

Mode of Application Concerning Paragraph 5 of Article 26 of the Convention between Japan and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

The competent authorities of Japan and New Zealand have established this Mode of Application of the arbitration process provided for in paragraph 5 of Article 26 of the Convention between Japan and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed at Tokyo on 10 December, 2012 (hereinafter referred to as "the Convention").

The competent authorities will follow the procedures in this Mode of Application in good faith.

1. Request for submission of case to arbitration

A request for arbitration pursuant to paragraph 5 of Article 26 of the Convention (hereinafter referred to as a "request for arbitration") will be made in writing and sent to the competent authority referred to in paragraph 1 of that Article through:

- (a) in the case of Japan, the Office of Mutual Agreement Procedures, National Tax Agency; and
- (b) in the case of New Zealand, International Revenue Strategy, Inland Revenue Department.

The request for arbitration 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 the request for arbitration that no decision on the same issues has already been rendered by a court or administrative tribunal in either Japan or New Zealand.

Within 10 days after the receipt of the request for arbitration, the competent authority that received it will send a copy of the request for arbitration and the accompanying statements to the other competent authority.

2. Time for submission of the 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 either Japan or New Zealand under paragraph 1 of Article 26 of the Convention has also been presented to the competent authority of the other country. For this purpose, a case will be considered to have been presented to the competent authority of the other country only if the following information has been presented:

- (a) the full name and address of the person who presented 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 not in accordance with the provisions of the Convention and the related amounts in the currencies of both Japan and New Zealand;
- (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 or will be taxation not in accordance with the provisions of the Convention;
 - (ii) the relationship, situation or structure of the transactions and related parties involved; and
 - (iii) copies of all documents issued by the relevant tax authority with regard to the taxation not in accordance with the Convention;
- (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 Japan or New Zealand; and
- (g) any specific additional information requested by the competent authority referred to in paragraph 1 of Article 26 of the Convention within 90 days after the receipt of the request for a mutual agreement procedure under that paragraph.

The competent authorities of Japan and New Zealand will confirm to each other the date on which all of the information referred to in this paragraph was presented.

The competent authority to which a case has been presented under paragraph 1 of Article 26 of the Convention will notify the person who made the request for a mutual agreement procedure of the starting date of the two year period for the mutual agreement procedure referred to in this paragraph.

3. Terms of Reference

Within 90 days after the request for arbitration has been received by the competent authorities of Japan and New Zealand, those 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 Mode of Application, the competent authorities of Japan and New Zealand may also 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 in the Terms of Reference.

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 time period referred to in paragraph 3 of this Mode of Application, that person and the competent authority of Japan and/or New Zealand 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 draft Terms of Reference.

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

Within 30 days after the revised version of the draft Terms of Reference have been received by the competent authorities of Japan and New Zealand, they will have the possibility to consider amended 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 amended Terms of Reference will constitute the Terms of Reference for the case.

If no amended Terms of Reference have been determined by the competent authorities of Japan and New Zealand and communicated in writing within that period, the revised version of the draft 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, where paragraph 4 of this Mode of Application applies, within 120 days after the request for arbitration has been received by the competent authorities of Japan and New Zealand, those 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 appointment of the third arbitrator is not made by the first two arbitrators within the required time period, unless otherwise decided, each competent authority will propose up to three candidates within 10 days after the end of that period. The arbitrators already appointed will appoint a 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.

The procedures specified in this paragraph will apply *mutatis mutandis* if for any reason it is necessary to replace an arbitrator after the arbitration process has begun.

Each competent authority will determine the remuneration of its appointed arbitrator. The mode of remuneration for the third arbitrator will be jointly decided on by the competent authorities of Japan and New Zealand before the appointment of the third arbitrator, taking into account the remuneration of the two other arbitrators.

6. Eligibility and appointment of arbitrators

In accordance with the provisions of items (i) and (iii) of subparagraph (b) of paragraph 16 of the Protocol to the Convention:

- (a) all arbitrators will have expertise or experience in international tax matters;
- (b) all arbitrators will not be employees of the tax authorities of Japan or New Zealand, nor have had dealt with the case presented pursuant to paragraph 1 of Article 26 of the Convention in any capacity; and
- (c) unless otherwise decided by the competent authorities of Japan and New Zealand, the third arbitrator will not be a national of either country, nor have had the arbitrator's usual place of residence in either country, nor have been employed by either country.

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.

