

Rev. Proc. 96-13

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January 16, 1996

## [\*1] SECTION 1. PURPOSE OF MUTUAL AGREEMENT PROCESS

This revenue procedure sets forth the procedures concerning requests by taxpayers for assistance of the U.S. competent authority under the provisions of an income, estate or gift tax treaty to which the United States is a party. Rev. Proc. 91-23, 1991-1 C.B. 534, and Rev. Proc. 91-26, 1991-1 C.B. 543, are superseded by this revenue procedure.

## SEC. 2. SCOPE

.01 General. The U.S. competent authority assists taxpayers with respect to matters covered in the mutual agreement procedure provisions of tax treaties in the manner specified in those provisions. A tax treaty generally permits taxpayers to request competent authority assistance when they consider that actions of the United States, the treaty country, or both, result or will result in taxation that is contrary to the provisions of a treaty. For example, tax treaties generally permit taxpayers to request assistance in order to relieve economic double taxation arising from an allocation under § 482 of the Internal Revenue Code or an equivalent provision under the laws of a treaty country. Competent authority assistance may also be available with respect to issues specifically[\*2] dealt with in other provisions of a treaty. For example, Article XIII(8) of the U.S.-Canada income tax treaty permits taxpayers to request the competent authority to defer the recognition of profit, gain or income with respect to property alienated in the course of a corporate organization, reorganization or similar transaction. In addition, many tax treaties contain provisions concerning fiscal residence or concerning whether a taxpayer is entitled to the benefits of a treaty under specific limitation on benefits provisions. See section 3.07 and 3.08 of this revenue procedure. Taxpayers are urged to examine the specific mutual agreement procedure provisions or other specific provisions of the treaty under which they seek relief, in order to determine whether relief is available in their particular case. This revenue procedure is not intended to limit or expand any specific treaty provisions relating to competent authority matters.

.02 Requests for Assistance. In general, all requests for competent authority assistance must be submitted in accordance with this revenue procedure. However, where a treaty provides specific procedures for requests for competent authority assistance, [\*3] those procedures shall apply, and the provisions of this revenue procedure shall not apply to the extent inconsistent with such treaty procedures. See also Rev. Proc. 91-22, 1991-1 C.B. 526, concerning requests for competent authority assistance with respect to an Advance Pricing Agreement ("APA").

.03 U.S. Competent Authority. The Assistant Commissioner (International) acts as the U.S. competent authority in administering the operating provisions of tax treaties (including entering into a competent authority settlement in a specific case) and in interpreting and applying these treaties. The Tax Treaty Division assists the Assistant Commissioner (International) in these matters. In interpreting or applying tax treaties, the Assistant Commissioner (International) acts only with the concurrence of the Associate Chief Counsel (International). See Delegation Order No. 114 (Rev. 10).

.04 General Process. If a taxpayer's request for competent authority assistance is accepted, the U.S. competent authority generally will consult with the appropriate foreign competent authority and attempt to reach a mutual agreement that is acceptable to all parties. The U.S. competent authority [\*4]also may initiate competent authority negotiations in any situation deemed necessary to protect U.S. interests. Such a situation may arise, for example, when a taxpayer fails to request competent authority assistance after agreeing to a U.S. or foreign tax assessment that is contrary to the provisions of an applicable tax treaty or for which correlative relief may be available.

.05 Failure to Request Assistance. Failure to request competent authority assistance or to take appropriate steps to maintain availability of the remedy may cause a denial of part or all of any foreign tax credits claimed. See § 1.901-

2(e)(5)(i) of the Income Tax Regulations. See also section 11 of this revenue procedure concerning the determination of creditable foreign taxes.

### SEC. 3. GENERAL CONDITIONS UNDER WHICH THIS PROCEDURE APPLIES

.01 General. The exclusions, exemptions, deductions, credits, reductions in rate, and other benefits and safeguards provided by treaties are subject to conditions and restrictions that may vary in different treaties. Taxpayers should examine carefully the specific treaty provisions applicable in their cases to determine the nature and extent of treaty [\*5] benefits or safeguards they are entitled to and the conditions under which such benefits or safeguards are available. In particular, taxpayers should be aware of statutes of limitations and other procedural barriers under U.S. or foreign law that may preclude or limit the extent of the assistance under this revenue procedure. See section 9 of this revenue procedure which prescribes protective measures to be taken by the taxpayer and any concerned related person with respect to U.S. and foreign tax authorities. See also section 12.02 of this revenue procedure for circumstances in which competent authority assistance may be denied.

.02 Requirements of a Treaty. There is no authority for the U.S. competent authority to provide relief from U.S. tax or to provide other assistance due to taxation arising under the tax laws of the foreign country or the United States, unless such authority is granted by a treaty. See Rev. Proc. 89-8, 1989-1 C.B. 778, for procedures for requesting the assistance of the Internal Revenue Service ("the Service") when a taxpayer is or may be subject to inconsistent tax treatment by the Service and a U.S. possession tax agency.

.03 Applicable [\*6] Standards in Allocation Cases. With respect to requests for competent authority assistance involving the allocation of income and deductions between a U.S. taxpayer and a related person, the U.S. competent authority, in seeking to arrive at an agreement with a treaty country, will be guided by the arm's length standard, as reflected in the regulations under § 482 of the Code. When negotiating mutual agreements on the allocation of income and deductions, the U.S. competent authority will take into account all of the facts and circumstances of the particular case and the purpose of the treaty to avoid double taxation.

