

## **Memorandum regarding paragraph 5 of Article 24 of the Agreement between Japan and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and to certain other Taxes and the Prevention of Tax Evasion and Avoidance**

The competent authorities of Japan and the Federal Republic of Germany have established this mode of application of the arbitration proceedings provided for in paragraph 5 of Article 24 of the Agreement between Japan and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and to certain other Taxes and the Prevention of Tax Evasion and Avoidance signed at Tokyo on 17 December 2015 (hereinafter referred to as “the Agreement”).

The competent authorities will follow the procedures related to a mutual agreement procedure provided for in Article 24 of the Agreement (hereinafter referred to as “Mutual Agreement Procedure”) in this Memorandum in good faith.

### **1. Request for submission of case to arbitration**

A request for arbitration pursuant to paragraph 5 of Article 24 of the Agreement (hereinafter referred to as a “request for arbitration”) will be made in writing and sent to one of the competent authorities through:

- a) in the case of Japan, the Office of Mutual Agreement Procedures, National Tax Agency; or
- b) in the case of the Federal Republic of Germany, the Federal Central Tax Office.

The request for arbitration will be made in English or in another language that each of the competent authorities may, at its own discretion, accept and will contain sufficient information to identify the case. The request for arbitration will also be accompanied by a written statement by the person who made this request for arbitration that no binding decision on the same issues has yet been rendered by a court or administrative tribunal of either Contracting State.

Within 14 days after the receipt of the request for arbitration, the competent authority which received it will send a copy of that request for arbitration and the accompanying statements to the other competent authority. If the request for arbitration is made in a language other than English to one of the competent authorities, an English translation of the request for arbitration and the accompanying statements will be sent to the other competent authority.

### **2. Time for submission of a case to arbitration**

A request for arbitration may only be made after two years from the date on which a case presented to the competent authority of one Contracting State under paragraph 1 of Article 24 of the Agreement has also been presented to the competent authority of the other Contracting State. For this purpose, a case will be considered to have been presented to the competent authority of the other Contracting State only when the following information has been presented:

- a) the full name and address of the presenter of the case to the competent authority;
- b) the full name and address of any other person directly affected by the case;
- c) the taxable years concerned;
- d) the nature and date of the actions giving rise to the taxation allegedly not in accordance with the provisions of the Agreement and the related amounts in the currencies of both Contracting States;
- e) the following information provided by the person who presented the case to the competent authority with a copy of any supporting documents:
  - i) an explanation of why the person considers that there is taxation not in accordance with the provisions of the Agreement;

- ii) the relationship, situation or structure of the transactions and related parties involved; and
- iii) a copy of documents issued by the tax authority with regard to the taxation allegedly not in accordance with the Agreement;
- f) a statement indicating whether the person directly affected by the case has filed a notice of objection, notice of appeal or comparable documentation in either Contracting State; and
- g) any specific additional information requested by the competent authority referred to in paragraph 1 of Article 24 of the Agreement within 90 days after the receipt of the request for a Mutual Agreement Procedure under that paragraph.

If necessary, the competent authority of one Contracting State will send relevant information in English to the competent authority of the other Contracting State. The competent authority of that other Contracting State will assess it for completeness and, within 90 days after receiving the relevant information, 1) request any additional information from the person who made the request or 2) inform the competent authority which received the request for arbitration that it has received the information necessary to undertake substantive consideration of the case. Both competent authorities will ensure that any requested additional information is shared between them to maintain equal information levels. The competent authorities will confirm to each other the date on which all of the information referred to in this paragraph was presented. If further information from the person who made the request is requested by one or both of the competent authorities after confirming this date, this information will be forwarded to the other competent authority immediately upon receipt.

The competent authority to which a case has been presented under paragraph 1 of Article 24 of the Agreement will notify the person who made the request for a Mutual Agreement Procedure with regard to the starting date of the two-year period for that procedure.

### **3. Terms of Reference**

Within 90 days after the request for arbitration has been presented to both competent authorities, the competent authorities will decide on the issues to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the “Terms of Reference” for the case.

Notwithstanding the following paragraphs of this Memorandum, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these paragraphs and deal with such other matters as are deemed appropriate.

### **4. Failure to communicate the Terms of Reference**

If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 3, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period will constitute the tentative Terms of Reference.

Within 30 days after all the arbitrators have been appointed as provided in paragraph 5, the arbitrators will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of Reference based on the lists so communicated.