7. Communication of information and confidentiality

In accordance with the provisions of item (iv) of subparagraph (b) of paragraph 16 of the Protocol to the Convention, the competent authorities of Japan and New Zealand 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 described in paragraph 2 of Article 27 of the Convention and in the applicable domestic laws of Japan and New Zealand.

8. Failure to provide information in a timely manner and suspension of a mutual agreement procedure

Notwithstanding paragraph 5 of this Mode of Application, where the competent authorities of Japan and New Zealand decide that the failure to resolve an issue within the two year period referred to in paragraph 5 of Article 26 of the Convention 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 arbitrators for a period of time corresponding to the delay in providing the information.

Notwithstanding paragraph 5 of this Mode of Application, if the failure to resolve an issue within the two year period referred to in paragraph 5 of Article 26 of the Convention is attributable to the fact that the mutual agreement procedure under paragraph 2 of that Article was suspended by a request from the person who presented the case, the competent authorities of Japan and New Zealand may postpone the appointment of the arbitrators for a period of time corresponding to the period of such suspension.

The competent authorities of Japan and New Zealand will determine the period of time corresponding to the delay and/or the suspension. The competent authority to which a case has been presented under paragraph 1 of Article 26 of the Convention will notify the person who made the request for arbitration of the determined period of time.

9. Procedural and evidentiary rules

Subject to this Mode of Application 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 16 of the Protocol to the Convention, the competent authorities of Japan and New Zealand will provide the information, including confidential information, necessary for the arbitration decision to all arbitrators and their staff without undue delay.

Unless the competent authorities decide otherwise, any information (including any information provided by the person who made the request for arbitration or their representatives in writing or orally under paragraph 10 of this Mode of Application) 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 the purposes of the arbitration decision.

10. Participation of the person who requested the arbitration proceedings

The person who made the request for arbitration may, either directly or through their representatives, present their position to the arbitrators in writing to the same extent that they can do so during the mutual agreement procedure.

In addition, with the permission of the arbitrators, the person may present their position orally during the arbitration proceedings.

11. Logistical arrangements

Unless decided otherwise by the competent authorities of Japan and New Zealand, the competent authority to which the case giving rise to the arbitration was initially presented will be responsible for the logistical arrangements for the meetings of the arbitration panel and will provide the administrative personnel necessary for the conduct of the arbitration

process. The administrative personnel so provided will report only to the chair of the arbitration panel concerning any matter related to that process.

12. Costs

In accordance with the provisions of item (v) of subparagraph (b) of paragraph 16 of the Protocol to the Convention:

- (a) each competent authority will bear the cost of its appointed arbitrator and its own expenses; and
- (b) the cost of the chair of the arbitration panel and other expenses associated with the conduct of the proceedings will be borne by the competent authorities of Japan and New Zealand in equal shares.

The competent authorities of Japan and New Zealand understand that the meaning of the term "other expenses associated with the conduct of the proceedings" referred to in item (v) of subparagraph (b) of paragraph 16 of the Protocol to the Convention will not include any indirect costs incurred in respect of logistical arrangements under paragraph 11 of this Mode of Application.

The person who made the request for arbitration will bear the costs related to their own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of their views).

13. Applicable legal principles

The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Convention and, subject to these provisions, of those of the domestic laws of Japan and New Zealand.

Issues of interpretation of the Convention 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 of Japan and New Zealand may expressly identify in the Terms of Reference.

14. Arbitration decision

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

The decision of the arbitration panel will be presented in writing and, where the competent authorities of Japan and New Zealand so decide, 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 both competent authorities.

In accordance with the provisions of item (i) of subparagraph (d) of paragraph 16 of the Protocol to the Convention, the decision of the arbitration panel has no formal precedential value. The decision will not be made public unless the person who made the request for arbitration and both the competent authorities of Japan and New Zealand agree on the form and contents of the publication in writing.

15. Time allowed for communicating the arbitration decision

The arbitration decision will be communicated to the competent authorities of Japan and New Zealand and the person who made the request for arbitration 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 they have received all the information necessary to begin consideration of the case.

Regardless, 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 all the information necessary to begin consideration of the case has not been received, 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 of Japan and New Zealand and the person who made the request for arbitration 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 of Japan and New Zealand decide otherwise, be reached without taking into account that information even if the chair of the arbitration panel receives it later and the decision will be communicated to the competent authorities and the person who made the request for arbitration 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, any of the periods mentioned in this paragraph may be extended by the period agreed on by the competent authorities of Japan and New Zealand and the person directly affected by the case.