.04 Who Can File Requests for Assistance. Unless otherwise permitted under an applicable tax treaty, the U.S. competent authority will only consider requests for assistance from U.S. persons, as defined in § 7701(a)(30) of the Code. For purposes of this revenue procedure, a U.S. person is referred to as "the taxpayer." Thus, non-U.S. persons generally must present their initial request for assistance to the relevant foreign competent authority.

.05 Closed Cases. A case previously closed after examination shall not be reopened in order to make an adjustment [\*7] unfavorable to the taxpayer unless the exceptional circumstances described in Rev. Proc. 94-68, 1994-2 C.B. 803, are present. The U.S. competent authority may, but is not required to, accept a taxpayer's request for competent authority consideration that will require the reopening of a case closed after examination.

.06 Foreign Initiated Competent Authority Request. When a foreign competent authority refers a request from a foreign taxpayer to the U.S. competent authority for consultation under the mutual agreement procedure, the U.S. competent authority generally will require the U.S. related taxpayer (in the case of an allocation of income or deductions between related persons) or may require the foreign taxpayer (in other cases) to file a request for competent authority assistance under this revenue procedure.

.07 Requests Relating to Residence Issues. U.S. competent authority assistance may be available to taxpayers seeking to establish their residency status in the United States. Examples include cases in which taxpayers believe that they are erroneously treated as non-U.S. residents by treaty countries or cases where taxpayers are treated as dual residents despite the [\*8] objective tie-breaker provisions contained in the applicable treaties. Generally, competent authority assistance is limited to situations where resolution of a residency issue is necessary in order to avoid double taxation or to determine the applicability of a benefit under the treaty. Further, a request for assistance regarding a residency issue will be accepted only if it is established that the issue requires consultation with the foreign competent authority in order to ensure consistent treatment by the United States and the applicable treaty country. The U.S. competent authority does not issue unilateral determinations with respect to whether an individual is a resident of the United States or of a treaty country.

.08 Determinations Regarding Limitation on Benefits. Many treaties contain a limitation on benefits article that enumerates prescribed requirements that must be met to qualify as a resident eligible for benefits under the treaty. The U.S. competent authority will not issue determinations regarding a taxpayer's status under one of the prescribed requirements in a limitation on benefits provision. However, certain treaties provide that the competent authority may, [\*9] as a matter of discretion, determine the availability of treaty benefits where the prescribed requirements are not met. See, e.g., Article 26(7) of the U.S.-Netherlands income tax treaty. Requests for assistance in such cases should comply with this revenue procedure and any other specific procedures that may be issued from time to time.

#### SEC. 4. PROCEDURES FOR REQUESTING COMPETENT AUTHORITY ASSISTANCE

.01 Time for Filing. A request for competent authority assistance generally may be filed at any time after an action occurs which would give rise to a claim for competent authority assistance. In a case involving a U.S. initiated adjustment of tax or income resulting from a tax examination, a request for competent authority assistance may be submitted as soon as practicable after the amount of the proposed adjustment is communicated in writing to the taxpayer. Where a U.S. initiated adjustment has not yet been communicated in writing (e.g., a notice of proposed adjustment) to the taxpayer, the U.S. competent authority generally will deny the request as premature. In the case of a foreign examination, a request may be submitted as soon as the taxpayer believes such filing[\*10] is warranted based on the actions of the country proposing the adjustment. In a case involving the reallocation of income or deductions between related entities, the request should not be filed until such time that the taxpayer can establish that there is the probability of double taxation. In cases not involving an examination, a request can be made when the taxpayer believes that an action or potential action warrants the assistance of the U.S. competent authority. Examples of such action include a ruling or promulgation by a foreign tax authority concerning a taxation matter, or the withholding of tax by a withholding agent. Except where otherwise provided in an applicable treaty, taxpayers have discretion over the time for filing a request; however, delays in filing may preclude effective relief. See section 9 of this revenue procedure concerning protective measures for taxpayers that need or wish to delay the filing of a request for assistance. See also section 7.06 of this revenue procedure for rules relating to accelerated issue resolution and competent authority assistance.

.02 Place of Filing. The taxpayer must send all written requests for, or any inquiries [\*11] regarding, competent authority assistance to the Assistant Commissioner (International), Attn: Tax Treaty Division, Internal Revenue Service, P.O. Box 23598, Washington D.C. 20026-3598.

.03 Additional Filing. In the case of U.S. initiated adjustments, the taxpayer also must file a copy of the request with the office of the Service where the taxpayer's case is pending. If the request is filed after the matter has been designated for litigation or while a suit contesting the relevant tax liability of the taxpayer is pending in a U.S. court, a copy of the request also must be filed with the Chief Counsel, Attention: Associate Chief Counsel (International), Internal Revenue Service, Washington, D.C. 20224, with a separate statement attached identifying the court where the suit is pending and the docket number of the action.

.04 Form of Request. A request for competent authority assistance must be in the form of a letter addressed to the Assistant Commissioner (International). It must be dated and signed by a person having the authority to sign the taxpayer's federal tax returns. The request must contain a statement that competent authority assistance is being requested and must[\*12] include the information described in section 4.05 of this revenue procedure. See section 5 of this revenue procedure for requests involving small cases.

