

MUTUAL AGREEMENT PROCEDURE (MAP)

THE MINISTER OF FINANCE, ECONOMIC AFFAIRS, AND CULTURE

Whereas:

- that Aruba is a member of the Inclusive Framework on Base Erosion and Profit Sharing (BEPS) of the Organization for Economic Development (OECD);
- that BEPS Action 14 prescribes a minimum standard for an effective dispute resolution mechanism;
- that it is desirable to establish a mutual agreement procedure (MAP) in this context on the basis of a tax treaty;

HAS DECIDED:

1. Introduction

Aruba is a party to several tax treaties that provide an agreement procedure. This means that Aruba may consult with another contracting state in the event of difficulties or doubts relating to the interpretation or implementation of a treaty.

The basic principle is that a tax levy that does not conform to the terms of a treaty (often resulting in double taxation) should be eliminated as soon and efficiently as possible. To achieve this, Aruba aims to start mutual agreement procedures with other parties to a treaty at an early stage, preferably even before the relevant tax assessments are completed.

The purpose of this Decree is to describe how the mutual agreement procedure plays out. Please note that this procedure can only be used in connection with the levy of tax, not the levy of social security contributions. Likewise, please note that this Decree is not meant to extend or limit any rights that taxpayers may have pursuant to a tax treaty.

2. Legal Framework

Here is a list of the treaties currently in effect in respect of Aruba that contain clauses relating to mutual agreement:

- Article 6 of the Agreement between the Kingdom of the Netherlands, in respect of Aruba, and the Kingdom of Sweden to promote economic relations;
- Article 6 of the Agreement between the Kingdom of the Netherlands, in respect of Aruba, and Iceland to promote economic relations;
- Article 6 of the Agreement between the Kingdom of the Netherlands, in respect of Aruba, and the Republic of Finland to promote economic relations;
- Article 6 of the Agreement between the Kingdom of the Netherlands, in respect of Aruba, and the Kingdom of Denmark to promote economic relations;

- Article 8 of the Agreement between the Kingdom of the Netherlands, in respect of Aruba, and Australia for the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments (please note that the mutual agreement procedure is limited to transfer pricing adjustments).

These treaties are available [in Dutch] at:

<https://verdragenbank.overheid.nl/nl>

Future treaties will likewise be included in this database for purposes of reference.

In addition, please note that Article 35 of the Tax Regulations for the Kingdom of the Netherlands (hereafter: “TRK”) provides the possibility of mutual consultation. The present policy likewise relates to mutual consultation (even though this policy is not a treaty). The TRK govern the relationship between Aruba and the Netherlands, Curacao, St. Maarten, and the BES islands (Bonaire, Saba, and St. Eustatius). Aruba, however, aims to soon be adopting new regulations to govern its relationship with the Netherlands.

A mutual agreement procedure may be related to matters of transfer pricing to the extent this is possible by virtue of treaty law. Further, please note that mutual consultation may also be related to the implementation of anti-abuse clauses included in treaties.

3. Petition to Start a Mutual Agreement Procedure

In the event a taxpayer has a reasonable suspicion that certain behavior of Aruba or the other contracting state results, or will result, in taxation that violates a treaty, the taxpayer may file a petition to start a mutual agreement procedure. This will not be prevented by any pre-existing settlement agreement, e.g. a settlement agreement that was entered into following an audit. The same goes for any pending objection or appeal proceedings.

A petition to start a mutual agreement procedure may likewise be related to behavior of several contracting states (multilateral disputes), or to several years.

Likewise, such a petition may be filed following adjustments voluntarily made abroad by a bona fide taxpayer which subsequently prove to result in taxation that violates a treaty.

The petition may be filed even before a tax assessment has been imposed, but must in any case be submitted within three years of the first notice (typically the imposition of an assessment) that reveals that tax is being levied in violation of the treaty, unless the treaty provides a different time limit.

A petition for mutual consultation must be addressed to the competent authority. The competent authority for Aruba is the Minister in charge of Finance. The Minister, however, mandates the implementation to the Tax Matters Coordination Board (TMCB). Consequently, a petition for a mutual agreement procedure should be sent to:

Coördinatie Bureau Fiscale Zaken (CBFZ)
[Tax Matters Coordination Board (TMCB)]
Camacuri 2
Oranjestad
Aruba
with reference to “mutual agreement procedure.”

