The position taken by the Netherlands' government is that the taxpayer's request is regarded as having

---

<sup>10</sup> See also footnote 23.

<sup>11</sup> 1. Confirmation of receipt and, if necessary, a request for further information; 2. Forwarding of the request to the other competent authority; and 3. Deciding whether there are grounds for the request.



been submitted in time if it is received within three years either of the date of the assessment incorporating the adjustment or of the date on which justification was given for the adjustment, should this be later. As the mutual agreement and arbitration procedures involve more than one state, the taxpayer should ascertain the position adopted by the other state with regard to the starting date of the three-year period. If the other state has a different position, this could result in the three-year period commencing on a date prior to that on which the three-year period starts in accordance with the Netherlands' position.

If the time limit in the mutual agreement procedure provisions contained in a treaty signed by the Netherlands differs from the three-year period referred to above, that different time limit will apply.<sup>12</sup> It should be noted that both the time limit for filing requests (six years) in the tax treaty with the United States and the starting date of the period (the end of the tax year to which the issue relates) differ from those commonly applied by the Netherlands.

Taxpayers wanting an early mutual agreement procedure (see section 3.1.2) should file their request before the tax inspector announces a decision on the objection lodged against the assessment. Taxpayers must ensure, therefore, that they file a request for an early mutual agreement procedure in good time. If a request for an early procedure is not received on time, it will normally still be able to be treated as a request for a standard mutual agreement procedure (see section 3.1.1).

### **2.3 When more than one treaty applies**

A transfer pricing issue between EU member states can in principle give rise to a mutual agreement procedure under the EU Arbitration Convention and the applicable bilateral tax treaty. If a taxpayer seeks recourse to *both* treaties without making a specific choice, the taxpayer will be assumed to be basing the request on the EU Arbitration Convention. This obviously applies only to the extent that the Convention and the treaty *de facto* overlap. The above does not apply if the relevant bilateral tax treaty contains provision for mandatory and binding arbitration in accordance with Article 25(5) of the OECD Model Convention. In order to avoid inconsistencies arising between treaties in practice, taxpayers have to specify in such situations which treaty or Convention they have chosen to base their request on. When specifying their choice, taxpayers can distinguish between those aspects of an issue that relate to transfer pricing and those that do not. In other words, it is possible to seek recourse to the bilateral tax treaty to decide the question of whether a permanent establishment exists, while the EU Arbitration Convention should be invoked to resolve the issue of attributing profits to this

---

<sup>12</sup> The treaties with Canada, the Philippines, Italy, Malaysia and Venezuela, for example, stipulate a period of two years, while the treaty with Switzerland specifies a period of one year. There are also treaties that allow longer periods. The tax treaties with the United States of America and the United Kingdom, for example, currently allow periods of six years, while the treaties with Brazil, the former Yugoslavia and New Zealand apply periods of five years. There are also a number of treaties, including those with Singapore, Japan, South Korea and Spain, that do not specify any time limit. In these cases, too, however, taxpayers are advised to file a request as soon as possible as this will help ensure that they do not exceed any periods that may be provided for in the legislation of the other state.

permanent establishment. Obviously it is logical to base all relevant transfer pricing issues relating to a specific assessment or set of consecutive assessments on the same choice of treaty or Convention.

#### **2.4 Where to file the request**

Taxpayers wanting to file a request for the application of the mutual agreement article of a tax treaty or the EU Arbitration Convention should send their request to the competent authority in the state in which they are resident.<sup>13</sup> The competent authority in the Netherlands is the Minister of Finance, who has given mandate to the Director of International Tax Policy and Legislation.

Requests for a mutual agreement procedure should be sent to:

Ministry of Finance  
International Tax Policy and Legislation Directorate  
P.O. Box 20201  
2500 EE The Hague

The words 'mutual agreement procedure' should be marked on the request.

##### **2.4.1 Transfer pricing issues; corresponding adjustments apart from the mutual agreement procedures**

There are two ways in which the Netherlands can eliminate double taxation arising as a result of transfer pricing adjustments in another country:

1. Following a taxpayer's request, the Dutch tax assessment can be unilaterally adjusted without consulting the treaty partner;
2. Following a taxpayer's request, the double taxation can be eliminated after consultations with the other competent authority, either by adjustment of the Dutch assessment or otherwise.

A request as referred to in point 1 is also referred to as a request for a corresponding adjustment. This can be sent to the competent tax inspector, who will then decide, on the basis of Dutch legislation and regulations (including the applicable tax treaty), whether the Netherlands will unilaterally renounce its claim. Depending on the stage of the tax assessment, such a request may be filed as:

- a. a request for adjustment of the taxpayer's tax return;
- b. an objection to the assessment;

---

<sup>13</sup> In the case of the EU Arbitration Convention, a request can also be filed in the state in which the taxpayer's permanent establishment is located.

- c. a request for a reduction ex officio of the tax liability.