Within 30 days after the revised version has been received by both competent authorities, they will have the possibility to decide on different Terms of Reference and to communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will

constitute the Terms of Reference for the case.

If no different Terms of Reference have been decided on by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

## **5. Selection of arbitrators**

Within 90 days after the Terms of Reference have been received by the person who made the request for arbitration or, in the case described in paragraph 4, within 120 days after the request for arbitration has been received by both competent authorities, the competent authorities will each appoint one arbitrator.

Within 60 days after the latter appointment, the arbitrators so appointed will appoint a third arbitrator who will function as the chair of the arbitration panel.

If the competent authority of one of the Contracting States is unable to appoint an arbitrator within the prescribed time period, the highest ranking official of the OECD Centre for Tax Policy and Administration who is not a national of either Contracting State will suggest to that competent authority, in writing within 30 days after the end of that period, three candidates who are not nationals of the other Contracting State. Within 60 days after the receipt of those suggestions in writing, the competent authority will appoint one of the suggested candidates as an arbitrator.

If the appointment of the third arbitrator is not made within the required time period, each competent authority will, unless the competent authorities have decided otherwise, propose up to three candidates within 10 days after the end of that period. The arbitrators already appointed will appoint the third arbitrator, who will function as the chair of the arbitration panel, from among the candidates so proposed within 10 days after the receipt of the lists of candidates.

If any difficulties arise in selecting arbitrators, the competent authorities will consult with each other to resolve them.

The procedures specified in this paragraph will be followed *mutatis mutandis* if for any reason it is necessary to replace an arbitrator after the arbitration proceedings have begun.

## **6. Eligibility and appointment of arbitrators**

In accordance with the provisions of (i) and (iii) of subparagraph (b) of paragraph 10 of the Protocol to the Agreement:

- a) all arbitrators will have expertise or experience in international tax matters; and
- b) all arbitrators and their staff will not be employees of the tax authorities of the Contracting States, nor have dealt with the case presented pursuant to paragraph 1 of Article 24 of the Agreement in any capacity. The third arbitrator will not be a national of either Contracting State, nor have had his usual place of residence in either Contracting State, nor have been employed by either Contracting State.

Each arbitrator will be free to be assisted by suitable staff. However, no separate remuneration will be paid for such staff by the competent authorities.

An arbitrator will be considered to have been appointed when a letter confirming that appointment has been signed both by the person or persons who have the power to appoint that arbitrator and by the arbitrator himself.

## **7. Communication of information and confidentiality**

In accordance with the provisions of (iv) of subparagraph (b) of paragraph 10 of the Protocol to the Agreement, the competent authorities will ensure that all arbitrators and their staff agree, in statements sent to each competent authority, prior to their acting in an arbitration proceeding, to abide by and be subject to the same confidentiality and

non-disclosure obligations as those described in paragraph 2 of Article 25 of the Agreement and under the applicable domestic laws of the Contracting States.

#### **8. Failure to provide information in a timely manner and suspension of a Mutual Agreement Procedure**

Notwithstanding paragraph 5, where both competent authorities decide that the failure to resolve an issue within the two-year period referred to in paragraph 5 of Article 24 of the Agreement is mainly attributable to the failure of the person directly affected by the case to provide relevant information in a timely manner, the competent authorities may postpone the appointment of the arbitrator for a period of time corresponding to the delay in providing that information.

Notwithstanding paragraph 5, if the failure to resolve an issue within the two-year period referred to in paragraph 5 of Article 24 of the Agreement is attributable to the fact that the Mutual Agreement Procedure was suspended on request from the presenter of the case, the competent authorities may postpone the appointment of the arbitrator for a period of time corresponding to the period of such suspension.

The competent authorities will determine the period of time corresponding to the delay and the suspension. The competent authority to which a case has been presented under paragraph 1 of Article 24 of the Agreement will notify the person who made the request for arbitration regarding the determined period of time.

#### **9. Procedural and evidentiary rules**

In line with this Memorandum and the Terms of Reference, the arbitrators will adopt those procedural and evidentiary rules that they deem necessary to resolve the issues set out in the Terms of Reference.

In accordance with the provisions of subparagraph (c) of paragraph 10 of the Protocol to the Agreement, the competent authorities will provide the information, including confidential information, necessary for the arbitration decision to all arbitrators and their staff without undue delay.

The working language of the arbitration proceedings will be English. All arbitrators may unanimously decide to use another working language without being entitled to a translation of the documents into that other working language by the competent authorities. Notwithstanding the decision to use another working language, the arbitration decision will be presented to the competent authorities in line with paragraph 14 of this Memorandum and be in writing, in English language.

