

**Memorandum of Understanding
Between
The Competent Authorities
of
Canada
and
The United States of America**

Introduction

The competent authorities of Canada and the United States hereby enter into the following agreement (“the Agreement”) regarding the application of the arbitration procedure under paragraphs 6 and 7 of Article XXVI (Mutual Agreement Procedure) of the Convention Between Canada and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes signed on September 26, 1980, as amended by the Protocols done on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007 (Convention). The Agreement is entered into under paragraph 17 of Annex A to the September 21, 2007, Protocol to the Convention (Arbitration Note). The purpose of the Agreement is to provide guidance under which the U.S.-Canada arbitration procedure will operate.

1. Competent Authority Assistance in General
 - a. A request for competent authority assistance must comply with the requirements as set out for the United States in Revenue Procedures 2006-54 and 2006-9, , and for Canada in the Canada Revenue Agency Information Circulars 71-17, 94-4, and any other guidance of either Contracting State relevant to a request for competent authority assistance.
 - b. A person shall submit a request for competent authority assistance to the Contracting State of which that person is a resident. In situations involving allocation of income or deductions between related persons, each person will send a request to the Contracting State of which that person is a resident.
2. Cases Eligible for Arbitration
 - a. According to paragraph 6 of Article XXVI (Mutual Agreement Procedure) of the Convention, arbitration is available with respect to any case where the competent authorities have endeavored but are unable to reach an agreement under Article XXVI of the Convention.
 - b. Arbitration is available in respect of an Accelerated Competent Authority Procedure (ACAP) request. For procedures regarding ACAP requests, see paragraph 18 of the Agreement.

- c. Arbitration is available in respect of an unresolved competent authority request which originated with, or in conjunction with, a bilateral Advance Pricing Agreement/Arrangement (APA) request. For procedures regarding APAs, see paragraph 19 of the Agreement.
- d. Once a case is accepted into the mutual agreement procedure, neither competent authority will cease unilaterally to consider a case, except for the circumstances described in paragraph 3 of the Agreement.

3. Cases Ineligible for Arbitration

- a. Arbitration is not available for a case that neither competent authority has accepted, or in which either competent authority ceases to provide assistance, in accordance with published guidance.
 - i. The Canadian competent authority will not accept a request for competent authority assistance or will cease providing assistance to a taxpayer, and thus not provide for arbitration if taxpayers do not comply with the requirements as described in Information Circulars 71-17, 94-4, and any other guidance relevant for competent authority assistance. In addition, the Canadian competent authority will not provide for arbitration in a case with respect to those issues for which a Canadian court decision has been rendered or a Canadian taxpayer has entered into an Appeals settlement.
 - ii. The U.S. competent authority generally will not accept a request for competent authority assistance or will cease providing assistance to a taxpayer, and thus not provide for arbitration in the circumstances described in section 12.02 (Denial of Assistance) of IRS Revenue Procedure 2006-54 and any other guidance relevant for competent authority assistance. In addition the U.S. competent authority will not provide for arbitration for a case with respect to those issues for which the taxpayer has reached a settlement on the issue with IRS Appeals (including an Appeals settlement through the Appeals arbitration process) or with Chief Counsel pursuant to an executed closing agreement or other written agreement such as Form 870-AD, or for which a US court decision has been rendered.
- b. Arbitration is not available for cases that have been accepted for competent authority consideration, but for which the competent authorities agree that the particular case is not suitable for determination by arbitration pursuant to paragraph 6(b)(i)(B) of Article XXVI of the Convention.
- c. In the event the taxpayer docket for litigation in a U.S. court the case for which it requested competent authority assistance, the case will be considered as not suitable for arbitration if the court does not allow for suspension of the litigation proceedings until such a time as a competent authority resolution has been reached. A temporary deferral of arbitration proceedings may also be considered in case of an administrative appeal if the appeals proceedings have not been suspended.

