

COMPETENT AUTHORITY MUTUAL AGREEMENT ON THE IMPLEMENTATION OF PARAGRAPH 5 OF ARTICLE 24

The competent authorities of Luxembourg and of Guernsey (hereinafter referred to as the “Contracting Parties”) hereby enter into the following mutual agreement (hereinafter referred to as the “Agreement”) to establish the mode of application of the arbitration process provided for in paragraph 5 of Article 24 of the “Agreement between the Grand Duchy of Luxembourg and Guernsey for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital”, which entered into force on 8 August 2014 (hereinafter referred to as the “DTA”). The competent authorities may modify or supplement this Agreement by an exchange of letters between them.

1. Request for submission of case to arbitration

A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 5 of Article 24 of the DTA (hereinafter referred to as the “request for arbitration”) must be made in writing and sent to one or both of the competent authorities. The request must contain sufficient information to identify the case. The request must also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Contracting Parties. Within 10 days after the receipt of the request, a competent authority who received it without any indication that it was also sent to the other competent authority will send a copy of the request and the accompanying statements to the other competent authority. Any unresolved issues shall only be submitted to arbitration if (i) the taxpayer agrees, (ii) the competent authorities agree, and (iii) the taxpayer agrees to be bound by the decision of the arbitration board, all such agreements being in writing.

2. Start date of the two-year period

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 Party under paragraph 1 of Article 24 has also been presented to the competent authority of the other Party. For this purpose, a case shall be considered to have been presented to the competent authority of the other Party only if the following information has been presented:

- a) Identity of the person(s) covered in the request for a mutual agreement procedure - the name, address, taxpayer identification number (if any) and/or birth date of the person who presented the case (hereinafter referred to as the “taxpayer”), contact details and the relationship(s) between the taxpayer and other persons covered in the request for a mutual agreement procedure.
- b) The basis for the request - the provision(s) of the DTA which the taxpayer considers are not being correctly applied by either one or both of the Contracting Parties (indicating which Contracting Party, the regional or local tax administration office that has made, or is proposing to make, the adjustment (if relevant), and contact information for the relevant person(s) in that Contracting Party responsible for the adjustment).

- c) Facts of the case - a summary of all relevant facts of the case, including documentation to support these facts, the taxation year(s) or period(s) involved and the related amounts (in all relevant currencies and supported by calculations, if applicable).
- d) Analysis of the issue(s) to be resolved through the mutual agreement procedure - an analysis of the issues with respect to which a mutual agreement procedure is requested, including the taxpayer's interpretation of the application of the relevant provision(s) of the DTA, to support the taxpayer's basis for its claim that the provision(s) of the DTA have not been correctly applied by either one or both of the Contracting Parties. The taxpayer's analysis should be supported with relevant documentation, which may include, but is not limited to
- transfer pricing documentation required by domestic legislation or other published guidance in the taxpayer's Contracting Party of residence;
 - copies of tax assessments and audit or other tax administration documentation and correspondence reflecting what the taxpayer considers to be the incorrect application of the relevant provision(s) of the DTA; and
 - copies of briefs, objections, etc., submitted by the taxpayer in response to the action or proposed action of a tax administration.

The competent authorities will endeavour to minimize administrative and other burdens related to the analysis of the issue(s) to be resolved through the mutual agreement procedure, in particular for individuals and small taxpayers. The competent authorities will accordingly evaluate the completeness of the taxpayer's analysis taking into account the amount(s) of tax at stake, the sophistication of the taxpayer, and whether a tax professional is representing the taxpayer in connection with its request for competent authority assistance. Even if a competent authority initially agrees to accept an abbreviated analysis of the issue(s) to be resolved through the mutual agreement procedure, that competent authority may subsequently require the taxpayer to supplement its analysis with additional information or documents.

