



Factsheet on the mutual agreement procedure

May 2018

1. General information on double taxation and the mutual agreement procedure

Switzerland has concluded double taxation agreements with numerous countries which can be consulted here: <https://www.admin.ch/opc/fr/classified-compilation/0.67.html>. If double taxation nevertheless occurs with a country with which Switzerland has signed a double taxation agreement or if there is a risk of such double taxation occurring, taxpayers resident in Switzerland can ask the Federal Department of Finance in Bern to initiate a mutual agreement procedure.

A distinction can generally be made between two types of mutual agreement procedure:

- a) Mutual agreement procedure to eliminate double taxation that has already occurred or to prevent imminent double taxation. If, for example, a retired person's pension is taxed both in Switzerland and in another state. Another example is when a state adjusts the taxable base of a company resident in the state due to transactions which it has carried out with a company based in Switzerland on the basis that the prices of which are considered not to match the at-arm's-length price.
- b) Mutual agreement procedure to avoid double taxation in the area of transfer pricing. Typically if a multinational wants to determine the pricing of transactions between group companies in advance in the form of an advance pricing agreement (APA). It is also possible within the framework of such an agreement to cover past tax periods if the facts and circumstances are identical (rollback).

A mutual agreement procedure can be multilateral if the circumstances justify this and a double taxation agreement which includes a provision on the mutual agreements exists between each of the countries concerned.

Before requesting the initiation of a mutual agreement procedure, if necessary, the taxpayer has to complete the administrative steps in line with what was agreed between the competent Swiss and foreign authorities in order to obtain the contractual foreign tax rebates (<https://www.estv.admin.ch/estv/fr/home/internationales-steuerrecht/fachinformationen/quellensteuernach-dba.html>). The mutual agreement option is possible only if this procedure is unsuccessful.

It is possible to request that a mutual agreement procedure be initiated even if the taxation which is not in accordance with the convention is the result of tax authorities applying anti-abuse provisions. This is also true for cases where a taxpayer initiated the initial adjustment personally and in good faith.

The initiation of a mutual agreement procedure may be requested even if, after a tax audit in Switzerland, the taxpayer accepted the adjustments to which the request refers. Initiating a mutual agreement procedure is independent of other legal remedies provided for under Swiss or foreign law. Therefore, a mutual agreement procedure can be requested regardless of whether or not a Swiss or foreign taxation decision has been accepted or challenged in a court of law. A request to initiate a mutual agree-

ment procedure does not allow the taxpayer to safeguard their rights contained in the other legal remedies. The competent authority in Switzerland is not bound by any decision made by a Swiss or foreign court.

2. Legal basis

The legal basis is formed by the provisions on the mutual agreement procedure set out in Swiss double taxation agreements.

3. Legal nature and object of the mutual agreement procedure

The mutual agreement procedure is a procedure between one state and another to which the taxpayer is not a party.

It aims to reach an agreement between the competent authorities according to double taxation agreements in a specific case at the taxpayer's request in order to eliminate double taxation that has occurred or to avoid taxation that is not in accordance with the applicable double taxation agreement.

It also enables the competent authorities to resolve difficulties or dispel doubts to which the interpretation or application of the double taxation agreement may give rise. These are essentially difficulties of a general nature that concern, or could concern, a category of taxpayers.

The mutual agreement procedure does not impose an obligation to achieve a result, merely an obligation of means. This means that the competent authorities are not obliged to achieve a solution that eliminates double taxation or non-compliant taxation; they just have to strive to do so.

A number of Swiss agreements contain an arbitration clause. In such cases, the taxpayer may ask for the issues not resolved in the mutual agreement procedure to be settled by arbitration once the deadline set out in the agreement has expired. However, most agreements exclude arbitration if a court has already handed down a decision on the matter. The arbitration decision must be enforced by mutual agreement by the competent authorities.

4. Mutual agreement procedure request

The mutual agreement procedure is initiated at the taxpayer's request. The request generally has to be submitted to the competent authority in the taxpayer's country of residence. If several taxpayers are concerned, each of them can submit a request to the competent authority in their country of residence.

If a taxpayer wishes to submit a request to two or more competent authorities, it has to be submitted simultaneously to each of them.

In Switzerland, mutual agreement procedure requests have to be submitted in writing or electronically in one of the official languages or in English. Requests should be made using the specified form which can be downloaded here: <https://www.sif.admin.ch/sif/en/home/bilateral/verstaendigungsverf.html>

- Requests for the initiation of a mutual agreement procedure from a *private individual or legal entity that do not concern transfer pricing* have to be sent to the following address:

Federal Department of Finance
State Secretariat for International Financial Matters (SIF)
Tax Division
Unit BS
Bundesgasse 3
CH-3003 Bern
Email: dba@sif.admin.ch

- Requests for the initiation of a mutual agreement procedure from a *company that concern transfer pricing* have to be sent to the following address:

Federal Department of Finance
State Secretariat for International Financial Matters (SIF)
Tax Division

Unit VP
Bundesgasse 3
CH-3003 Bern
Email: transferpricing@sif.admin.ch

5. Time limit for submitting requests

According to the OECD Model Tax Convention on Income and on Capital of 2017, the taxpayer has to request the initiation of a mutual agreement procedure within three years from the first notification of the action resulting in double taxation.

