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EU JOINT TRANSFER PRICING FORUM

QUESTIONNAIRE ON THE INTERACTION BETWEEN MAP

AND JUDICIAL APPEALS

ART 7.3 OF THE ARBITRATION CONVENTION

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Questionnaire on Article 7(3) of the Arbitration Convention

1. Background information

The inter-action of domestic legal procedures with the Arbitration Convention is recognised by many observers as a difficult area. Some MS have previously attempted to clarify their positions so that taxpayers can better understand the options open to them to resolve double taxation. However, the positions of not all MSs are clear. The Forum has therefore decided first to clarify the status quo and if possible identify improvements in this area that can be made to ensure the better elimination of double taxation in the EU.

This questionnaire attempts to clarify the position over what is meant by Article 7(3) of the Arbitration and what it actually means to apply or not to apply that Article.

1.1. *Article 7 of the Arbitration Convention*

This article states:

"1. If the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6 (1), they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question.

Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in the first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given.

2. The submission of the case to the advisory commission shall not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters.

3. Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered. This provision shall not affect the appeal if and in so far as it relates to matters other than those referred to in Article 6.

4. The competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1.

5. In so far as the provisions of paragraphs 1 to 4 are not applied, the rights of each of the associated enterprises, as laid down in Article 6, shall be unaffected."

1.2. List of Member States having made a unilateral statement declaring that they will apply Article 7(3):

In 1995:

- France
- and the United Kingdom

In 2005:

- Belgium,
- the Czech Republic,
- Latvia,
- Hungary,
- Poland,
- Portugal,
- Slovakia
- and Slovenia

Regrettably, it is not clear what is meant by "apply."

2. Questionnaire

In order to assess the situation prevailing in each Member State it was agreed by the members of the JTPF to clarify how their tax administration applies Article 7 (3) in practice. It was considered that this situation can lead to long delays in the application of the Arbitration Convention and the elimination of double taxation. **Therefore Member States are invited to complete the following questionnaire and to send their answers to the JTPF secretariat by Thursday 20th December 2007.**

Question 1:

Considering Art. 7(3) "*Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered.*", can your Member State/Tax administration derogate from the decisions of their judicial bodies?

Question 2:

Those MS who can derogate, what do they consider to be a judicial body and when is the decision considered as final?

Question 3:

3.1 Those MS who can derogate, do they actually derogate in practice?

3.2 If the case has so far never arisen, would those countries who can derogate be willing to derogate in practice?

Question 4:

MS who cannot derogate, do they stop in practice all negotiations with the other MS or do they continue and inform the taxpayer once they have reached an agreement so that he has the choice to see the agreement implemented or to continue with his judicial appeals?

Question 5:

In general it may be useful to learn about any experience with the application of art 7(3). Where it is not yet covered by your answers to the previous questions could you describe your national experiences?