- d. If a taxpayer proceeds with either a Notice of Objection or an appeal to a Canadian court on a matter that is under competent authority consideration, and does not request that the objection or appeal be held in abeyance, the competent authority process will be terminated.
- e. Arbitration is not available for a particular taxation year of a case that has been accepted for competent authority consideration under paragraph 3(b) of Article IX of the Convention where the six-year notification period has been exceeded. However, the competent authorities may agree to apply the board's determination to that year if the year is not barred by any time or procedural limitations under domestic law

4. Commencement Date for Cases Eligible for Arbitration

- a. For cases eligible for arbitration, it is understood that confirmation of the "information necessary to undertake substantive consideration for a mutual agreement" is envisioned to ordinarily occur within 30 calendar days after the necessary information is provided to the competent authority. For cases initially submitted to the competent authorities as a bilateral APA request, this confirmation is envisioned to ordinarily occur within 60 calendar days after the necessary information is provided to the competent authority.
- b. If a competent authority determines that the request for assistance is not complete, that competent authority ordinarily will inform the taxpayer in writing within 45 calendar days (75 calendar days in the case of APAs) of receipt of the request, what information is necessary consistent with IRS Rev. Procs. 2006-54 and 2006-9 or the information required under Canada Revenue Agency's Information Circulars 71-17, 94-4 and any other guidance of either Contracting State relevant to a request for competent authority assistance.
- c. Once complete information is provided, pursuant to paragraph 16 of the Arbitration Note, each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date.
- d. When the Commencement Date is established, the competent authority that received the information necessary to undertake substantive consideration for mutual agreement on the later date referred to in paragraph 4(c) above (i.e. the Commencement Date) shall confirm, in writing, to the other competent authority the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration. Each competent authority will inform the taxpayer(s) resident in its country in writing of the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration.

5. Date Arbitration Proceedings Begin

- a. Arbitration proceedings in a case will begin on the later of:

- i. Two years after the Commencement Date of that case, unless both competent authorities have agreed prior to the date arbitration proceedings begin to a different date, and
 - ii. The earliest date upon which the nondisclosure agreements of each Concerned Person and their representatives or agents have been received by both competent authorities.
- b. As contemplated in paragraph 5(a)(i) above, the competent authorities may agree to accelerate or delay the date an arbitration proceedings would ordinarily begin. For example, the competent authorities may agree to accelerate the date the arbitration proceedings begins for any case for which the competent authorities think resolution of the case is unlikely through further negotiation. Situations where the competent authorities may agree to delay the date the arbitration proceedings begin include situations where the competent authorities are close to reaching an agreement, where there has been a delay by the taxpayer in providing information or where the taxpayer has provided significant new information after the Commencement Date.
- c. If the competent authorities agree to begin arbitration proceedings on a date different from that generally required, then the competent authorities will confirm that date in writing to each other and to their taxpayers.

6. Board Member¹ Appointment

- a. Each competent authority will appoint a member to the board by sending a written communication indicating its appointment to the other competent authority within 60 calendar days of the date on which the arbitration proceedings begin.
- b. If one competent authority fails to appoint a member, the other competent authority shall contact the highest ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen of either Canada or the United States, who shall appoint a Board Member by written notice to both countries within 60 calendar days of the date of such failure.
- c. If the Board Members appointed by the competent authorities fail to agree upon the Chair, the members will contact their respective appointing competent authorities, and the competent authorities will jointly contact the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen of either Canada or the United States, and request the appointment of the Chair by written notice to both competent authorities within 60 calendar days of the date of such failure.
- d. The competent authorities will not appoint current Canadian or U.S. government employees or former government employees during the one-

¹ In this memorandum of understanding, the term Board Member includes the Chair, unless the context requires otherwise.

year period immediately following their departure from government employment.

- e. The competent authorities will appoint members who have significant international tax experience. They need not, however, have experience as either a judge or an arbitrator. Every member of a board shall be impartial and independent of the Contracting States and Concerned Persons at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceedings and for a reasonable period of time thereafter.
- f. Prior to accepting an appointment, a prospective Board Member shall disclose to both competent authorities any fact or circumstance likely to give rise to justifiable doubts as to the Board Member's impartiality or independence. If, at any stage during the proceeding, new circumstances or facts arise that may give rise to such doubts, a Board Member shall promptly disclose such facts or circumstances to both competent authorities.
- g. If a Board Member is unable to fulfill his or her duties the chair will notify the competent authorities. The competent authority that selected the Board Member who is unable to fulfill his or her duties will select a substitute Board Member within 14 calendar days of having been notified.
- h. If the Chair is unable to fulfill his or her duties, the remaining Board Members will contact their respective appointing competent authorities and the competent authorities will ask the Board Members to appoint a new chair within 30 calendar days of having been asked to select a substitute.
- i. If any Board Member is unable to fulfill his or her duties the competent authorities will consult with the Chair after the appointment of the new Board Member to determine whether a new timetable is necessary.