- e) Whether the request for a mutual agreement procedure was also submitted to the competent authority of the other Contracting Party - a copy of any other relevant mutual agreement procedure request(s) and associated documents filed, or to be filed, with the competent authority of the other Contracting Party, including copies of correspondence from the other tax administration. The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.
- f) Whether the request for a mutual agreement procedure was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes - a copy of any other request for a mutual agreement procedure under another instrument that provides for a mechanism to resolve treaty-related disputes (including all documentation filed with that submission). The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.
- g) Whether the issues involved were previously dealt with - the request should state whether the request for a mutual agreement procedure involves issues that are currently being considered or were previously considered:
- by the tax authorities of either Contracting Party as part of an advance ruling, advance pricing arrangement, settlement agreement or similar proceedings;
 - as part of any other administrative proceedings;
 - or by any tax tribunal or court.

Copies of any relevant rulings, agreements or decisions should be provided.

- h) Any other specific additional information requested by the competent authority of a Contracting Party within three calendar months after the receipt of the request for a mutual agreement procedure.

3. Selection and appointment of arbitrators

1. The arbitration panel shall consist of three individual arbitrators with expertise or experience in international tax matters. Each arbitrator appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance, or equivalent, of the Contracting Parties and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

2. Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities shall each appoint one arbitrator. Within 60 days after the latter appointment, the arbitrators so appointed will appoint a third arbitrator who will function as Chair. The Chair shall not be a national or resident of either Contracting Party. The competent authorities will identify and mutually agree on a list of five persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary.

3. If any appointment is not made within the required time period, the arbitrator(s) not yet appointed shall be appointed by the highest ranking official of the Center for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national or resident of either Contracting Party within 10 days after receiving a request to that effect from the person who made the request for arbitration. The same procedure shall apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun.

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

4. Arbitration process

1. Within 90 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities decide on a different period or decide to use the approach described in Article 5 with respect to the relevant case), the competent authority of each Contracting Party will submit to the Chair of the arbitration panel a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities). The Chair will forward the proposed resolutions to the other members of the arbitration panel and the other competent authority only after receipt of both proposed resolutions or after the 90 day period has expired, whichever is the earlier. The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged pursuant to the provisions of the DTA, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting Parties have been unable to reach agreement on an issue regarding the conditions for application of a provision of the DTA (hereinafter referred to as a “threshold question”),

such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

2. The competent authority of each Contracting Party may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper will be submitted to the Chair of the arbitration panel within the period of time provided for in paragraph 1. The Chair will forward the supporting position papers to the other members of the arbitration panel and the other competent authority only after receipt of both supporting position papers or after the period of time provided for in paragraph 1 has expired, whichever is the earlier. Any annex to a supporting position paper must be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure case.

3. In the event that the competent authority of one Contracting Party fails to submit a proposed resolution within the period of time provided for in paragraph 1, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

4. Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. Any such reply submission will be submitted to the Chair of the arbitration panel within 150 days after the appointment of the Chair of the arbitration panel. The Chair will forward the reply submissions to the other members of the arbitration panel and the other competent authority only after receipt of both reply submissions or after the 150-day period has expired, whichever is the earlier.

5. Unless the competent authorities jointly decide otherwise, the arbitrators will use tele- and videoconferencing to communicate between themselves and with both competent authorities. If a face-to-face meeting involving additional costs is necessary, the Chair will contact the competent authorities who will decide when and where the meeting should be held and will communicate that information to the arbitrators.

6. The arbitration panel will select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and will not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the arbitrators. Unless the competent authorities agree otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting Parties in writing within 90 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 180 days after the appointment of the Chair of the arbitration panel. The arbitration decision will have no precedential value.

5. Optional arbitration process

1. If, within 60 days after the appointment of the Chair of the arbitration panel, the competent authorities agree to use the approach described in this Article with respect to a given case, each competent authority must provide to the arbitration panel and to the other competent authority, within 120 days after that agreement, any information that it considers necessary for the panel to reach its decision. That information should include a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Unless the competent authorities agree otherwise, the arbitration panel may not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof).

2. The person who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedure. In addition, if the competent authorities and arbitrators all agree, the person may present his position orally during the arbitration proceedings.

3. Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel should be held, the competent authorities will decide when and where the meeting will be held and will communicate that information to the arbitrators.