Unless the competent authorities decide otherwise, any information (including any information provided by the person who made the request for arbitration or his representatives in writing under paragraph 10) that was not available to both competent authorities before the request for arbitration was received by both of them will not be taken into account for purposes of the arbitration decision.

#### **10. Participation of the person who requested the arbitration**

The person who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing, in the English language, to the same extent that he can do so during the Mutual Agreement Procedure.

#### **11. Logistical arrangements**

Unless decided otherwise by the competent authorities, the competent authority to which the case giving rise to the arbitration was initially presented will be responsible for the logistical arrangements for the telephone, video or face-to-face meetings of the arbitration panel and will provide the administrative personnel necessary for the conduct of the arbitration proceedings. The administrative personnel so provided will report only

to the chair of the arbitration panel concerning any matter related to those proceedings.

As far as possible, the arbitrators will use telephone and video conferencing to communicate among themselves and with both competent authorities. If a face-to-face meeting involving additional costs is necessary, the chair will inform the competent authorities accordingly. Within 30 days after the chair has informed the competent authorities that a face-to-face meeting of the arbitration panel should be held, the chair will obtain approval from both competent authorities on whether the meeting will be held at all and if so, when and where.

## **12. Costs**

In conformity with the provisions of (v) of subparagraph (b) of paragraph 10 of the Protocol to the Agreement:

- a) each competent authority and the person who requested the arbitration will bear the costs related to his own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of his position);
- b) each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority together with that arbitrator's travel, telecommunication and administrative costs which are related to the specific case, including the costs of translation and interpretation;
- c) the costs of the chair of the arbitration panel and other expenses associated with the conduct of the proceedings will be borne by the competent authorities in equal shares. The term "other expenses associated with the conduct of the proceedings" in (v) of subparagraph (b) of paragraph 10 of the Protocol to the Agreement will not include the costs related to the logistical arrangements for the meetings of the arbitration panel and to the administrative personnel necessary for the conduct of the arbitration proceedings described in paragraph 11. Those costs will be borne by the competent authority to which the case giving rise to the arbitration was initially presented; and
- d) each arbitrator appointed by the competent authorities will receive remuneration of 1,000 euros or the equivalent amount in Japanese yen for each day of the arbitration panel meetings or preparation. The chair of the arbitration panel will receive a remuneration that is 10% above that of the other arbitrators. The amount of remuneration may be reviewed, as necessary, at the request of each competent authority, to reflect inflation or deflation, exchange rate volatility or other circumstances appropriately.

In general, each arbitrator will be compensated for no more than seven days of work on the arbitration. The arbitrators will provide adequate records of their days of work on the arbitration proceeding, including documents in which they confirm their respective work on the arbitration case on a given day or the minutes of their joint decision-making on the case, and submit these to the competent authorities in a timely manner. If the arbitrators require additional time to properly consider the case, the chair of the arbitration panel will contact both competent authorities to request additional time. The competent authorities of both Contracting States will decide together whether and how much additional time will be granted.

## **13. Applicable legal principles**

The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Agreement and, subject to these provisions, with those of the domestic laws of the Contracting States.

Issues of interpretation of the Agreement will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, having regard to the Commentaries of the OECD

Model Tax Convention as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction to the OECD Model Tax Convention. Issues related to the application of the arm's length principle should similarly be decided having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

#### **14. Arbitration decision**

The arbitration decision will be adopted by a simple majority of the arbitrators.

The arbitration decision will be presented exclusively to the competent authorities in writing, in the English language, and will be communicated to the person who made the request for arbitration by the competent authorities immediately thereafter. Where the competent authorities so decide, the arbitration decision will indicate the sources of law relied upon and the reasoning which led to its result. When requested by either competent authority, the chair of the arbitration panel will present the summary of the discussion in the arbitration panel to the competent authorities.

In accordance with the provision of subdivision (i) of subparagraph (d) of paragraph 10 of the Protocol to the Agreement, the arbitration decision has no formal precedential value. The arbitration decision will not be made public unless the person who made the request for arbitration, any directly affected person and both competent authorities consent in writing to the publication of all or specific parts of the arbitration decision as well as the form of publication..

#### **15. Time allowed for communicating the arbitration decision**

The arbitration decision will be communicated to the competent authorities within 180 days after the date on which the chair of the arbitration panel notifies in writing the competent authorities and the person who made the request for arbitration that he has received all the information necessary to begin consideration of the case.