.05 Information Required. The following information shall be included in the request for competent authority assistance:

- (a) a reference to the specific treaty and the provisions therein pursuant to which the request is made;
- (b) the names, addresses, U.S. taxpayer identification number and foreign taxpayer identification number (if any) of the taxpayer and, if applicable, all related persons involved in the matter;
- (c) if applicable, a description of the control and business relationships between the taxpayer and any relevant related person for the years in issue, including any changes in such relationship to the date of filing the request;

(d) a brief description of the issues for which competent authority assistance is requested, including a brief description of the relevant transactions, activities or other circumstances involved in the issues raised and the basis for the adjustment, if any;

(e) the years and amounts involved with respect to the issues in both U.S. dollars and foreign currency;

(f) if applicable, [\*13] the district office which has made or is proposing to make the adjustment;

(g) an explanation of the nature of the relief sought or the action requested in the United States or in the treaty country with respect to the issues raised, including a statement as to whether the taxpayer wishes to avail itself of the relief provided under Rev. Proc. 65-17, 1965-1 C.B. 833, as amplified, amended, clarified and modified by Rev. Proc. 65-31, 1965-2 C.B. 1024, Rev. Proc. 65-17 Amendment I, 1966-2 C.B. 1211, Rev. Proc. 65-17 Amendment II, 1974-1 C.B. 411, Rev. Proc. 70-23, 1970-2 C.B. 505, Rev. Proc. 71-35, 1971-2 C.B. 573, Rev. Proc. 72-48, 1972-2 C.B. 829, Rev. Proc. 72-53, 1972-2 C.B. 833, and Rev. Proc. 91-24, 1991-1 C.B. 542, (hereinafter referred to as "Rev. Proc. 65-17"), as indicated in section 10 of this revenue procedure;

(h) a statement whether the period of limitations for the years for which relief is sought has expired in the United States or in the treaty country;

(i) a statement whether the request for competent authority assistance involves issues that are currently, or were previously, considered as part of an APA proceeding in the United States or in a similar proceeding[\*14] in the foreign country;

(j) if applicable, powers of attorney with respect to the taxpayer;

(k) a statement whether the taxpayer is requesting the Simultaneous Appeals procedure as provided in section 8 of this revenue procedure;

(l) an amended return, if required under section 9.02 of this revenue procedure;

(m) on a separate document, a statement that the taxpayer consents to the disclosure to the competent authority of the treaty country (with the name of the treaty country specifically stated) and the competent authority's staff of any or all of the items of information set forth or enclosed in the request for U.S. competent authority assistance within the limits contained in the tax treaty under which the taxpayer is seeking relief. This statement must be dated and signed by a person having authority to sign the taxpayer's federal tax returns and is required to facilitate the administrative handling of the request by the U.S. competent authority for purposes of the record-keeping requirements of § 6103(p) of the Code. Failure to provide such a statement will not prevent the U.S. competent authority from disclosing information under the terms of a treaty. See § 6103(k)(4) [\*15] of the Code; and

(n) a penalties of perjury statement in the following form: "Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the facts presented in support of the request for competent authority assistance are true, correct and complete." The declaration must be signed by the person or persons on whose behalf the request is being made and not by the taxpayer's representative. The person signing for a corporate taxpayer must be an authorized officer of the taxpayer who has personal knowledge of the facts. The person signing for a trust, an estate or a partnership must be respectively, a trustee, an executor or a partner who has personal knowledge of the facts.

.06 APAs. Requests for competent authority assistance that involve an APA request must include the information required under Rev. Proc. 91-22, 1991-1 C.B. 526, as well as the applicable information under section 4.05 of this revenue procedure.

.07 Other Documentation. In addition, the taxpayer shall, on request, submit any other information or documentation deemed necessary by the U.S. or foreign competent authority[\*16] for purposes of reaching an agreement. This includes English translations of any documentation required in connection with the competent authority request.

.08 Updates. The taxpayer must keep the U.S. competent authority informed of all material changes in the information or documentation previously submitted as part of, or in connection with, the request for competent authority assistance. The taxpayer also must provide any updated information or new documentation that becomes known or is created after the request is filed and which is relevant to the resolution of the issues under consideration.

.09 Conferences. The taxpayer may, at any time, request a pre-filing conference with the U.S. competent authority to discuss the mutual agreement process with respect to matters covered under a treaty, including discussion of the proper time for filing, the practical aspects of obtaining relief and actions necessary to facilitate the proceedings. Similarly, after a matter is resolved by the competent authorities, a taxpayer may also request a conference with the U.S. competent authority to discuss the resolution.

## SEC. 5. SMALL CASE PROCEDURE FOR REQUESTING COMPETENT AUTHORITY[\*17] ASSISTANCE

.01 General. To facilitate requests for assistance involving small cases, this section provides a special procedure simplifying the form of a request for assistance and, in particular, the amount of information that initially must be submitted. All other requirements of this revenue procedure continue to apply to requests for assistance made pursuant to this section.

.02 Small Case Standards. Eligible taxpayers may file an abbreviated request for competent authority assistance in accordance with this section if the total proposed adjustment involved in the matter is not greater than the following:

	Proposed
Taxpayer	Adjustment
Individual	\$ 100,000
Corporation	\$ 200,000
Other	\$ 200,000

.03 Small Case Filing Procedure. The abbreviated request for competent authority assistance under the small case procedure must be dated and signed by a person having the authority to sign the taxpayer's federal tax returns. Although other information and documentation may be requested at a later date, the initial request for assistance should include the following information and materials:

- (a) a statement indicating that this is a matter subject to the small [\*18]case procedure;
- (b) the name, address, U.S. taxpayer identification number and foreign taxpayer identification number (if any) of the taxpayer and if applicable, all related persons involved;
- (c) a description of the issue and the nature of the relief sought;
- (d) the taxable years and amounts involved with respect to the issues in both U.S. and foreign currency;
- (e) the name of the treaty country;
- (f) an amended return, if required under section 9.02 of this revenue procedure; and
- (g) the statements described in section 4.05(m) and (n) of this revenue procedure.