Further contact details TMCB:

Phone number: +297 522 74 67

Fax number: +297 522 74 29

E-mail addresses: caa@impuesto.aw and bfrichard@impuesto.aw

A petition to start a mutual agreement procedure must be filed in writing. There are no formal requirements, but the petition needs to be signed and must contain at least the following information:

- a. personal data (name, address, fiscal number, etc.) of the taxpayer filing the petition and of the other (foreign) parties involved;
- b. information about the relevant facts and circumstances of the matter raised;
- c. the other state or other states to which the petition is related;
- d. an explanation by the taxpayer of the reasons why the taxpayer feels that Aruba or the other contracting state has (or may have) shown behavior that results, or will result, in taxation that violates a treaty;
- e. the selected legal basis for the petition;
- f. information about the tax periods under discussion;
- g. copies of tax assessments, the report on any audit conducted or any other measures that may have as a result the taxation in violation of the treaty;
- h. information about any legal remedies that the taxpayer or the other parties may have used in making the relevant transactions, and information about any legal remedies that are still available to challenge the relevant assessments in Aruba or the other state involved;
- i. information about any decisions of judicial authorities in connection with the matter;
- j. whether a petition for mutual consultation has likewise been filed in the other contracting state and/or whether the relevant behavior has previously been the subject of a petition for mutual consultation;
- k. if applicable, proof, and a detailed explanation, of adjustments voluntarily made abroad by a bona fide taxpayer;
- l. a statement to the effect that all information submitted is truthful and that, upon request, complementary information will be submitted within the time limit set for that purpose.

If the taxpayer simultaneously approaches the proper competent authority of the other state to address the same matter, it is important for the taxpayer to provide this proper competent authority with the same material information.

The taxpayer will be allowed to explain his or her petition orally. The taxpayer may indicate in the petition whether he or she wishes to take this opportunity.

As a rule, a mutual agreement procedure will be conducted in the English language (except when it is about implementation of the TRK). To prevent administrative charges, documents may be supplied in English.

4. Handling a Petition to Start a Mutual Agreement Procedure

After a petition has come in, the TMCB will assess whether the taxpayer has enclosed all required information. If necessary, the taxpayer will be asked to provide further information within two months after the petition came in. This information must then be submitted within a time limit to be decided on that occasion by the TMCB.

The TMCB will then assess the petition and inform the taxpayer of the further handling of the petition. This will happen within two months of reception of the complete petition.

In its response, the TMCB will grant the petition if, based on the information, facts, and circumstances presented, the TMCB finds that the matter cannot be resolved unilaterally and a mutual agreement procedure with the competent authorities of the other state or states involved is required to try and find a solution to the matter. In this case, the TMCB will see to it that a first notice is sent to the competent authority of the other state, together with confirmation that the petition was filed within the applicable time limit. At the same time, a copy of the taxpayer's petition will be forwarded. The TMCB will likewise make sure that the Inspector of Taxes receives a copy of the taxpayer's petition.

By contrast, a petition will be denied if, based on the information, facts, and circumstances presented, the TMCB finds that no mutual agreement procedure needs to be started. This will be the case if Aruba or the other contracting state has shown no behavior that results, or will result, in taxation that violates a treaty, or if the petition was not filed in due time. The petition will likewise be denied if the petition is incomplete and the taxpayer has failed to use the opportunity given to complete the petition.

5. Course of the Mutual Agreement Procedure

The parties will aim to complete the mutual agreement procedure within two years. If a petition is granted, the taxpayer will be informed of the start time of this two-year period. In principle, the two-year period will start at the time a taxpayer living in Aruba has submitted a complete petition.

Next, the TMCB will inform the competent authority of the other state involved of the matter, as soon as possible but in any case within four months of the start date of the two-year period, in the form of a so-called position paper, which will contain:

- a material assessment of the question to what extent the challenged taxation violates a treaty;
- the proposed solution or solution direction;
- any other relevant underlying documents.

