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EU JOINT TRANSFER PRICING FORUM
BUSINESS CONTRIBUTION ON THE INTERPRETATION
OF THE PROVISIONS OF THE ARBITRATION
CONVENTION

PREPARED BY A BUSINESS MEMBER

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Accession country and eligibility to Arbitration Convention procedure

1. Issue presented

We have encountered requests whether the Arbitration Convention can be availed off with respect to the so-called EU Accession Countries and in particular, what the effective date is for the Arbitration Convention for the respective Accession Countries.

2. Facts

An adjustment is proposed in one of the Arbitration Convention signatory Countries by the domestic tax authorities as regards the return for the related party distributor of an entity located in an Accession Country. The country where the primary adjustment is made is party to the Arbitration Convention (“original Arbitration Convention country”). In issue is (1) whether and (2) when the Arbitration Convention can be availed off to avoid double taxation between the original Arbitration Convention country and the Accession Country in issue.

For all practical purposes, let’s assume as hypothetical number 1 that The Netherlands would be proposing an adjustment that affects a related party distributor in Estonia, that conducts business with a Netherlands based manufacturer. The adjustment regards the tax return of 2005 a calendar year taxpayer and is made in July of 2007. The filing for access to the Arbitration Convention is made today, October 15, 2007.

Hypothetical number 2 assumes that the manufacturer is located in Belgium, all other facts are the same.

Summary facts:

Tax year in issue: 2005 return filed timely in 2006

Adjustment proposed: timely, in July 2007

Request for Arbitration Convention relief: timely, on October 15, 2007

3. Discussion

The Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Arbitration Convention of December 21, 1995 (the “*1995 Accession Convention*”) provides in relevant part¹ that it shall enter into force as between the States which have ratified it, on the first day of the third month following deposit of the last instrument of ratification by the Republic of Austria or the Republic of Finland or the Kingdom of Sweden and by one State which has ratified the Arbitration Convention.

The 1995 Accession Convention enters into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification. The 1995 Accession Convention has been ratified by all eligible and relevant States, and as such appears to pose no obstacle to access to the Arbitration Convention at this time.

¹ Article 5 of the 1995 Accession Convention

The Convention for 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 Arbitration Convention of December 8, 2004 (the “2004 Accession Convention” provides in relevant part² that it shall enter into force as between the Contracting States which have ratified, accepted or approved it, on the first day of the third month following deposit of the last instrument of ratification, acceptance or approval by these States. This 2004 Accession Convention incorporates the May 25, 1999 Protocol extending the Arbitration Convention.

As such, for the countries that have signed and ratified the 2004 Accession Convention, the Arbitration Convention will be in effect on the first day of the third month following deposit of the last instrument of ratification, acceptance or approval by these States and will apply between those States and other States that are signatories to the Arbitration Convention. For our hypothetical examples, it is relevant that the Estonian authorities have ratified the 2004 Accession Convention so that it is in effect as of April 2007.

The eligible and relevant States that have not yet ratified the 2004 Accession Convention at this time, to the best of my knowledge, are: Austria, Belgium, France, The United Kingdom, Italy and Slovenia. This seems to indicate that no Arbitration Convention procedure option currently exists between the 2004 Accession Countries (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) and Austria, Belgium, France, The United Kingdom, Italy and Slovenia, but that application of the Arbitration Convention is technically possible between all of the 2004 Accession Countries (with the exception of Slovenia) and all other signatories to the Arbitration Convention.

If this is correct, hypothetical number 2 would appear to not be eligible for relief under the Arbitration Convention.

The date as of which a claim for application of the Arbitration Convention can be made would be any date within the 3-year period of article 6(1) of the Arbitration Convention within which a request is to be presented to the competent authorities of the Contracting State (the 3-year period since the so-called first notification³) as long as that date falls on or after the first day of the third month following deposit of the last instrument of ratification, acceptance or approval by the respective States (the entry into-force date). Thus, there is no longer a rule in place that bars access to the Arbitration Convention for any country that has already ratified the Arbitration Convention (as unfortunately was the case during the ratification period of the Protocol extending the Arbitration Convention).

This seems to mean that for hypothetical number 1, there would be access to the Arbitration Convention as long as the date of filing for relief under the Arbitration Convention is within 3 years from the date of first notification (let’s assume that date of first notification would be also October 2007) and after the entry into force date. Estonia has ratified the Accession Convention with an effective date of April 2007. As such, a current filing for access to the Arbitration Convention would seem to be acceptable for a Netherlands made adjustment made in July 2007

² Article 5 of the 2004 Accession Convention

³ This is counted as of the first tax assessment notice or equivalent which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention (e.g. due to a transfer pricing adjustment)

relating to tax/calendar year 2005 and an Estonian corresponding adjustment (or however the MAP procedure in the end resolves double taxation) because the Arbitration Convention is in effect for Estonia as of April 2007 (Please also see annex to this memo for effective date overview). The request for relief under the Arbitration Convention is made in time, as it is within the 3 year statute of limitations.