## SEC. 6. RELIEF REQUESTED FOR FOREIGN INITIATED ADJUSTMENT WITHOUT COMPETENT AUTHORITY INVOLVEMENT

Taxpayers seeking correlative relief with respect to a foreign initiated adjustment involving a treaty matter should present their request to the U.S. competent authority. However, when the adjustment involves years under the jurisdiction of the District Director or Appeals, taxpayers sometimes try to obtain relief from these offices. This may occur, for example, if the adjustment involves a re-allocation of income or deductions involving a related person in a country with which the United States has an income tax treaty. [\*19] In these cases, taxpayers will be advised to contact

the U.S. competent authority office. In appropriate cases, the U.S. competent authority will advise the District of Appeals office on appropriate action. The U.S. competent authority may request the taxpayer to provide the information described under sections 4.05 and 4.07 of this revenue procedure. Failure to request competent authority assistance may result in denial of correlative relief with respect to the issue, including applicable foreign tax credits.

## SEC. 7. COORDINATION WITH OTHER ADMINISTRATIVE OR JUDICIAL PROCEEDINGS

.01 Suspension of Administrative Action with Respect to U.S. Adjustments. When a request for competent authority assistance is accepted with respect to a U.S. initiated adjustment, the Service will postpone further administrative action with respect to the issues under competent authority consideration, except (a) in situations in which the Service may be requested otherwise by the U.S. competent authority, or (b) in situations involving cases pending in court and in other instances in which action must be taken to avoid prejudicing the U.S. Government's interest. The normal administrative procedures[\*20] continue to apply, however, to all other issues not under U.S. competent authority consideration. For example, if there are other issues raised during the examination and the taxpayer is not in agreement with these issues, the usual procedures for completing the examination with respect to these issues apply. If the taxpayer is issued a thirty day letter with respect to these issues and prepares a protest of the unagreed issues, the taxpayer need not include any unagreed issue under consideration by the competent authority. Following the receipt of a taxpayer's protest, normal Appeals procedures shall be initiated with respect to those issues not subject to competent authority consideration.

.02 Coordination with Appeals. Taxpayers that disagree with a proposed U.S. adjustment may either pursue their right of administrative review with Appeals before requesting competent authority assistance or may request competent authority assistance immediately. See, however, section 8 of this revenue procedure for Simultaneous Appeals procedures. Appeals' consideration of potential competent authority matters will be made without regard to other issues or considerations that do not involve[\*21] potential competent authority matters.

.03 Coordination with Litigation. The U.S. competent authority will not, without the consent of the Chief Counsel, accept (or continue to consider) a taxpayer's request for assistance if the request involves a taxable period pending in a U.S. court or involves a matter pending in a U.S. court or designated for litigation for any taxable period. If the case is pending in the United States Tax Court, the taxpayer may, in appropriate cases, be asked to join the Service in a motion to sever issues or delay trial pending completion of the competent authority proceedings. If the case is pending in any other court, the Chief Counsel will consult with the Department of Justice about appropriate action, and the taxpayer may, in appropriate cases, be asked to join the U.S. Government in a motion to sever issues or delay trial pending completion of the competent authority proceedings. Final decision on severing issues or delaying trial rests with the court. The filing of a competent authority request does not, however, relieve the taxpayer from taking any action that may be necessary or required with respect to litigation.

.04 Coordination with [\*22] the APA Procedure. Rev. Proc. 91-22, 1991-1 C.B. 526, informs taxpayers how to request an APA from the office of the Associate Chief Counsel (International). If an APA request involves a treaty country, taxpayers are encouraged to seek a competent authority agreement with respect to the matters that are the subject of the APA. The purpose of a competent authority agreement in this case is to avoid double taxation that otherwise may occur. Further, where the taxpayer requests that, as part of the APA process, consideration be given to resolving an issue raised by the Service for earlier taxable periods, the taxpayer is encouraged to seek competent authority consideration of the issue for these periods.

.05 Effect of Agreements or Judicial Determinations on Competent Authority Proceedings. If a taxpayer either executes a closing agreement with the District (whether or not contingent upon competent authority relief) with respect to a potential competent authority issue or reaches a settlement on the issue with Appeals or Counsel pursuant to a closing agreement or other written agreement, the U.S. competent authority will endeavor only to obtain a correlative adjustment from the[\*23] treaty country and will not undertake any actions that would otherwise change such agreements. However, the U.S. competent authority will, in appropriate cases, consider actions necessary for the purpose of providing relief pursuant to Rev. Proc. 65-17. Once a taxpayer's tax liability for the taxable periods in issue has been determined by a U.S. court (including settlement of the proceedings before or during trial), the U.S. competent authority similarly will endeavor only to obtain correlative relief from the treaty country and will not undertake any action that would otherwise reduce the taxpayer's federal tax liability for the taxable periods in issue as determined by a U.S. court. Taxpayers therefore should be aware that in these situations, as well as in situations where a treaty country

takes a similar position with respect to issues resolved under its domestic laws, relief from double taxation may be jeopardized.