The tax inspector will decide whether a reduction is appropriate. The tax inspector has to submit all requests to the Coordination Group on Transfer Pricing for binding advice. If the inspector decides, based on the information provided by the taxpayer, that the Netherlands cannot eliminate the double taxation by reducing the assessment or considers consultations with the other country to be needed in order to decide which country should be assigned the taxation rights, the double taxation will continue to apply. If a taxpayer disagrees with the inspector's decision and is still in stage a. or b. above, the taxpayer can still seek recourse to the domestic remedies available. In addition to the various domestic remedies, it is always possible to request a mutual agreement procedure (as indicated in point 2 above), providing the time limit for filing such requests has not expired. Section 5.8 provides more information on the taxpayer's role in this process.

### **2.5 Conditions to be met by a request**

A request for a mutual agreement or arbitration procedure must be submitted in writing. There are no specific requirements as to the form in which such a request has to be submitted, but it must in any event be signed by the taxpayer and contain at least the following information:

- a. details (including the name, address and tax information number) of the taxpayer filing the request and the other parties involved;
- b. information on the relevant facts and circumstances of the case (including information on the relationship between the taxpayer and the other parties);
- c. the other country or countries to which the request relates;
- d. an explanation of why the taxpayer believes that there is or may be double taxation or why – if the request is based on the EU Arbitration Convention – the taxpayer believes that the principles of Article 4 of the EU Arbitration Convention have not been observed;
- e. the treaty on which the request is based (i.e. the bilateral tax treaty to which the Netherlands is a party or the EU Arbitration Convention);
- f. the type of mutual agreement procedure to be started (i.e. standard, early or one of the other two forms referred to in section 3.1.3);
- g. information on the tax periods at issue;
- h. details of the tax authorities involved;
- i. copies of tax assessments, a copy of the report of any audits conducted by the tax authorities and details of any other measures that could result in the double taxation;
- j. information on the legal remedies to which the taxpayer or the other parties have sought recourse in respect of the relevant transactions and information on any legal remedies still available in the Netherlands or the other country in respect of the relevant assessments; information on any rulings by courts in respect of the matter in dispute; and

- k. a commitment by the taxpayer to comply as quickly as possible with all reasonable and appropriate requests by a competent authority and to make all documents available to the competent authorities.

If the request is for an *early mutual agreement procedure*, the following information must also be provided:

- l. a letter signed by the taxpayer requesting the tax inspector to postpone a decision on the objection filed against the assessment until the mutual agreement (or EU arbitration) procedure and any subsequent arbitration have been completed.

If the taxpayer also contacts the other competent authority involved, it is important for that authority to receive the same information.

The mutual agreement procedure will normally be conducted in English. Documents may be provided in English in order to reduce the administrative burden.

Lastly, taxpayers should note that they are entitled to explain their case orally. When filing a request, taxpayers may indicate that they want to make use of this opportunity. The Netherlands' competent authority will then contact the taxpayer directly. Obviously taxpayers can also choose (if they want) to communicate their views on the disputed issue or the solution they are seeking in writing.

### **3 When the Netherlands' competent authority will start a mutual agreement procedure**

This section and the sections that follow are based on the assumption that the mutual agreement procedure is conducted in response to an adjustment made by the Netherlands. The same options, rules and conditions will apply, wherever relevant, to procedures conducted in response to adjustments applied by a foreign state.

#### **3.1 Standard or early procedure**

A taxpayer may indicate whether the request for a mutual agreement procedure is a request for an early or a standard mutual agreement procedure.

##### **3.1.1 Standard mutual agreement procedure**

A standard mutual agreement procedure takes place when the Netherlands' competent authority initiates the procedure after all the remedies available in Dutch law to contest the relevant assessment (i.e. an objection, appeal, appeal in cassation ) have been exhausted or are no longer available. By then, the assessment will have been irrevocably determined. In other words, the standard mutual agreement procedure takes place once no further legal remedies are available in the Netherlands. It is

important, however, that any request for a standard mutual agreement procedure is filed on time (see section 2.2). This usually means that the taxpayer must file the request before all the domestic remedies for contesting the assessment have been used or exhausted.

If the taxation that is not accordance with the treaty has not been eliminated by the time the taxpayer has used all the possible domestic remedies available, the parties still have to consult, following a request to this effect, to see whether the taxation can be eliminated by means of a mutual agreement procedure. As well as taking quite some time to complete, this procedure can in many cases be an ineffective way of eliminating taxation that is not in accordance with the treaty (see section 1.2.1). This is why this decree allows the opportunity to request an early mutual agreement procedure (see section 3.1.2).

### **3.1.2 Early mutual agreement procedure**

An early mutual agreement procedure takes place when the Netherlands' competent authority initiates the mutual agreement procedure with the other state's competent authority in the period between the date of the assessment containing the adjustment or the date (if later) when the reason for the adjustment is given and the date on which the tax inspector announces a decision on the objection filed. In other words, when the taxpayer receives a final assessment, against which an objection can be filed, possibly followed by an administrative and judicial appeal. Consultations on an early mutual agreement procedure consequently take place while remedies are still available in domestic law.

#### **3.1.2.1 Early commencement of the mutual agreement or arbitration procedure: conditions**

The Netherlands' competent authority is willing to initiate contact with the other competent authority (i.e. initiate an 'early commencement of the mutual agreement or arbitration procedure') even if the assessment is not yet irrevocable, providing the taxpayer:

- agrees in writing that the tax inspector's decision on the objection may be postponed until the mutual agreement procedure and any subsequent arbitration have been completed;
- files the request for an early commencement of the mutual agreement or arbitration procedure before the tax inspector's decision on the objection is announced;

and, if the request is based on the EU Arbitration Convention:

- agrees to a standard determination agreement (see section 3.1.2.2).