16. Failure to communicate the decision within the required period

In the event that the decision has not been communicated to the competent authorities of Japan and New Zealand within the period provided for in paragraph 15 of this Mode of Application, the competent authorities and the person directly affected by the case may agree to extend that period for a period not exceeding 180 days or, if they fail to do so within 30 days after the end of the period provided for in that paragraph, the competent authorities will appoint a new arbitrator or arbitrators in accordance with paragraph 5 of this Mode of Application.

17. Streamlined arbitration process

Notwithstanding the provisions of paragraphs 10 and 15 of this Mode of Application, the competent authorities of Japan and New Zealand may decide to apply the following streamlined rules to a particular arbitration case if:

- (a) the competent authorities decide on the issues to be resolved by the arbitration panel in accordance with paragraph 3 of this Mode of Application; and
- (b) the competent authorities indicate that such rules are to apply in the Terms of Reference.

Paragraph 5 of this Mode of Application will apply to the selection and remuneration of the arbitrators under this process except that the competent authorities of Japan and New Zealand will each appoint one arbitrator within 60 days after the Terms of Reference have been received by the person who made the request for arbitration.

Within 90 days after the Terms of Reference have been received by the person who made the request for arbitration, that person may, either directly or through their representatives, present their position to the arbitrators (but only in writing).

Within 60 days after the appointment of the third arbitrator, the competent authority of Japan and the competent authority of New Zealand will each present their arbitration position paper regarding each of the issues contained in the Terms of Reference to the arbitrators and each other. Any position paper received outside of this time period will not be considered by the arbitration panel. Unless otherwise decided in the terms of Reference, the arbitration position paper will not exceed 20 pages (not including any exhibits).

Within 60 days after the receipt of the arbitration position paper of the other competent authority, either the competent authority of Japan or New Zealand may submit a reply to the arbitrators, so that they may address any points raised by the other competent authority. Unless otherwise decided in the Terms of Reference, such replies will not exceed 20 pages (not including any exhibits).

Within 150 days after the appointment of the third arbitrator, the chair of the arbitration panel may request any additional information from either the competent authority of Japan or New

Zealand with the consent of the other competent authority. The competent authority so requested will respond to the chair within 60 days after such a request has been made.

Within 180 days (or such shorter time period that may be specified in the Terms of Reference) after the receipt of the last of the replies from the competent authorities of Japan and New Zealand, or the last of the arbitration position papers if any replies were not submitted by the competent authorities, the arbitration panel will decide each issue included in the Terms of Reference in accordance with one of the two arbitration position papers received from the competent authorities and will communicate that decision to both competent authorities in writing.

18. Final decision

The arbitration decision will be final, unless that decision is found to be unenforceable by the courts of either Japan or New Zealand due to a violation of paragraph 5 of Article 26 of the Convention (including paragraph 16 of the Protocol to the Convention) or of any procedural rule in the Terms of Reference or in this Mode of Application that may reasonably have affected the decision.

If a decision is found to be unenforceable for one of these reasons, the request for arbitration will be considered not to have been made and the arbitration process will be considered not to have taken place except for the purposes of paragraphs 7 and 12 of this Mode of Application.

19. Implementing the arbitration decision

The competent authorities of Japan and New Zealand will implement the arbitration decision within the period of 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

The period may be extended by the period agreed on by the competent authorities of Japan and New Zealand and the person directly affected by the case.

20. Where no arbitration decision will be provided

In accordance with the provisions of subparagraph (e) of paragraph 16 of the Protocol to the Convention, where, at any time after a request for arbitration has been made and before the arbitration panel has delivered a decision to the competent authorities of Japan and New Zealand and the person who made the request for arbitration, the competent authorities may by written notification inform the arbitrators and that person that they have solved all the unresolved issues submitted for arbitration and therefore the case will be considered as resolved pursuant to paragraph 2 of Article 26 of the Convention and no arbitration decision will be required.

21. Final provisions

This Mode of Application applies to any request for arbitration made pursuant to paragraph 5 of Article 26 of the Convention after the Convention has entered into force.

The competent authorities of Japan and New Zealand may modify or supplement this Mode of Application at any time by an exchange of letters between them.

Signed at Wellington on the third day of October, 2013 and at Tokyo on the twenty-seventh day of November, 2013, respectively, in duplicate, in the English and Japanese languages, both text being equally authentic.