

Negotiating Italy's Arbitration Convention

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Arbitration Convention No. EEC/90/436, approved on July 23 1990, sets forth an arbitration procedure for the settlement of double taxation issues deriving from diverging transfer pricing adjustments applied by associated enterprises in different Member States.

By means of Circular No. 21/E of June 5 2012, the Revenue Office elucidates on the provisions contained in the Arbitration Convention, clarifying, in particular, the following aspects:

- entities entitled to submit a petition to the competent Italian authorities are both resident enterprises as well as permanent establishments in Italy of resident enterprises of another Member State;
- differently from the mutual agreement procedure (MAP) activated on the basis of Art. 25 of the OECD Model (prior to the 2008 version), any recourse to the Arbitration Convention determines the obligation to settle a particular case: where the competent authorities do not succeed in reaching an agreement to eliminate double taxation within two years from the submission of the taxpayer's request, these are in fact required to set up an Advisory Committee for the purpose of issuing an opinion on the relevant matter;
- as to the grounds precluding access to the arbitration procedure, identified by the Arbitration Convention as "serious penalties", Italy's unilateral declaration – annexed to the same Convention, according to which serious penalties are those referring to crimes consisting of tax crimes – is still valid; Circular No. 21/E specifically refers to fraudulent cases or to cases, which are exceptional and never actually occurred in practice, with a "clear intent to evade with specific fraudulent evasion intention";
- as far as the relation with internal litigation, the initial arbitration phase is inhibited where a ruling has already been issued by the courts;
- as to the procedural protocol, the Italian tax authorities adhere to the procedural and temporal criteria set forth by the Code of Conduct for the effective implementation of the Arbitration Convention.

Circular No. 21/E also clarifies the interaction between procedures set forth by the Arbitration Convention and by Article 25 of the OECD Model, on the one hand, and the adoption of litigation avoidance tools, on the other: having recourse to these latter determines "immutability of that which has already been defined" and excludes, therefore, the possibility to activate any amicable procedure (for example MAP) or any arbitration procedure.

The Circular at issue defines the practice followed by the Italian tax authorities also in relation to Art. 25 of the OECD Model, which provides a mutual

agreement procedure to settle controversies involving the application of treaties against double taxation.

In order to ensure the effectiveness of mutual agreements, Article 25 was amended in 2008 by including paragraph 5, which establishes the submission to an arbitration procedure upon taxpayer's request, for those cases where the competent authorities did not succeed in reaching an amicable settlement within two years from the filing of taxpayer's request.

With regard to Article 25 of the OECD Model, Circular No. 21/E specifies that:

- activating the procedure does not impose upon the competent authorities the mandatory obligation to settle the case but rather, to spend their best efforts to achieve such result as "diligently" as possible;
- the procedure may not be activated by taxpayers only but also by competent authorities in order to solve interpretative issues or to eliminate double taxation phenomena linked to cases that are not provided for by the treaty;
- upon receipt of request and ascertainment of the fact that all the subjective and objective requirements are complied with to activate the procedure, the competent authority first examines the possibility to proceed unilaterally to the elimination of double taxation; should such latter step not be possible, it activates a MAP.

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