#### **3.1.2.2 Early mutual agreement procedure: determination agreement**

If the early procedure results in an acceptable solution for both competent authorities, the taxpayer will normally be able to choose whether to accept the result. In other words, the taxpayer is entitled to reject the result and to opt to pursue the remedies still available in domestic law. If he finds the result of the competent authorities' negotiations acceptable, the taxpayer will be asked to accept a determination agreement stating that the taxpayer will not seek recourse to any remaining remedies available in the relevant countries' domestic law systems in respect of the issues for which the mutual

agreement procedure has produced a solution. This means that the taxpayer can still seek recourse to domestic remedies for other aspects of the dispute.

If the request for an early procedure is based on the EU Arbitration Convention, the extent to which this option is available to the taxpayer is more limited. This is because the taxpayer will be asked at an earlier stage – before the consultations between the two competent authorities begin – to accept a determination agreement stating that the taxpayer accepts that the tax inspector's response to the objection will be postponed until the arbitration has been concluded and that the taxpayer will also not pursue any remedies still available in domestic law if any one of the following situations applies:

- the competent authorities proceed to implement the outcome of an agreed solution that complies with the requirements of the EU Arbitration Convention;
- an advisory commission is established.

The solution arrived at by the competent authorities has to be presented to the taxpayer(s) before it is implemented. The taxpayer will then be given a reasonable period of time to decide either to agree to the solution or to withdraw the request. Unless the request is withdrawn within six weeks of its being communicated to the taxpayer, the competent authorities will be entitled to implement the solution identified. If the taxpayer decides to withdraw the request, the determination agreement will be declared void and the taxpayer can then seek recourse to any domestic remedies still available.

Obviously the above applies only in respect of the elements of an assessment for which a request based on the EU Arbitration Convention was filed.

### ***3.1.2.3 Early commencement of the mutual agreement or arbitration procedure: what happens if the other competent authority is unwilling to assist?***

The other competent authority may be unwilling to assist in an early commencement of the mutual agreement or arbitration procedure. This could, for example, be the case if the other competent authority is of the opinion that the existence of international double taxation has not or not yet been satisfactorily established. If so, the Netherlands' competent authority will notify the taxpayer involved and the tax inspector immediately. The tax inspector will then take a decision on the applicant's letter of objection and the taxpayer can use the remedies still available in domestic law. The basic principle then is that a standard mutual agreement procedure can start – at the taxpayer's indication – once the tax assessment is irrevocable. This will be based on the taxpayer's original request.

### ***3.1.3 Specific exceptions***

Despite what is stated above in respect of the time frame for initiating an early commencement of the mutual agreement or arbitration procedure, the Netherlands' competent authority may in exceptional circumstances be willing to contact the other competent authority with a request for a mutual agreement or arbitration procedure before the tax assessment in the other state has been finalized

(*'extra early commencement of the mutual agreement or arbitration procedure'*) and a position paper has been received. This is possible if it can be shown that:

- taxation that is not in accordance with the treaty will arise in another treaty state as a result of action by the state in question, *and*
- the relevant treaty state does not provide any realistic possibility to defer payment of tax or high rates of assessment and collection interest will be charged, *and*
- the taxpayer is consequently at risk of serious financial or liquidity problems or there are other urgent reasons why action is required in the short term.

In these situations the Netherlands will actively urge the other state to start consultations or to settle the problem that has arisen.

It should also be noted, however, that bilateral consultations may still be held if an (extra early commencement of the) mutual agreement or arbitration procedure is not possible because, for example, the case does not or does not yet comply with the various criteria. In such a situation a bilateral advance pricing agreement ('APA') could bring a suitable solution. More information on the opportunities for a bilateral APA can be found in the Decree of 11 August 2004 (No. IFZ2004/124M).

In specific situations the Netherlands' competent authority is also willing to invoke an early procedure before an assessment has been irrevocably determined, providing the tax inspector has announced a decision on the objection filed (*'early consultations in exceptional situations'*). This is possible if:

- the taxpayer can demonstrate that rights to request for a mutual agreement procedure abroad are at risk of expiring (because of the passing of time), *and*
- the taxpayer can provide a statement from the Dutch court (judicial authorities) agreeing to suspend legal action for the duration of the mutual agreement procedure and any arbitration.

In these exceptional cases, too, the other competent authority may be unwilling to assist in an early commencement of the procedure. If so, the Netherlands' competent authority will strongly urge the other authority to defer payment of tax (on reasonable conditions) in view of the standard mutual agreement procedure to be conducted in the future. In such cases, the Netherlands' competent authority will also notify the taxpayer and the tax inspector immediately.

## **4 Assessment of the request**

### **4.1 What the Netherlands will do**

In principle the Netherlands' competent authority will process all requests it receives for a mutual agreement procedure, unless there is a specific reason why such a procedure is not appropriate. Section 4.2.1 outlines the situations in which a taxpayer's request will not be processed or cannot be processed until a later stage.