.06 Accelerated Competent Authority Procedure. A taxpayer requesting competent authority assistance with respect to an issue raised by the Service also may request that the competent authorities attempt to resolve the issue for subsequent taxable periods ending[\*24] prior to the date of the request for assistance if the same issue continues in those periods. See also Rev. Proc. 94-67, 1994-2 C.B. 800, concerning the Accelerated Issue Resolution ("AIR") process. The U.S. competent authority will consider the request and will contact the appropriate District to consult on whether the issue should be resolved for subsequent taxable periods. If the District consents to this procedure, the U.S. competent authority will present to the foreign competent authority the request to consider such taxable periods. For purposes of resolving the issue, the taxpayer must furnish all relevant information and statements that may be requested by the U.S. competent authority pursuant to this revenue procedure. In addition, if the case involves a Coordinated Examination Program ("CEP") taxpayer, the taxpayer must furnish all relevant information and statements requested by the District Director, as described in Rev. Proc. 94-67, 1994-2 C. B. 800. If the case involves a non-CEP taxpayer, the taxpayer must furnish all relevant information and statements that may be requested by the District Director. A request for the accelerated competent authority procedure may [\*25]be made at the time of filing a request for competent authority assistance or at any time thereafter, but generally before conclusion of the mutual agreement in the case; however, taxpayers are encouraged to request the procedure as early as practicable. The application of the accelerated procedure may require the prior consent of the Chief Counsel. See section 7.03 of this revenue procedure. A request for the accelerated competent authority procedure must contain a statement that the taxpayer agrees that: (1) the inspection of books of account or records under the accelerated competent authority procedure will not preclude or impede (under § 7605(b) or any administrative provision adopted by the Service) a later examination of a return or inspection of books of account or records for any taxable period covered in the accelerated competent authority assistance request and (2) the Service need not comply with any applicable procedural restrictions (for example, providing notice under § 7605(b)) before beginning such examination or inspection. For competent authority assistance with respect to prospective periods, see Rev. Proc. 91-22, 1991-1 C.B. 526. The accelerated competent[\*26] authority procedure is not subject to the AIR process limitations.

## SEC. 8. SIMULTANEOUS APPEALS PROCEDURE

.01 General. A taxpayer filing a request for competent authority assistance under this revenue procedure may, at the same time or at a later date, request Appeals' consideration of the competent authority issue under the procedures and conditions provided in this section. The U.S. competent authority also may request Appeals' involvement if it is determined that such involvement would facilitate the negotiation of a mutual agreement in the case or otherwise would serve the interest of the Service. The taxpayer may, at any time, request a pre-filing conference with the offices of the National Director of Appeals and the U.S. competent authority to discuss the Simultaneous Appeals procedure.

.02 Time for Requesting the Simultaneous Appeals Procedure.

(a) When Filing For Competent Authority Assistance.

The Simultaneous Appeals procedure may be invoked at any of the following times:

(1) When the taxpayer applies for competent authority assistance with respect to an issue for which the District has proposed an adjustment and before the protest is filed;

(2) When[\*27] the taxpayer files a protest with Appeals and decides to sever the competent authority issue and seek competent authority assistance while other issues are referred to Appeals; and

(3) When the case is in Appeals and the taxpayer later decides to request competent authority assistance with respect to the competent authority issue. The taxpayer may sever the competent authority issue for referral to the U.S. competent authority and invoke the Simultaneous Appeals procedure at any time when the case is in Appeals but before settlement of the issue. Taxpayers, however, are encouraged to invoke the Simultaneous Appeals procedure as soon as possible, preferably as soon as practicable after the first Appeals conference.

(b) After Filing For Competent Authority Assistance. The taxpayer may request the Simultaneous Appeals procedure at any time after requesting competent authority assistance. However, a taxpayer's request for the Simultaneous Appeals

procedure generally will be denied if made after the date the U.S. position paper is communicated to the foreign competent authority, unless the U.S. competent authority determines that the procedure would facilitate an early resolution[\*28] of the competent authority issue or otherwise is in the best interest of the Service.

.03 Cases Pending in Court. If the matter is pending before a U.S. court or has been designated for litigation and jurisdiction has been released to the U.S. competent authority, a request for the Simultaneous Appeals procedure may be granted only with the consent of the Chief Counsel.

.04 Request for Simultaneous Appeals Procedure. The taxpayer's request for the Simultaneous Appeals procedure should be addressed to the U.S. competent authority either as part of the initial competent authority assistance request or, if made later, as a separate letter to the U.S. competent authority. The request should state whether the issue was previously protested to Appeals for the periods in competent authority or for prior periods (in which case a copy of the relevant portions of the protest and an explanation of the outcome, if any, should be provided). The U.S. competent authority will send a copy of the request to the National Director of Appeals, who, in turn, will forward a copy to the appropriate Regional Director of Appeals. When the U.S. competent authority invokes the Simultaneous Appeals[\*29] procedure, the taxpayer will be notified. The U.S. competent authority has jurisdiction of the issue when the Simultaneous Appeals procedure is invoked.

.05 Role of Appeals in the Competent Authority Process.