7. Nondisclosure Issues

Each Concerned Person and their authorized representatives or agents must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either competent authority or the board, other than the determination of the board and must sign and have notarized a non-disclosure agreement.

8. List of Chairs

- a. The competent authorities will identify and agree to at least 10 qualified persons who are willing to serve as a Chair for a board.
- b. The competent authorities will annually review and revise this list, as necessary.

9. Proposed Resolution, Position Papers and Reply Submissions

- a. Each competent authority will be permitted to submit, within 60 calendar days of the appointment of the Chair of the board, a Proposed Resolution paper, not to exceed five pages, describing the proposed disposition of the

specific monetary amounts of income, expense or taxation at issue in the case, and a supporting Position Paper, not to exceed 30 pages, plus annexes, for consideration by the board.

- b. The Proposed Resolution should be drafted in the form of a mutual agreement that may be provided by the competent authorities to the relevant audit offices for implementation, including appropriate resolutions for each specific amount of income, expense or taxation at issue in the case. However, in the case of an Article IV or V issue, the Proposed Resolution will include a resolution about, respectively, the residence of an individual or the existence (yes/no) of a permanent establishment.
- c. In the event that only one competent authority submits a Proposed Resolution within the allotted time, then that Proposed Resolution will be deemed to be the determination of the board in that case and the arbitration proceeding will be terminated.
- d. Each competent authority may, if it so desires, submit a Reply Submission, not to exceed 10 pages, to the board within 120 calendar days of the appointment of the Chair, to address any points raised by the Proposed Resolution or Position Paper submitted by the other competent authority.
- e. In a particular case, the competent authorities may agree on different page limitations for the Proposed Resolutions, Position Papers or Reply Submissions.
- f. Any annex to a Position Paper must be a document that was provided by one competent authority to the other, or by any Concerned Person to both competent authorities, for use in the negotiation of the case.
- g. All submissions to the board will be made as follows: The submitting competent authority will send four copies of each document to the Chair, who will distribute copies to the Board Members and the other competent authority.

10. Requests for Additional Information

- a. Additional information may be submitted to the Chair only at his or her request on behalf of the board, and copies of the board's request and the competent authority's response shall be provided to the other competent authority on the date on which the request or the response is submitted.
- b. The Chair may request additional information only from the competent authorities and only information that consists only of existing documents and may not request new or additional analyses.

11. Multiple Issues

- a. A case may consist of multiple issues. The existence of multiple issues in a case may be identified by the assertion of multiple discrete proposed adjustments arising from an audit. The Proposed Resolutions and Position Papers should address the issues separately and the board will make separate determinations on the issues as presented. Thus, the final decision

of the board may be comprised of the Proposed Resolutions submitted by each of the competent authorities.

- b. In an appropriate case, for example where the issues are interrelated or have been considered as a package by the competent authorities during negotiations, the competent authorities may agree to a different presentation of the issues to the board

12. Permanent Establishment Cases

The procedures in this paragraph apply to a case that includes issues as a result of the application of both Article V (Permanent Establishment) and Article VII (Business Profits) of the Convention. The other provisions of the Agreement also apply, as appropriate, with such modification as necessary. If a case involves only Article V or only Article VII, then the general provisions of the Agreement apply and not the provisions of this paragraph.