Upon receipt of a request for an early or standard commencement of the mutual agreement or arbitration procedure, the competent authority will decide whether there are grounds for granting the request.

#### **4.2 Assessing whether to process a request**

The competent authority will assess the request received and inform the taxpayer within two months as to whether the request will be processed. The assessment process will involve:

##### *1 Confirmation of receipt and possible request for further information*

Within five working days, the taxpayer will receive confirmation that the Netherlands' competent authority has received the request. The competent authority will assess whether the taxpayer has supplied all the information specified in point 2.5 and, if necessary, request further information from the taxpayer within two months of receiving the request.

##### *2 Forwarding of request to other competent authority/authorities and the tax inspector*

On receipt of the request, the Netherlands' competent authority will send initial notification to the other competent authority. This essentially means providing the following information:

- a copy of the taxpayer's request;
- confirmation that the request was filed within the applicable time frame;

and, if the request is based on the EU Arbitration Convention:

- information on the Dutch view on when the two-year period starts (Article 7(1) of the EU Arbitration Convention; see section 5.1).

The Netherlands' competent authority will also ensure that the competent tax inspector (or unit) receives a copy of the taxpayer's request.

The above will be completed as soon as possible, and in any event within one month of the Netherlands' competent authority's receipt of the full request.

##### *3 Accepting or rejecting request for processing*

The Netherlands' competent authority will assess the request and notify the taxpayer as to whether it will be processed. This will be done within two months of the competent authority's receipt of the full request. The competent authority's response will state that the request has been:

- Accepted. This means that, based on the information, facts and circumstances presented, the Netherlands' competent authority believes that:



- the issue can be resolved by the Netherlands unilaterally. No mutual agreement procedure will be invoked, but the issue will be resolved in consultation with the competent tax inspector as soon as possible; or
  - the Netherlands cannot resolve the issue unilaterally. The competent authority will then start a mutual agreement or arbitration procedure with the competent authority of the other country or countries in order to try to resolve the issue.
- **Rejected.** This means that, based on the information, facts and circumstances presented, the Netherlands' competent authority has decided that it will not start a mutual agreement or arbitration procedure. More information on the reasons for such a decision can be found in section 4.2.1.

The competent authority may also decide not to process the request or to suspend processing. More information on the reasons for such a decision can be found in section 4.2.2.

#### **4.2.1 Request rejected: why the competent authority may decide not (or not yet) to start a mutual agreement or arbitration procedure**

The Netherlands' competent authority will declare the request to be unfounded if:

- a. the taxpayer has not made a reasonable case for double taxation to occur either now or in the future or action contravening a bilateral tax treaty or the EU Arbitration Convention (i.e. no access to the facilities);
- b. the request was not filed on time, which means that it is no longer likely that a mutual agreement or arbitration procedure with the other treaty partner(s) can succeed.

It should be noted that a unilateral APA or an agreement (compromise) with a foreign tax authority does not prevent application of a mutual agreement procedure.

#### **4.2.2 Reasons why a request may be refused or suspended**

The Netherlands' competent authority will refuse or suspend the request if:

- a. the information and documentation provided are insufficient to assess the request or to conduct a mutual agreement or arbitration procedure and the taxpayer filing the request has not used the opportunity to supplement the information required;
- b. if the tax inspector can demonstrate that the taxpayer has not complied with the applicable administrative obligations, which means that the burden of proof in respect of the adjustment to which the request relates has been reversed and rests with the

- taxpayer, unless the taxpayer subsequently complies with the requirements and demonstrates that the taxation is not accordance with the treaty;
- c. a request relating to the same issue was previously withdrawn by the taxpayer, and no new facts or altered circumstances have been demonstrated;
  - d. in the event of recourse to the EU Arbitration Convention, a judge has imposed a penalty because of action intentionally giving rise to one of the facts referred to in Article 68(2) of *Algemene wet inzake rijksbelastingen*.

The situation referred to in d. above applies only to cases involving the EU Arbitration Convention and not to mutual agreement procedures based on a bilateral tax treaty. The situation referred to in d. was the Netherlands' unilateral response to Article 8 of the EU Arbitration Convention, which allows an exception to be made in the event of a serious offence.<sup>14/15</sup> This does not alter the fact that the Netherlands' competent authority believes that criminal actions should be combated by remedies available in criminal law rather than by allowing double taxation to continue. The Netherlands' competent authority believes, therefore, that the existence of a criminal offence should not prevent a request for a mutual agreement procedure or arbitration from being accepted or, if such procedure has already started, from being allowed to continue.

## **5 Course of mutual agreement procedure**

### **5.1 Time frame for settling mutual agreement procedure**

The Netherlands' competent authority strives to complete mutual agreement procedures within two years. This period is in line with the period specified in the EU Arbitration Convention for eliminating double taxation. If a procedure under the Convention is not completed within this period, the case will automatically go to arbitration. If a request is accepted for processing (see section 4.2, subsection 3), the taxpayer will be informed of when the two-year period starts.