(a) Appeals Process. The Appeals representative assigned to the case will consult with the taxpayer and the U.S. competent authority for the purpose of reaching a resolution of the unagreed issue under competent authority jurisdiction before the issue is presented to the foreign competent authority. For this purpose, established Appeals procedures apply. The Appeals representative will consult with the U.S. competent authority during this process to ensure appropriate coordination of the Appeals process with the competent authority procedure, so that the terms of a tentative resolution and the principles and facts upon which it is based are compatible with the position that the U.S. competent authority intends to present to the foreign competent authority with respect to the issue. Any resolution reached with the Service under this procedure is subject to the competent authority process and, therefore, is tentative and not binding on the Service or the taxpayer. The [\*30]Service will not request the taxpayer to conclude the Appeals process with a written agreement. The conclusions of the tentative resolution, however, generally will be reflected in the U.S. position paper used for negotiating a mutual agreement with the foreign competent authority. The procedures under this section do not give taxpayers the right to receive a fresh consideration of the issue by Appeals where the taxpayer applied for competent authority assistance after having received substantial Appeals consideration. Rather, the Service shall rely upon such previous consideration by Appeals when considering the case under the Simultaneous Appeals procedure.

(b) Assistance to U.S. Competent Authority. The U.S. competent authority is responsible for developing a U.S. position paper with respect to the issue and for conducting the mutual agreement procedure. Generally, requesting Appeals' consideration of an issue under competent authority jurisdiction will not affect the manner in which taxpayers normally are involved in the competent authority process.

.06 Denial or Termination of Simultaneous Appeals Procedure. (a) Taxpayer's Termination. The taxpayer may, at any time, [\*31] withdraw its request for the Simultaneous Appeals procedure.

(b) Service's Denial or Termination. The U.S. competent authority, the National Director of Appeals, or the appropriate Regional Director of Appeals may decide to deny or terminate the Simultaneous Appeals procedure if the procedure is determined to be prejudicial to the mutual agreement procedure or to the administrative appeals process. For example, a taxpayer that received Appeals consideration before requesting competent authority assistance, but was unable to reach a settlement in Appeals, may be denied the Simultaneous Appeals procedure. A taxpayer may request a conference with the offices of the U.S. competent authority and the National Director of Appeals to discuss the denial or termination of the procedure.

.07 Returning to Appeals. If the competent authorities fail to agree or if the taxpayer does not accept the mutual agreement reached by the competent authorities, the taxpayer will be permitted to refer the issue to Appeals for further consideration.



.08 Appeals Consideration of Non-Competent Authority Issues. The Simultaneous Appeals procedure does not affect the taxpayer's rights to Appeals' [\*32] consideration of other unresolved issues. The taxpayer may pursue settlement discussions with respect to the other issues without waiting for resolution of the issues under competent authority jurisdiction.

## SEC. 9. PROTECTIVE MEASURES

.01 General. In any matter subject to this revenue procedure, the taxpayer must take (or, if necessary, advise a related person to take) such protective measures as may be necessary with the U.S. and foreign tax authorities so that the implementation of any agreement reached by the competent authorities is not barred by administrative, legal or procedural barriers. Such barriers may arise either before or after a competent authority request is filed. Protective measures include, but are not limited to: (a) filing amended returns or protective claims for refund or credit; (b) staying the expiration of any period of limitations on the making of a refund or other tax adjustment; (c) avoiding the lapse or termination of the taxpayer's right to appeal any tax determination; (d) complying with all applicable procedures for invoking competent authority consideration, including applicable treaty provisions dealing with time limits within which to invoke[\*33] such remedy; and (e) contesting and adjustment or seeking an appropriate correlative adjustment with respect to the U.S. or treaty country tax. A taxpayer should take protective measures in a timely manner, that is, in a manner that allows sufficient time for appropriate procedures to be completed and effective before barriers arise. Generally, a taxpayer should consider, at the time an adjustment is first proposed, which protective measures may be necessary and when such measures should be taken. However, earlier consideration of appropriate actions may be desirable, for example, in the case of a recurring adjustment or where the taxpayer otherwise is on notice that an adjustment is likely to be proposed. See section 9.05 of this revenue procedure regarding treaty provisions waiving procedural and other barriers. Taxpayers may consult with the U.S. competent authority to determine the need for and timing of protective measures in their particular case.

.02 Filing of Amended Tax Return in the United States. At the time the request for competent authority assistance is filed, the taxpayer also must file, in cases involving an adjustment proposed by a treaty country, an amended [\*34]federal tax return (for example, a Form 1120X, Amended U.S. Corporation Income Tax Return, if a Form 1120 was originally filed) in the manner provided in the regulations under § 6402 of the Code. The amended tax return shall be limited to a claim for credit or refund of the taxes attributable to the matters under competent authority consideration. The amended tax return shall be filed by attaching it to the request for competent authority assistance. An amended return filed in accordance with this section should not be filed with any other office of the Service, notwithstanding any instructions concerning the place for filing on such forms or in such regulations. Final disposition of the amended return will be deferred by the Service until the U.S. competent authority disposes of the issues under consideration.

.03 Filing a Protective Claim in the United States.

(a) In General. There may be situations where a taxpayer is unable to file a formal competent authority assistance request before the statute of limitations expires with respect to the affected U.S. return. In this situation, before the statute of limitations expires, the taxpayer should file a protective claim [\*35]for refund or credit of the taxes attributable to the potential competent authority issue to ensure that assistance will not be barred. Situations for which a protective filing may be appropriate include: (i) the treaty country is considering but has not yet proposed an adjustment; (ii) the treaty country has proposed an adjustment but the related taxpayer in the treaty country decides to pursue administrative or judicial remedies in the foreign country; or (iii) the terms of the applicable treaty require notification to be made to the competent authority within a certain time period. In considering whether to accept a taxpayer's request for competent authority assistance, the U.S. competent authority will consider whether the taxpayer has filed a protective claim in accordance with this subsection.