Most of Switzerland's double taxation agreements contain this legal time limit of three years. However, some of them do not specify a deadline, or specify a different delay, by which the mutual agreement procedure must be requested. In any case, it also in the taxpayer's interests to request the initiation of a mutual agreement procedure as quickly as possible.

6. Content of the mutual agreement procedure request

The request must contain the following:

- a) Details (e.g. name, address, tax identification number) regarding the identity of the taxpayer concerned;
- b) Details (e.g. name, address, tax identification number) regarding the identity of any other directly affected persons (e.g. associated companies);
- c) If the taxpayer has an authorised representative, a valid power of attorney;
- d) The Swiss tax authority concerned, including the contact person if known;
- e) The other country(ies) concerned;
- f) Description of the facts and circumstances of the specific case (including the tax amounts in question in Swiss francs and in the foreign currency, details of any relationships between the taxpayer making the request and the other persons directly affected by the case, as well as the annual financial statements for the tax periods concerned in the case of companies);
- g) The tax periods for which double taxation is claimed, is imminent or is to be avoided;
- h) If available, a copy of the assessment decisions issued in Switzerland and in the country concerned for the tax periods in question;
- i) If available, a copy of the tax audit reports and adjustment proposals that led to the double taxation claimed;
- j) Detailed information on any steps taken in Switzerland or abroad to prevent or eliminate double taxation (correspondence with tax authorities, objection, etc.), particularly on any mutual agreement procedure request submitted to the competent authority abroad (indicating the date of the request, as well as the name of the person and the authority where the request was sent);
- k) If the mutual agreement procedure request was also submitted to another authority based on another international treaty with a dispute resolution mechanism, the date of that request, the name of the person and the authority to which it was submitted; a copy of that other request and all enclosures is to be included if this mutual agreement procedure request is not identical to the other request;
- l) If available, detailed information on any legal remedies sought in Switzerland or abroad;
- m) If applicable, an indication that the object of the mutual agreement procedure request was already dealt with, e.g. in an advance ruling, an advance pricing agreement (APA) or a court ruling, together with a copy thereof;
- n) Any other pertinent details or documents for resolving the case;

- o) A declaration confirming that all information and all documents in the mutual agreement procedure request are accurate and that the taxpayer will assist the competent authority by diligently supplying any other pieces of information or any other document required by the authority.

7. Cooperation on the part of the taxpayer

It is the responsibility of the taxpayer to set out the pertinent facts and circumstances regarding the case in question and to supply all of the elements necessary for the mutual agreement procedure to be completed.

8. Mutual agreement procedure

8.1. Initial analysis by SIF

Within two months of receiving the mutual agreement procedure request, SIF contacts the taxpayer, indicating if it needs additional information, particularly if items mentioned in section 6 above are missing, in order for the request to be completed by the taxpayer.

8.2. Response to the request

If the above conditions are not met, SIF will decline to initiate a mutual agreement procedure. It will inform the taxpayer of this refusal and notify the competent foreign authority concerned by the request.

If SIF considers the conditions required to initiate a mutual agreement procedure to be met and believes that the double taxation can be eliminated unilaterally, it contacts the canton(s) concerned for that purpose.

If SIF considers the conditions required to initiate a mutual agreement procedure to be met and finds that the double taxation that occurred cannot be eliminated unilaterally, it initiates the mutual agreement procedure and informs the competent authority of the state concerned about the mutual agreement procedure request. The Swiss tax authorities concerned are also informed of the initiation of a mutual agreement procedure.

The taxpayer is notified about the unilateral elimination of the double taxation or about the initiation of the mutual agreement procedure.

8.3. How the mutual agreement procedure unfolds

The mutual agreement procedure is a procedure between competent authorities in accordance with the applicable double taxation agreement. The taxpayer is not a party to it. The competent authorities strive to eliminate the double taxation or to prevent it from arising by communicating directly either verbally or in writing.

8.4. Cost of the mutual agreement procedure

The mutual agreement procedure is free of charge. The taxpayer bears his or her own costs involved in making the request (in particular any agent fees due).

8.5. Outcome of the mutual agreement procedure

The taxpayer is informed about the outcome of the mutual agreement procedure. He or she generally has 30 days to accept implementation of the mutual agreement procedure. If the taxpayer accepts, he or she is requested to renounce recourse to judicial remedies in relation to the issues to which a solution has been found in the mutual agreement. If the taxpayer is not satisfied with the mutual agreement signed by the competent authorities, he or she has no recourse to remedy against this agreement. If he or she rejects the implementation of the agreement it will not be implemented but the mutual agreement procedure will nonetheless be concluded. If the implementation of the mutual agreement is rejected, the taxpayer may have recourse to Swiss internal appeal procedures against the Swiss tax decision if the conditions are met.

SIF informs the relevant Swiss tax authority about the outcome of the mutual agreement procedure and, if the taxpayer has agreed, tells it to implement the mutual agreement automatically.