After receiving the position paper, the other competent authority may, in principle, respond in either of two ways. It may agree with the substance of the proposed solution, in which case it will give notice of such agreement. Or it may disagree, and respond in the form of a so-called answer position paper, containing its material response to the arguments put forward by Aruba in the position paper.

If the competent authorities (continue to) hold different opinions about the question whether Aruba or the other contracting state has shown behavior that results, or will result, in taxation that violates a treaty, or if the competent authorities involved do not collectively agree with the proposed solution, new written rounds may be held in order to find a solution.

The mutual agreement procedure is an interstate matter to be settled by the proper competent authorities. Consequently, the taxpayer will not be directly involved in the exchange of views between the competent authorities. This also means that the taxpayer will not be given copies of any correspondence between the competent authorities involved. The goal is, however, to keep the taxpayer informed as well and as completely as possible throughout the procedure, and to have as much regard as possible to the taxpayer's view on the situation.

The taxpayer may apply for a deferral of payment during the mutual agreement procedure (Article 8 of the National Ordinance on Direct Taxes). Such deferral may be granted by the Receiver of Taxes (to the extent not already granted as a result of an objection or appeal), subject to any conditions the Receiver may decide (such as the requirement to provide security).

6. Outcome and Implementation of the Mutual Agreement Procedure

The taxpayer will be informed of the outcome of the mutual agreement procedure as soon as possible, in writing.

If the mutual agreement procedure has resulted in agreement between the competent authorities involved, the taxpayer involved will, in principle, be allowed to either accept the outcome in full or reject it altogether.

If the taxpayer wants to reject the outcome, the taxpayer may choose to take advantage of any court proceeding that may still be pending. The same applies if the mutual agreement procedure has failed to produce an outcome, or the petition for mutual consultation has been denied. Thus, the possibility of filing an objection or appeal does not affect the mutual agreement procedure. By contrast, there is no possibility to ask for arbitration, as current treaties signed by Aruba do not provide this possibility.

It may happen that, at the time another state makes a correction, the corresponding assessments have already become final in Aruba. In such case, if there are reasons to do so, a corresponding correction will be made by reducing, *ex officio*, the amount of the assessment. In this regard, please note that an application for an *ex officio* reduction will, in principle, be handled only if it was filed within five years after the tax debt came into existence (Article 32, third paragraph, of the General National Ordinance on Taxation). If a treaty contains a clause in conformity with the first and

second sentences of Article 25, second paragraph, of the OECD's model convention (“*Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*”), this five-year time limit will, however, be extended. An *ex officio* reduction may also differ from a decision previously made in objection or appeal (in cassation) proceedings.

If, by contrast, there are still possibilities to challenge the assessments (and these assessments therefore have not yet become final), or the assessments are yet to be imposed, the taxpayer will have the possibility to accept the outcome of the mutual consultation. In such case, the taxpayer may be asked to agree to a settlement agreement in which the taxpayer represents that he or she waives any (further) legal remedies.

If the amount of the assessment is reduced *ex officio*, the same will apply to default penalties, offense penalties, and collection interest.

It is also possible that the competent authorities involved fail to reach agreement and that no solution is found to the taxation that a taxpayer is facing in violation of the treaty. In this case, too, the taxpayer may, of course, choose to take advantage of any court proceeding that may still be pending. National legal remedies, however, provide no guarantee that the taxation in violation of the treaty will be eliminated.

A mutual agreement procedure between competent authorities concerns, as a rule, a one-time assessment of (a set of) facts and circumstances in specific years on the basis of the legal rules that were in place at that time. This means that the outcome of a mutual consultation will, in principle, apply only to that one specific case and only to the period for which the mutual agreement procedure in question was followed.

Nevertheless, the possibility will always be considered to enter into an agreement (also) relating to the years following the years to which the agreement procedure was related. This will particularly be a possibility when the mutual agreement procedure is related to transfer pricing corrections between connected businesses.

7. Entry into Effect

This policy will take effect as of the date of its publication in the Law Gazette of Aruba.

Oranjestad, May 18, 2020

The Minister of Finance, Economic Affairs, and Culture,
Ms. *mr.* X.J. Ruiz-Maduro