In principle, the two-year period will start once the Netherlands' competent authority receives the full request from a Dutch-resident taxpayer (see section 2.5 for details of the information required) and the relevant assessment has been irrevocably determined. If the request meets the conditions for an early mutual agreement procedure (see section 3.1.2.1), the two-year period will in principle start earlier. In other words, on the date on which the final assessment is imposed or the date (if later) on which the competent authority receives the full request.

Although the two-year period is internationally regarded as an acceptable period for completing mutual agreement procedures, whether or not the consultations achieve their objective will ultimately depend

---

<sup>14</sup> Stated in a unilateral declaration by the Netherlands at the time the EU Arbitration Convention was established.

on the willingness of the other competent authority to cooperate.<sup>16</sup> In order to ensure that mutual agreement procedures progress as quickly and efficiently as possible, the Netherlands will seek to agree with other treaty states on how best to conduct mutual agreement procedures. In 2003, for example, agreement was reached with the US competent authority on various operating practices,<sup>17</sup> followed by agreement in 2006 with the French competent authority.<sup>18</sup> The Netherlands' competent authority will obviously make every effort to ensure procedures are completed as quickly as possible.

## **5.2 Procedure followed by Netherlands' competent authority within two-year time frame**

There is no fixed course for a mutual agreement procedure, although there are certain fixed elements and, in the case of transfer pricing issues, the Code of Conduct for the EU Arbitration Convention specifies a number of steps and time frames. The OECD's online manual (*Manual on Effective Mutual Agreement Procedures*; MEMAP) provides additional guidelines for effectively operating mutual agreement procedures. This manual can be found on the OECD website under the heading 'Dispute Resolution' (via 'By Topic' / 'Taxation') or by clicking on the following link:

<http://www.oecd.org/ctp/memap>.

Although the Netherlands aims to conduct all mutual agreement procedures as uniformly as possible, there will be differences in the periods of time taken to complete procedures and, more specifically, the various elements involved in the procedure.

In the case of transfer pricing issues, for example, the course of a mutual agreement procedure will depend partly on which state has made the adjustment. Some elements of the procedure will vary if it is the other treaty state, rather than the Netherlands, that has made the adjustment. Information on these differences can be found in section 5.6.

Obviously there are also other factors that can make it difficult to complete a mutual agreement procedure within a predetermined period. The taxpayer will be kept advised of the procedure's progress.

An indicative course of a mutual agreement procedure from a Dutch perspective is outlined below, followed by an explanation of the various stages.

---

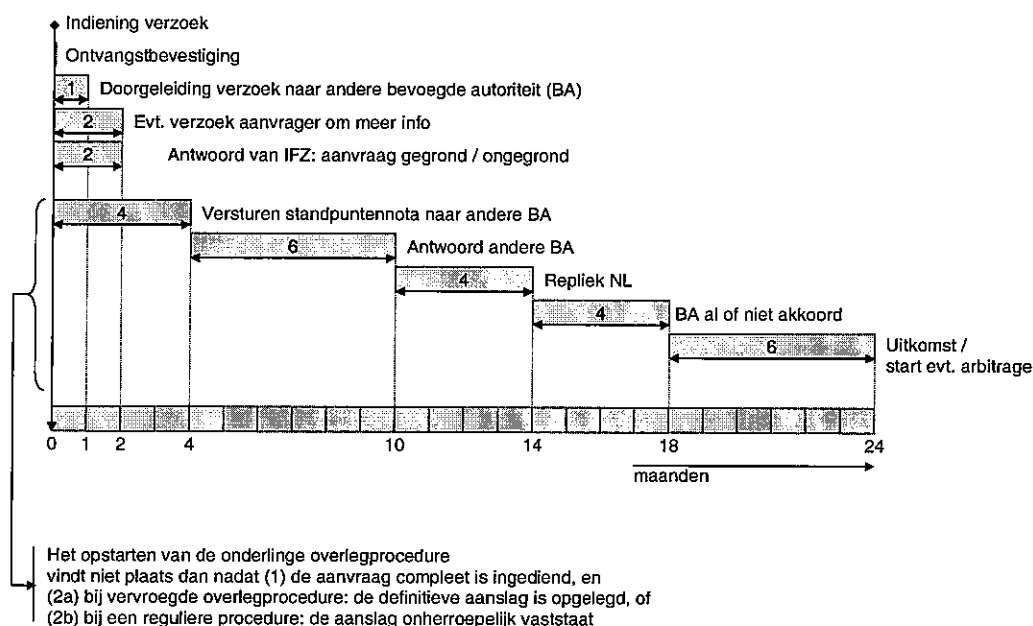
<sup>15</sup> Although access to the EU Arbitration Convention will consequently not be readily available in such situations, the Netherlands will be prepared, upon receipt of a request, to invoke a mutual agreement procedure under the applicable bilateral tax treaty.

<sup>16</sup> It is also important in this respect whether the taxpayer has chosen to seek recourse (simultaneously or otherwise) to legal remedies available abroad.

