



Belgium ratifies Protocol to EU Arbitration Convention

Belgium has ratified the Protocol amending the EU Arbitration Convention by Act of 23 February 2003, published in the Belgian State Gazette of 30 July 2003 (p. 39.720).

The original convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises¹ expired at the end of 1999. In 1998, political agreement was reached to extend the applicability of the Arbitration Convention, and, to this end, the EU Member States signed a protocol on May 25, 1999².

Once in force, this protocol will extend the Convention for further successive periods of five years, but only after all Member States have ratified the agreement. The majority of the 15 EU Member States have now done so, with the exception of Greece, Ireland, Italy, Portugal and Sweden. It will, in any event enter into force retroactively as of 1 January 2000 (article 2 of the Protocol).

In the meantime, tax payers cannot validly submit a case to start the proceedings under the EU Arbitration Convention to seek a downward profit adjustment at home if another Member State's tax authorities have made an upward profit adjustment.

While Italy simply considers the Arbitration Convention as non existing, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom are willing to deal with claims under the procedure of the EU Arbitration Convention if the other Member State agrees to do so³. If the other Member State is not willing to do so, they fall back on the arbitration procedure under the double taxation agreement.

The other Member States consider the Convention, and in particular the two year period for the mutual agreement procedure as merely suspended. They would be willing to initiate a mutual agreement procedure under the double taxation agreement⁴ with the other Member State, either automatically (Belgium, Denmark, Finland, France, Germany, Portugal and Sweden), upon information by the taxpayer (Spain, the Netherlands, and Greece), or if so requested by the taxpayer (Austria and Italy).

However, the provision relating to the mutual agreement procedure in most double taxation conventions does not require the competent authorities to reach an agreement to eliminate double taxation. The only requirement is for them to endeavour in good faith to reach an agreement.

In its Administrative Note of 7 July 2000 (for previous coverage, see Doc 2000-22465), the Belgian Tax Authorities has already announced that they will accept applications by tax payers, and that they might start a preliminary enquiry or even start discussions with another Member State which takes a similar position during the transitory period. The procedures and the time

¹ Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, O.J. L. 225, 20 Augustus 1990, p. 10.

² O.J., C 202 , 16/07/1999 p. 1.

³ Working documents of the EU Joint Transfer Pricing Forum, nr JTPF/007/2002/REV1/EN, 'Procedural Improvements to the Arbitration Convention and Related Mutual Agreement Procedures'.

⁴ See Article 25 of the OECD Model Tax Convention on Income and on Capital.



limits laid down in the Convention, will be suspended until the Protocol enters into force. The Belgian Tax Authorities do, however, not want to go as far as to set up an advisory commission or adopt a mutual agreement.

Marc Quaghebeur
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