3 Conclusion

Based on the above, it would seem that the Arbitration Convention can technically apply to taxable years *that are prior to the entry into force date of the Arbitration Convention* for an Accession Country (the adjustment relates to 2005, the Arbitration Convention is in effect for Estonia as of April 2007), as long as the request is filed timely (within the 3-year period after first notification) *and* the time of filing the request takes place *after* the date the Arbitration Convention is effective for the respective Accession Country. In this respect, the date of the first notification of a transfer pricing adjustment, regardless what taxable year that notification relates to (and assuming the notice is within the statute of limitations within which the revenue authorities can formally still propose adjustments) appears determinative for whether a year can be covered by the Arbitration Convention.

That said, one caveat may apply to this observation, however. You should know that 8 of the 13 Accession Countries are not members of the OECD (Bulgaria, Estonia, Cyprus, Latvia, Lithuania, Malta, Romania and Slovenia) meaning that the 1995 OECD Guidelines technically do not apply in those countries unless the Guidelines happen to have been explicitly implemented into domestic law. The reason reference is made to the OECD Guidelines, is that according to the Arbitration Convention, however, the arm's length principle will be applied, as advocated by the OECD. Furthermore, as far as I know, the OECD member countries party to the Arbitration Convention have each domestically decided in their domestic law ratifying the Arbitration Convention that the Arbitration Convention applies *to procedures commenced after the date the Convention has become effective*, rather than taxable years commenced after the date the Convention has become effective (as is usually the case with bilateral treaties for the avoidance of double taxation). So the Arbitration Convention, under the "procedures" interpretation, allows for a bit of a retroactive effect. This seems very sensical, as otherwise, the Arbitration Convention would not be accessible for at least 2 years after its effective date (first year/effective date year tax return still needs to be filed and audited before an adjustment can be brought under the Arbitration Convention...) In light of this, there is a concern that it cannot be ruled out that Non-OECD Accession Countries may argue that the Arbitration Convention can technically only apply to taxable years that regard the tax/calendar year of entry into force of the Arbitration Convention or thereafter for that particular Non-OECD Accession Country (for our hypothetical number 1 that would mean for Netherlands adjustments relating to the year 2007). This is not the official EU interpretation as far as I could find, but as the Arbitration Convention or 2004 Accession Convention do not expressly address this issue, it simply cannot be excluded that this line of reasoning would be applied if the Non-Accession Countries would have objections to a case brought under the Arbitration Convention that is filed timely in 2007, yet regards years prior to 2007 and prior to the effective date of the Arbitration Convention for the Accession Country.

In this case, Estonia could perhaps argue that the year 2005 is not covered by the arbitration convention, even though the adjustment that relates to 2005 is only proposed in 2007 and actually applied (and the request filed) after the moment of ratification of the 2004 Accession Convention.

We are uncertain whether a filing of a request for arbitration in this case will be accepted. I have attached a grid showing all dates of ratification, allowing you to determine what technically the effective date is of the Arbitration Convention for that respective country. This is an actual case, although the facts (countries/dates etc.) are adjusted for purposes of anonymity.

Proposal

It is suggested that within the EUJTPF, and within the monitoring scope of the EUJTPF, it is reviewed and clarified whether all countries signatory to the Arbitration Convention, Accession Country or other, agree that the effective date applies to *procedures* filed timely rather than taxable years.

Annex : Effective dates

Countries	Arbitration Convention Entry into force	1995 Accession Convention Entry into force	2004 Accession Convention Entry into force
Austria		01/10/1999	01/11/2007
Belgium	01/01/1995	01/04/2002	
Bulgaria			<i>01/01/2007</i>
Cyprus			01/10/2006
Czech Republic			01/10/2006
Denmark	01/01/1995	01/05/1999	01/04/2006
Estonia			01/04/2007
Finland		01/05/1999	01/09/2006
France	01/01/1995	01/02/2003	
Germany	01/01/1995	01/10/2000	01/06/2007
Greece	01/01/1995	01/04/2005	01/06/2007
Hungary			01/06/2006
Ireland	01/01/1995	01/05/2004	01/08/2006
Italy	01/01/1995	01/05/1999	
Latvia			01/06/2007
Lithuania			01/12/2006
Luxembourg	01/01/1995	01/05/1999	01/09/2006
Malta			01/11/2006
Netherlands	01/01/1995	01/05/1999	01/06/2006
Poland			01/02/2007
Portugal	01/01/1995	01/05/1999	01/05/2007
Romania	01/01/1995		<i>01/01/2007</i>
Slovakia			01/04/2006
Slovenia			
Spain	01/01/1995	01/01/2000	01/11/2007
Sweden		01/04/2000	01/09/2006
United Kingdom	01/01/1995	01/05/1999	01/09/2007