<sup>17</sup> See

[http://www.minfin.nl/nl/actueel/kamerstukken\\_en\\_besluiten,2003/08/onderlinge\\_overlegprocedures\\_ve\\_renigde\\_staten\\_en\\_nederland.html](http://www.minfin.nl/nl/actueel/kamerstukken_en_besluiten,2003/08/onderlinge_overlegprocedures_ve_renigde_staten_en_nederland.html)

<sup>18</sup> See <http://www.minfin.nl/nl/actueel/nieuwsberichten,2006/07/Onderlinge-overlegprocedure-met-Frankrijk.html>



### 5.3 Indicative course of mutual agreement procedure

If the Netherlands' competent authority decides, on the basis of the information, facts and circumstances presented, that there are sufficient grounds for the request and that it cannot resolve the issue unilaterally, it will seek to resolve the issue by means of a mutual agreement procedure with the competent authority of the other state or states. The Netherlands will invoke a mutual agreement procedure (i.e. contact the other competent authority) at the start of the two-year period referred to above (see section 5.1).

### 5.4 Netherlands' competent authority's position paper

As soon as possible and in any event no later than four months after the start of the two-year period<sup>19</sup> the Netherlands' competent authority will send a position paper to the competent authorities of the other country or countries. This position paper must contain:

- the Netherlands' competent authority's assessment of the issue and the extent to which it believes there to be taxation that is not in accordance with treaty provisions;
- the proposed solution or direction in which a solution can be sought;
- other underlying documents considered relevant.

The mutual agreement procedure is an inter-state matter to be resolved by the relevant competent authorities. The taxpayer is consequently not directly involved in the authorities' exchange of views. This in turn means that the taxpayer will not receive copies of correspondence between the competent

<sup>19</sup> In other words, no later than four months after the final assessment has been determined and the taxpayer's full request has been received (by the other competent authority).

authorities. More information on the exchange and confidentiality of information can be found in section 8.3.

#### **5.5 Response from other competent authority: agreement or position paper**

There are in principle two ways in which the other competent authority can respond to receipt of a position paper. It can notify the Netherlands' competent authority that it agrees with the proposed solution. Or it can disagree and respond by sending a position paper containing its response to the solution proposed in the Dutch position paper. In both situations, the EU Arbitration Convention stipulates a time limit of six months for a response.

#### **5.6 Indicative course of mutual agreement procedure if other treaty state makes the adjustment**

If the *other* treaty state that has made an adjustment, the steps outlined in sections 5.4 and 5.5 will be reversed. Once the Netherlands' competent authority forwards the request to the other competent authority (as outlined in section 4.2), the latter will assess the case and will normally inform the Netherlands' competent authority of its response in the form of a position paper. If the request is based on the EU Arbitration Convention, the other competent authority will also indicate when the two-year period will start (see Article 7(1) of the EU Arbitration Convention). The EU Arbitration Convention stipulates a time limit of four months from the start of the two-year period.<sup>20</sup>

There are in principle two ways in which the Netherlands' competent authority can respond when it receives a position paper. It can either notify the other competent authority that it agrees with the proposed solution. Alternatively it can disagree and send the other competent authority a position paper containing its response to the proposed solution.

This position paper sent in reply to the other competent authority must contain:

- a proposed time frame for completing the mutual agreement procedure;
- a proposal to meet the other competent authority or authorities.

In both situations, the EU Arbitration Convention stipulates a time limit of six months for a response. This period starts upon receipt of the position paper from the other competent authority.

#### **5.7 If competent authorities disagree or continue to disagree: new exchange of written communications and possible meeting of competent authorities**

If competent authorities disagree or continue to disagree on whether there is or could be double taxation, or if they cannot reach mutual agreement on the proposed solution, a new round of written

communications can be held in order to find a solution. If this does not result in sufficient progress, the Netherlands' competent authority will make extra efforts (such as e-mails, telephone calls and meetings) to resolve the matter as quickly as possible.

The taxpayer may be asked to provide extra information.

### **5.8 Taxpayer's role**

Although the mutual agreement procedure is a government-to-government matter and the taxpayer is in that respect not directly involved (see section 5.4), the competent Dutch authority will endeavour to keep the taxpayer as fully informed as possible throughout the procedure. It will aim in this respect to take as much account as possible of the taxpayer's view of the situation. As stated in section 2.5, the taxpayer's role in this respect is optional and can be oral or in writing. The Netherlands' competent authority will also strive to inform the taxpayer as quickly as possible of any unexpected changes in the course of the procedure.

## **6 Outcome and implementation of mutual agreement procedure**

The outcome of the mutual agreement procedure will be advised to the taxpayer in writing as soon as possible.

If the mutual agreement procedure results in agreement between the competent authorities, the taxpayer can in principle choose either to accept or reject the outcome in full. The competent authority must be notified in writing by the taxpayer as to whether the outcome of the mutual agreement procedure will be accepted or rejected.

A taxpayer wanting to reject the outcome may choose to use remedies that are still available in domestic law.<sup>21</sup> This option will only, however, be available in the case of an early mutual agreement procedure.

It should be noted that the taxpayer is not allowed to reject the outcome if the request was based on the EU Arbitration Convention and the outcome is the result of an advisory commission being established. In such cases, the solution agreed by the competent authorities is binding, both on the relevant competent authorities and on the taxpayer. The taxpayer will be asked to confirm receipt of the outcome in writing. This is a formality that is required so that certain tax administrations in the EU can complete their internal handling of the procedure.

