

# TRANSFER PRICING: MUTUAL AGREEMENT PROCEDURES AND ADVANCE PRICING AGREEMENTS



Germany has well over 100 double taxation agreements (DTAs) with other countries. The history of DTAs goes back more than 150 years. Double taxation agreements are primarily aimed at avoiding double taxation. Double taxation can occur as a result of the correction of tax assessments, e.g. in the course of a tax audit: Profits already taxed abroad are then additionally subject to taxation in Germany. This is regularly the case if transfer prices are corrected.

## MUTUAL AGREEMENT PROCEDURE

The **Mutual Agreement Procedure (MAP)** is a mechanism designed to provide relief in the event of double taxation. The competent authorities are to settle disputes regarding the application of a double taxation agreement (DTA) by way of consultation.

It is a flexible instrument for the taxpayer as he can terminate the process at any time. After having concluded a MAP its result can be rolled forward in an APA (see below) for the subsequent years to obtain safety for the coming years. In addition, the effort is, generally speaking, lower than in the case of court proceedings.

To initiate a MAP a formal and timely application to the Federal Central Tax Office is required on the German side. It can be applied for as soon as there is a risk of double taxation. There is no application fee for initiating the procedure. Furthermore, the taxpayer's participation is regularly no longer required once the procedure has been initiated.

To the extent that there is an obligation to reach an agreement under the relevant DTA, the agreement must generally be reached within two years. The taxpayer can then decide whether to accept the proposed mutual agreement solution to avoid double taxation.

To eliminate double taxation in the case of profit adjustments between associated companies within the EU, the EU Arbitration Convention<sup>1</sup> provides for the possibility of arbitration proceedings.

## DISPUTE RESOLUTION WITHIN THE EU

The EU Dispute Settlement Directive<sup>2</sup> provides taxpayers with an additional procedure for the resolution of double taxation disputes. The Directive, which has meanwhile been transposed into German law<sup>3</sup>, on the one hand provides for a compulsory settlement of double taxation disputes by means of an arbitration phase. On the other hand it provides a transparent and enforceable time frame for the dispute resolution procedure by means of time windows and deadlines.

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<sup>1</sup> 90/436/EWG, OJ EU L 225/10 of 20.8.1990

<sup>2</sup> Directive (EU) 2017/1852 of the Council of 10.10.2017, OJ EU L 265/1 of 14.10.2017

<sup>3</sup> EU Double Taxation Agreement Dispute Settlement Act of 10.12.2019, German Federal Tax Gazette I 2020, 3

## ADVANCE PRICING AGREEMENT

An **Advance Pricing Agreement (APA)** is a binding agreement between a taxpayer and the responsible tax authority of one or more countries (unilateral, bilateral or multilateral APA). It defines the criteria to be applied for determining the transfer price for a specific type of intra-group cross-border transaction over a specified period of time. The goal for the taxpayer is to achieve legal certainty in this way.

If the subject matter is implemented as described to the authorities, i.e. the critical assumptions are met, the agreed transfer pricing system may not be questioned in retrospect, e.g. in the course of a tax audit. However, the authorities are entitled to review the underlying circumstances and the implementation of the APA.

An APA can in particular avoid long-lasting disputes during a tax audit. In addition, retroactive application of the rules agreed in the APA is also possible ('roll-back').

To initiate an APA, a written application that sets out the details of the facts and the transfer pricing system to be established is required in Germany. In addition, an application fee of currently EUR 30,000 is charged by the competent authority. Experience shows that the APA process takes at least two to three years.

## EFFECTIVE SUPPORT FROM BDO

We are looking forward to provide advice and support in the effective elimination of double taxation in the area of transfer pricing. If required, we cooperate with colleagues of the respective BDO Member Firms from our international network in more than 160 countries.

### YOUR CONTACTS AT BDO

BDO's International Tax Services & Transfer Pricing team in Frankfurt am Main is looking forward to support you in planning, documenting and defending transfer prices



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