(b) Filing of Protective Claim. A protective claim is made by filing an appropriate amended federal tax return, as provided in section 9.02 of this revenue procedure. The amended tax return is filed with the U.S. competent authority at the address indicated in section 4.02 of this revenue procedure and before the expiration of any applicable time limitations. The amended return shall[\*36] indicate that the taxpayer is filing a protective claim and shall set forth, to the extent available, the information required under section 4.05 (a) through (j) or under section 5.03 (a) through (e) of this revenue procedure. An amended tax return filed in this manner will be considered a properly filed amended tax return, notwithstanding any other instruction on the form or in regulations concerning the place for filing.

(c) Notification Requirement. After filing a protective claim, the taxpayer periodically must notify the U.S. competent authority whether the taxpayer still is considering filing for competent authority assistance. The notification must be filed every six months until the formal request for competent authority assistance is filed. The U.S. competent authority may deny competent authority assistance if the taxpayer fails to file this semi-annual notification.

(d) No Consultation between Competent Authorities until Formal Request is Filed. The U.S. competent authority generally will not undertake any consultation with the treaty country's competent authority with respect to a protective claim. The U.S. competent authority shall place the protective claim [\*37] in suspense until either a formal request for competent authority assistance is filed or the taxpayer notifies the U.S. competent authority that competent authority consideration is no longer needed.

.04 Effect of an Amended Tax Return. An amended tax return filed under either sections 9.02 and 9.03 of this revenue procedure only allows a credit or a refund to the extent agreed to by the U.S. and foreign competent authorities or to the extent unilaterally allowed by the U.S. competent authority. This revenue procedure does not grant a taxpayer the right to invoke § 482 of the Code in its favor or compel the Service to allocate income or deductions or grant a tax credit or refund.

.05 Treaty Provisions Waiving Procedural Barriers. In those cases where the mutual agreement procedure provision of a tax treaty waives or removes procedural barriers to the credit or refund of tax, taxpayers may be allowed a credit or refund of U.S. or foreign tax even though the otherwise applicable period of limitations has expired, prior closing agreements have been entered into, or other actions have been taken or omitted that ordinarily would foreclose relief in the form of a credit or refund[\*38] of tax. However, because of differences in interpreting these waiver provisions or other difficulties that may arise in their application, taxpayers nonetheless should take appropriate protective measures as described under this revenue procedure or under applicable foreign procedures. In considering whether to accept a taxpayer's request for competent authority assistance, the U.S. competent authority will consider whether the taxpayer took protective measures in accordance with this section.

## SEC. 10. APPLICATION OF REV. PROC. 65-17

Rev. Proc. 65-17 generally provides for the tax-free repatriation of certain amounts following an allocation of income between related U.S. and foreign corporations under § 482 of the Code. If a taxpayer intends to request competent authority assistance to resolve the underlying double taxation matter with the treaty country, the taxpayer should file for Rev. Proc. 65-17 relief in conjunction with its request for competent authority assistance. See Rev. Proc. 96-14, page , this Bulletin, which also sets forth the procedures for securing relief under Rev. Proc. 65-17 when a taxpayer does not intend to request competent authority assistance. [\*39]

## SEC. 11. DETERMINATION OF CREDITABLE FOREIGN TAXES

For purposes of determining the amount of foreign tax creditable under §§ 901 and 902 of the Code, any amounts paid to foreign tax authorities that would not have been due if the treaty country had made a correlative adjustment may not constitute a creditable foreign tax. See § 1.901-2(e)(5)(i) of the regulations and Rev. Rul. 92-75, 1992-2 C.B. 197. Acts or omissions by the taxpayer that preclude effective competent authority assistance, including failure to take protective measures as described in section 9 of this revenue procedure or failure to seek competent authority assistance, may constitute failure to exhaust all effective and practical remedies for purposes of § 1.901-2(e)(5)(i). Further, the fact that the taxpayer has sought competent authority assistance but obtained no relief, either because the competent authorities failed to reach an agreement or because the taxpayer rejected an agreement reached by the competent authorities, generally will not, in and of itself, demonstrate for purposes of § 1.901-2(e)(5)(i) that the taxpayer has exhausted all effective and practical remedies to reduce the taxpayer's liability[\*40] for foreign tax (including liability pursuant to a foreign tax audit adjustment). Any determination within the Service of whether a taxpayer has exhausted the competent authority remedy must be made in consultation with the U.S. competent authority.

## SEC. 12. ACTION BY U.S. COMPETENT AUTHORITY

.01 Notification of Taxpayer. Upon receiving a request for assistance pursuant to this revenue procedure, the U.S. competent authority will notify the taxpayer whether the facts provide a basis for assistance.