---

<sup>20</sup> In other words, no later than four months after the final assessment has been determined *and* the taxpayer's full request has been received (by the other competent authority).

<sup>21</sup> See section 3.1.2.2 for details of the domestic-law remedies that can be used for aspects not covered by the mutual agreement procedure.

### **6.1 Implementation of outcome: official reduction**

It regularly happens that by the time another state makes an adjustment, the corresponding assessments in the Netherlands have already been irrevocably determined. If applicable, the way then to make a corresponding adjustment in the Netherlands is by means of an official reduction ('reduction *ex officio*') in the assessment. The Decree on reductions *ex officio* in final tax assessments (the Decree of 25 March 1991 (DB89/735)) gives the tax administration a period of five years (plus any extension that may be allowed) in which to grant a request for an official reduction. In certain situations in which a mutual agreement procedure has been conducted, the five-year period has been found to be too short, despite compliance with the time limits that the relevant tax treaty or the Arbitration Convention set for filing requests. In such cases, the five-year period may, if necessary, be extended.

## **7 What happens if agreement is not reached?**

Although it will not occur often in practice, competent authorities may be unable to reach agreement and unable to eliminate the double taxation (i.e. taxation that is not in accordance with the treaty) to which a taxpayer is subjected.

In such cases, the taxpayer can obviously choose (in the event of an early mutual agreement procedure) to use remedies still available in domestic law. These domestic remedies, however, offer no guarantee that the taxation contravening the treaty will be eliminated, given that they involve only two of the three interested parties. If the tax inspector is found to have acted correctly (either in all or some respects of the assessment), the double taxation will continue to apply.

In certain cases it will also be possible to seek arbitration if the mutual agreement procedure does not produce a solution.

### **7.1 Arbitration under bilateral tax treaties**

A limited number of Dutch tax treaties contain provision for arbitration. The competent authorities in these cases can agree to seek arbitration voluntarily, in contrast to what applies in the case of action under the EU Arbitration Convention (see below). If the authorities agree to arbitration, the arbitration committee's decision will in almost all cases be binding, both on the competent authorities and on the relevant taxpayer(s).

The following tax treaties signed by the Netherlands currently contain an arbitration provision: Albania, Armenia, Canada, Croatia, Egypt, Estonia, Georgia, Iceland, Kazakhstan, Kuwait, Latvia, Lithuania, Macedonia, Moldova, Poland, Russia, Slovenia, Uganda, Ukraine, Uzbekistan, the United States of America and Venezuela.

Under the provisions agreed, both competent authorities have to agree to accept the results of arbitration. Under the arbitration provision agreed in 2007 as part of the OECD Model Convention, arbitration is mandatory if the competent authorities fail to reach a solution. As stated in section 1.2.2, the Netherlands is seeking to include provisions for mandatory arbitration in all new and existing tax treaties.

## **7.2 Arbitration under the EU Arbitration Convention**

The EU Arbitration Convention provides for mandatory arbitration if the competent authorities in a mutual agreement procedure are unable to reach agreement within two years. The relevant treaty states (EU member states) are then obliged to establish an advisory commission. By signing the Convention the treaty states have undertaken to accept this commission's advice if they are unable to eliminate double taxation resulting from a profit adjustment by one of their authorities.

The advisory commission will deliver its advice within six months of request. Within six months of receiving the commission's advice, the competent authorities must then take measures to eliminate the double taxation. The measures taken by the competent authorities may differ from the advisory commission's advice, but they must in all cases result in the double taxation being eliminated. If the competent authorities cannot reach agreement on how to proceed, the advisory commission's advice will be binding on all parties.

## **8 Additional consequences of processing request for mutual agreement procedure**

### **8.1 Deferral of tax payment**

If the Netherlands is the state causing the double taxation (by, for example, making an adjustment in the income reported by a taxpayer), the Dutch tax administration will, at the taxpayer's request, grant a deferral of payment on that part of the tax charge that relates to the double taxation. It should be noted that in the event of a request for an early mutual agreement procedure, deferral will automatically be granted.

In principle, deferral will be granted until both the domestic and the international procedures for resolving the dispute have been completed. The policy in this respect will be based on the policy applying to objections lodged against tax assessments (see Article 25(2) of the Tax Collection Guidelines (*Leidraad Invordering*) 2008). This means that the taxpayer will not suffer any loss of interest other than the obligatory assessment and collection interest (see section 8.2). This resolves the interest and financing problems that can result from mutual agreement and arbitration procedures. In certain exceptional cases, deferral can also be granted if the other state makes an adjustment (see Article 25(2) referred to above).



## **8.2 Assessment and collection interest / Penalties**

In addition to the actual adjustment or correction discussed in the mutual agreement or arbitration procedures, differences in domestic regulations in respect of the assessment and collection interest charged by states may result in a disproportional increase in the interest payable during the mutual agreement procedure. In some cases, the interest payable may even exceed the amount of the tax. Article 30k of the Dutch State Taxes Act (*Algemene wet inzake rijksbelastingen*) and Article 31a of the Dutch Collection of State Taxes Act (*Invorderingswet*) 1990 allow parties to deviate in certain instances from the provisions in domestic law while they are consulting on a mutual agreement procedure. During the course of mutual agreement and arbitration procedures the Netherlands' competent authority will seek to align the assessment and collection interest charged to the taxpayer in one state with that payable to the taxpayer in the other state.<sup>22</sup> A protocol to this effect has, for example, been agreed with France.<sup>23</sup>

If a mutual agreement procedure being conducted also covers a penalty that has been imposed, the policy applied will be in line with Article 25(2)(4) in conjunction with Article 25(2)(3) of the Tax Collection Guidelines 2008.