4. The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the DTA and, subject to these provisions, of those of the domestic laws of the Contracting Parties. The arbitrators shall also consider any other sources which the competent authorities of the Contracting Parties may by mutual agreement expressly identify.

5. Subject to the provisions of the DTA and of this Agreement, the arbitrators may adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.

6. Unless the competent authorities agree otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting Parties in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.

6. Communication of information and confidentiality

1. For the sole purposes of the application of the provisions of Articles 24 and 25 and of the domestic laws of the Contracting Parties, concerning the communication and the confidentiality of the information related to the case that results in the arbitration process, each arbitrator and a maximum of three staff per arbitrator (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be designated as authorized representatives of the competent authority that has appointed that arbitrator or, if that arbitrator has not been appointed by a competent authority, of both competent authorities.

2. In designating a person as its authorised representative pursuant to paragraph 1, the competent authority of a Contracting Party shall ensure that the person agrees in writing to treat any information relating to the arbitration proceeding consistently with the confidentiality requirements of the DTA and of the applicable laws of that Contracting Party.

7. Suspension of time in the case of failure to provide information in a timely manner

Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start date of the two-year period referred to in Article 2, the period provided in that Article shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

8.Costs

1. Unless agreed otherwise by the competent authorities:

- 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 views);
- b) each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority, or appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting Party because of the failure of that competent authority to appoint that arbitrator, together with that arbitrator's travel, telecommunication and secretariat costs;
- c) the remuneration of the Chair of the arbitration panel and that Chair's travel, telecommunication and secretariat costs will be borne in equal shares by the two competent authorities;
- d) other costs related to any meeting of the arbitration panel will be borne by the competent authority that hosts that meeting; and
- e) other costs related to expenses that both competent authorities have agreed to incur will be borne in equal shares by the two competent authorities.

2. Unless agreed otherwise by the competent authorities, compensation of the arbitrators will be determined as follows:

- a) The fees of the arbitrators will be fixed at EUR 1000 per person per meeting, preparation or travel day. The reimbursement of the expenses of the arbitrators will be limited to the reimbursement usual for high ranking civil servants of the Contracting Party that first received the request for submission of the unresolved issue(s) in the case to arbitration.
- b) Each arbitrator will be compensated for no more than three days of preparation, for two meeting days and for travel days. If the arbitration panel considers that it requires additional time to properly consider the case, the Chair will contact the competent authorities to request additional time.

9. Failure to communicate the decision within the required period

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 6 of Article 4 or paragraph 6 of Article 5, as the case may be, or within any other period agreed to by the competent authorities, the competent authorities may agree to appoint new arbitrators in accordance with Article 3. The date of such agreement shall, for the purposes of the subsequent application of Article 3, be deemed to be the date when the request for arbitration has been received by both competent authorities.

10. Where no arbitration decision will be provided

Where, at any time after a request for arbitration has been made and before the arbitrators have delivered a decision to the competent authorities, the competent authorities notify in writing the arbitrators:

- a) that they have solved all the unresolved issues that were subject to the arbitration, or

b) that the person who presented the case has withdrawn the request for arbitration or the request for a mutual agreement procedure

no arbitration decision shall be provided and the mutual agreement procedure shall be considered to have been completed.

11. Final decision

The arbitration decision shall be final, unless that decision is found to be unenforceable by the courts of one of the Contracting Parties because of a violation of paragraph 5 of Article 24 of the DTA or for any other reasons. If a decision is found to be unenforceable, the request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 6 “Communication of information and confidentiality” and 8 “Costs”.

12. Implementing the arbitration decision

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

This Agreement applies to any request for arbitration made pursuant to paragraph 5 Article 24 of the DTA after that provision has become effective.

Date of signature

Date of signature

For the competent authority of
the Grand Duchy of Luxembourg

For the competent authority of
Guernsey

Ms. Pascale Toussing
Director
Direct Tax Administration

Mr Nigel Garland
Head of Policy (Deputy Director)
Guernsey Revenue Service