Notwithstanding the first subparagraph of this paragraph, if at any time within 60 days or, where the appointment of the third arbitrator was not made within 60 days after the latter appointment of the first two arbitrators, 40 days after the date on which the last arbitrator was appointed, the chair of the arbitration panel, with the consent of one of the competent authorities, notifies in writing the other competent authority and the person who made the request for arbitration that he has not received all the information necessary to begin consideration of the case, then:

- a) if the chair of the arbitration panel receives the necessary information within 60 days after the date on which that notice was sent, the arbitration decision will be communicated to the competent authorities within 180 days after the date on which the information was received by the chair of the arbitration panel; and
- b) if the chair of the arbitration panel has not received the necessary information within 60 days after the date on which that notice was sent, the arbitration decision will, unless the competent authorities decide otherwise, be adopted without taking into account that information, even if the chair of the arbitration panel receives it later, and the arbitration decision will be communicated to the competent authorities within 240 days after the date on which the notice was sent.

Where the arbitration decision is not expected to be communicated within the required period due to any unforeseen events, the periods in this paragraph may be extended by a period decided by the competent authorities.

#### **16. Failure to communicate the arbitration decision within the required period**

In the event that the arbitration decision has not been communicated to the competent authorities within the period specified in paragraph 15, the competent

authorities may decide to extend that period for a period not exceeding 180 days or, if the competent authorities fail to do so within 30 days after the end of the period specified in paragraph 15, they will appoint a new arbitrator or arbitrators in line with paragraph 5.

#### **17. Final arbitration decision**

The arbitration decision will be final, unless it is found to be unenforceable by the courts of one of the Contracting States due to a violation of paragraph 5 of Article 24 of the Agreement or of paragraph 10 of the Protocol to the Agreement or due to a failure to follow any procedural rule in the Terms of Reference or in this Memorandum that may reasonably have affected the arbitration decision.

If the arbitration decision is found to be unenforceable due to the violation or the failure to follow any procedural rule, the request for arbitration will be considered not to have been made and the arbitration proceedings will be considered not to have taken place, except for the purposes of paragraphs 7 and 12.

#### **18. Implementing the arbitration decision**

The competent authorities will implement the arbitration decision by reaching a mutual agreement on the case that led to the arbitration within the period of 180 days after the arbitration decision was communicated to them and communicate this mutual agreement to the person who made the request for arbitration.

The period may be extended by a period decided by the competent authorities.

In accordance with the provisions of subparagraph (f) of paragraph 10 of the Protocol to the Agreement:

- a) in the event a case is pending in litigation or appeal, the mutual agreement that implements the arbitration decision will be considered not to be accepted by the presenter of the case if any person directly affected by the case who is a party to the litigation or appeal does not withdraw within 60 days after receiving the determination of the arbitration panel from consideration by the relevant court or administrative tribunal all issues resolved in the arbitration proceedings; and
- b) in this case, the case will not be eligible for any further consideration by the competent authorities.

#### **19. Where no arbitration decision will be delivered**

In accordance with the provisions of subparagraph (e) of paragraph 10 of the Protocol to the Agreement, the Mutual Agreement Procedure, including the arbitration proceedings, with respect to the case will terminate if at any time before the arbitration panel delivers a determination to the competent authorities of the Contracting States:

- a) the competent authorities of the Contracting States notify in writing the arbitrators and the person who made the request for arbitration that they have reached a mutual agreement to resolve the case pursuant to paragraph 2 of Article 24 of the Agreement;
- b) the presenter of the case withdraws the request for arbitration; or
- c) a binding decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting States during the arbitration proceedings.

If the Mutual Agreement Procedure, including the arbitration proceedings, with respect to the case is terminated for the reason referred to in b) or c) of this paragraph, the competent authorities will exchange letters to close the case undetermined.

#### **20. Final matters**

This Memorandum applies to any request for arbitration made pursuant to paragraph 5 of Article 24 of the Agreement after that provision has become effective. If the competent authorities have decided that the unresolved issues are not suitable for

resolution through arbitration and have notified the presenter of the case of such decision within two years from the presentation of the case to the competent authority of the other Contracting State, the arbitration proceedings will not take place in accordance with paragraph 5 of Article 24 of the Agreement.

The competent authorities may modify or supplement this Memorandum by an exchange of letters between them.

Signed in duplicate, in the English language.

For the Competent Authority of Japan

For the Competent Authority of the Federal  
Republic of Germany