## **8.3 Exchange and confidentiality of information**

When invoking a mutual agreement procedure, the Netherlands' competent authority has to provide the other competent authority with specific information on the situation and the international double taxation involved. Strictly speaking, the provision of such information to another competent authority can be regarded as an exchange of information within the meaning of the International Assistance (Levying of Taxes) Act (*Wet op de internationale bijstandsverlening*). If the mutual agreement procedure between the Netherlands and the other competent authority is conducted at the explicit request of a taxpayer, the Netherlands' competent authority's provision of information to the other competent authority in this way can in principle be regarded as being provided with the knowledge and consent of the taxpayer. In such cases, no notification as referred to in Article 5(2) and Article 7(2) of the International Assistance (Levying of Taxes) Act will be needed.

The confidentiality of the information used or exchanged between competent authorities in a mutual agreement procedure and possibly made available to an arbitration or advisory commission is protected by Article 67 of the Dutch State Taxes Act and the relevant provisions in the individual tax treaties. Confidentiality of information is important, not least because disclosing sensitive or confidential information, such as trade or commercial secrets, could seriously damage the taxpayer's competitive position. Everything possible will therefore be done to protect such information.

---

<sup>22</sup> See, for example, section 27 of the Protocol to the Belgian/Dutch tax treaty.

<sup>23</sup> See <http://www.minfin.nl/nl/actueel/nieuwsberichten,2006/07/Onderlinge-overlegprocedure-met-Frankrijk.html>.

#### **8.4 Legal consequences and establishment of precedent**

A mutual agreement procedure between competent authorities generally involves assessing a combination of facts and circumstances in specific years against the background of the rules applying at that time. This means that the outcome of a mutual agreement procedure and/or arbitration applies only to that specific case and only in respect of the specific period for which the relevant mutual agreement procedure and/or arbitration was conducted.

If the mutual agreement procedure (and/or arbitration) relates to transfer pricing adjustments between associated enterprises, it may be possible in certain circumstances to use the outcome of a mutual agreement procedure as the basis for a bilateral or multilateral advance pricing agreement for the years following the years to which the mutual agreement procedure relates.

If a large number of cases are found to involve the same issue, the competent authorities of the specific states may decide to agree on and publish a joint position paper on the issue. Once this has been published, taxpayers in a similar situation can invoke the position detailed in the publication.<sup>24/25</sup>

#### **9 Relationship with other procedures (unilateral or multilateral APA/corresponding adjustments outside mutual agreement procedures)**

Even though a mutual agreement procedure (whether early or extra early) may not be possible because, for example, the assessment has not yet been declared final or one of the other criteria has not or not yet been met, it may still be possible to hold bilateral consultations or for the Netherlands to determine its position unilaterally.

The tax inspector may be able to give advance approval of the transfer prices to be applied on international transactions. This will be in the form of a unilateral, bilateral or multilateral Advance Pricing Agreement ('APA'), as referred to in the Decree of 11 August 2004 (No. IFZ2004/124M). An APA gives advance certainty on what is considered 'arm's-length remuneration' for a specific transaction. An APA can also include a request to backdate the agreement to include previous years. In this way, an APA also allows taxpayers to respond quickly and effectively to investigations, audits or actual or proposed adjustments by the Netherlands or other countries involved in the transaction. Requests for an APA involve other requirements and procedures than requests for mutual agreement procedures. The above decree provides details of these requirements.

---

<sup>24</sup> An example of this is the joint scheme agreed by the Dutch and German competent authorities on allocating profits to Dutch flower traders' permanent establishments in Germany. Details of this scheme (IFZ 2002/715M) were published in the Government Gazette of 27 September 2002, No. 186.

<sup>25</sup> In certain cases the tax treaty itself also allows the solution agreed in a specific situation to be made binding in other similar cases. See, for example, section 3 of the Protocol to the Belgian/Dutch tax treaty.

A situation may also arise in which another state makes a transfer pricing adjustment. Here, too, the taxpayer can ask the tax inspector to confirm whether a corresponding adjustment in the Dutch assessment will be possible. More information on this can be found in section 2.4.1.

#### **10 When the decree will take effect**

This decree will take effect on the second day after the date of the Government Gazette in which it is published, with retroactive effect from the date of this decree.

#### **11 Repeal of previous decrees**

This decree will replace the State Secretary for Finance's decree of 13 October 1997 (No. IFZ97/1113M) and sections 3.1 – 3.1.8 (mutual agreement procedures) of the State Secretary for Finance's decree of 30 March 2001 (No. IFZ 2001/295).

This decree will be published in the Government Gazette.

The Hague, 23 September 2008.

State Secretary for Finance

On whose behalf:

Director-General for Tax and Customs Policy and Legislation

T.W. Langejan