.02 Denial of Assistance. The U.S. competent authority generally will not accept a request for competent authority assistance or will cease providing assistance to the taxpayer if:

- (a) the taxpayer is not entitled to the treaty benefit or safeguard in question or to the assistance requested;
- (b) the taxpayer is willing only to accept a competent authority agreement under conditions that are unreasonable or prejudicial to the interests of the U.S. Government;
- (c) the taxpayer rejected the competent authority resolution of the same or similar issue in a prior case;
- (d) the taxpayer does not agree that competent authority negotiations are a government-to-government activity[\*41] that does not include the taxpayer's participation in the negotiation proceedings;
- (e) the taxpayer does not furnish upon request sufficient information to determine whether the treaty applies to the taxpayer's facts and circumstances;
- (f) the taxpayer was found to have acquiesced in a foreign initiated adjustment that involved significant legal or factual issues that otherwise would be properly handled through the competent authority process and then unilaterally made a corresponding correlative adjustment or claimed an increased foreign tax credit, without initially seeking U.S. competent authority assistance; or
- (g) the taxpayer: (i) fails to comply with this revenue procedure; (ii) fails to cooperate with the U.S. competent authority (including failing to provide sufficient facts and documentation to support its claim of double taxation or taxation contrary to the treaty); or (iii) failed to cooperate with the Service during the examination of the periods in issue and such failure significantly impedes the ability of the U.S. competent authority to negotiate and conclude an agreement (e.g., the period of limitations for assessment in the foreign country has expired or significant[\*42] factual development is required that cannot effectively be completed outside the examination process).

.03 Extending Period of Limitations for Assessment. If the U.S. competent authority accepts a request for assistance, the taxpayer may be requested to execute a consent extending the period of limitations for assessment of tax for the taxable periods in issue. Failure to comply with the provisions of this subsection can result in denial of assistance by the U.S. competent authority with respect to the request.

.04 No Review of Denial of Request for Assistance. The U.S. competent authority's denial of a taxpayer's request for assistance or dismissal of a matter previously accepted for consideration pursuant to this revenue procedure is final and not subject to administrative review.

.05 Notification. The U.S. competent authority will notify a taxpayer requesting assistance under this revenue procedure of any agreement that the U.S. and the foreign competent authorities reach with respect to the request. If the taxpayer accepts the resolution reached by the competent authorities, the agreement shall provide that it is final and is not subject to further administrative[\*43] or judicial review. If the competent authorities fail to agree, or if the agreement reached is not acceptable to the taxpayer, the taxpayer may withdraw the request for competent authority assistance and may then pursue all rights to review otherwise available under the laws of the United States and the treaty country. Where the competent authorities fail to agree, no further competent authority remedies generally are available, except with respect to treaties that provide for arbitration of the dispute. See, e.g., Article 25(5) of the U.S.-German income tax treaty. A request for arbitration shall be made in accordance with the procedures prescribed under the applicable treaty and related documents, including procedures which the Service may promulgate from time to time.

.06 Closing Agreement. When appropriate, the taxpayer will be requested to reflect the terms of the mutual agreement and of the competent authority assistance provided in a closing agreement, in accordance with section 6.07 and 6.17 of Rev. Proc. 68-16, 1968-1 C.B. 770.

.07 Unilateral Withdrawal or Reduction of U.S. Initiated Adjustments. With respect to U.S. initiated adjustments under § 482 of the [\*44] Code, the primary goal of the mutual agreement procedure is to obtain a correlative adjustment from the treaty country. For other types of U.S. initiated adjustments, the primary goal of the U.S. competent authority is the avoidance of taxation in contravention of an applicable treaty. Unilateral withdrawal or reduction of U.S. initiated

adjustments, therefore, generally will not be considered. For example, the U.S. competent authority will not withdraw or reduce an adjustment to income, deductions, credits or other items solely because the period of limitations has expired in the foreign country and the foreign competent authority has declined to grant any relief. If the period provided by the foreign statute of limitations has expired, the U.S. competent authority may take into account other relevant facts to determine whether such withdrawal or reduction is appropriate and may, in extraordinary circumstances and as a matter of discretion, provide such relief with respect to the adjustment to avoid actual or economic double taxation. In no event, however, will relief be granted where there is fraud or negligence with respect to the relevant transactions. In keeping with the U.S. [\*45] Government's view that tax treaties should be applied in a balanced and reciprocal manner, the United States normally will not withdraw or reduce an adjustment where the treaty country does not grant similar relief in equivalent cases.

### SEC. 13. REQUESTS FOR RULINGS

.01 General. Requests for advance rulings regarding the interpretation or application of a tax treaty, as distinguished from requests for assistance from the U.S. competent authority pursuant to this revenue procedure, must be submitted to the Associate Chief Counsel (International) in accordance with Rev. Proc. 96-1, 1996-1 I.R.B. 8.

.02 Foreign Tax Rulings. The Service does not issue advance rulings on the effect of a tax treaty on the tax laws of a treaty country for purposes of determining the tax of the treaty country.

### SEC. 14. FEES

Rev. Proc. 96-1, 1996-1 I.R.B. 8, sec. 14, requires the payment of user fees for requests to the Service for rulings, opinion letters, determination letters and similar requests. No user fees are required for requests for competent authority assistance pursuant to this revenue procedure.

### SEC. 15. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 91-23 and Rev. Proc. 91-26 are superseded[\*46] by this revenue procedure. Rev. Proc. 91-22 is amplified. Rev. Rul. 72-437, 1972-2 C.B. 660, is modified. Rev. Rul. 92-75 is clarified.

### SEC. 16. EFFECTIVE DATE

This revenue procedure is effective for requests for competent authority assistance filed after January 16, 1996.

### DRAFTING INFORMATION

The principal authors of this revenue procedure are Edward G. Turco of the Office of International Programs, Tax Treaty Division and Judith Cavell Cohen of the Office of the Associate Chief Counsel (International). For further information regarding this revenue procedure, contact either Mr. Turco on (202) 874-1570 or Ms. Cohen on (202) 622-3880 (not toll-free calls).