- a. Each competent authority will be permitted to submit, within 60 calendar days of the appointment of the Chair, a separate Proposed Resolution, each not to exceed five pages, and a separate Position Paper, each not to exceed 30 pages, plus annexes, addressing the issue under each article for consideration by the board.
- b. Each competent authority will submit its Article VII Proposed Resolution and Position Paper to the board (*i.e.*, the Chair) in a sealed envelope concurrently with its Article V Proposed Resolution and Position Paper.
- c. Each competent authority may, if it so desires, submit separate Reply Submissions, each not to exceed 10 pages, regarding each of Articles V and VII within 120 calendar days of the appointment of the Chair, to address any points raised by the Proposed Resolutions or Position Papers submitted by the other competent authority. The Reply Submissions regarding Article VII must be sent to the Chair in sealed envelopes.
- d. Board Members must first determine whether a permanent establishment exists under Article V of the Convention.
- e. If the board determines that a permanent establishment does not exist, then the arbitration proceeding is terminated and the Chair will inform the competent authorities of the board's determination.
- f. If the board determines that a permanent establishment exists, the Chair will distribute the sealed Article VII Proposed Resolutions, Position Papers, and the Reply Submissions, if any, to the Board Members.
- g. The Board must then choose one of the two Article VII Proposed Resolutions.
- h. If the board is unable to reach its determination on both the Article V issue and the Article VII issue within six months of the appointment of the Chair, the Chair will advise both competent authorities that the

board requires an additional 30 calendar days to reach its determination on the Article VII issue.

13. Logistical Coordination

The competent authorities will alternate responsibility and cost for coordinating logistics, such as, meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the Proceedings.

14. Communication Between the Board and the Competent Authorities

- a. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both Board Members.
- b. After the Chair is appointed, the competent authorities will send any correspondence to the Chair. Similarly, the Chair will send any correspondence concurrently to the competent authorities.
- c. All communication, except for logistical matters, between the competent authorities and the board must be in writing. Written communication by facsimile or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email or facsimile. The Chair and the competent authorities will use express delivery for all correspondence other than that sent via facsimile or email.
- d. No competent authority will have any ex parte communications, except for administrative or logistical matters, with a Board Member.

15. Fees and Expenses

- a. The fees and expenses will be borne equally by the competent authorities.
- b. Neither competent authority will charge a taxpayer for costs associated with arbitration.
- c. In general, each Board Member will be compensated for no more than three days of preparation, two meeting days and for travel days.
- d. The fees and expenses of Board Members will be set in accordance with the International Centre for Settlement of Investment Disputes.

16. Board Determination

- a. A determination of the board will constitute a resolution by mutual agreement under Article XXVI of the Convention and will be binding on both competent authorities with respect to that case. The determination of the board will have no precedential value.
- b. Within 30 calendar days of receiving the determination each Concerned Person(s) must accept the determination in writing sent to the Contracting State of which the Concerned Person is a resident. If the Concerned Persons fail to accept the determination within 30 calendar days, the determination is considered rejected.
- c. If any Concerned Person rejects a determination, including by virtue of paragraph (b) above, the case will be closed and will not be subject to any further mutual agreement procedure consideration.

- d. The treatment of any interest or penalties will not be part of the board's determination and will be determined by applicable domestic law of Canada or the United States.

17. Terminating Proceedings

If a Concerned Person terminates an arbitration proceeding by withdrawing its request for assistance,

- a. the competent authorities will exchange letters to close the case, and
- b. the Concerned Person will not be allowed access to the mutual agreement procedures for the same matter and same years.

18. Accelerated Competent Authority Procedure (ACAP) Cases

For any MAP case other than an Advance Pricing Agreement/Arrangement, for which a taxpayer has also requested ACAP treatment and both competent authorities have accepted that request, all tax years are eligible for arbitration as one case.

19. Advance Pricing Agreements/Arrangement (APA)

- a. Where the competent authorities have endeavored but are unable to reach an agreement in a case initially submitted to the competent authorities as a bilateral APA request this case is eligible for arbitration procedures.
- b. For APA years for which tax returns have been filed in both countries for at least 12 months before the date arbitration proceedings begin (including any years for which the taxpayer has requested, and both tax authorities have previously accepted a rollback) the board's determination will be the amount of income, expense or tax reportable to either Canada or the United States.
- c. For APA years for which tax returns have not been filed for at least 12 months in both countries before the date arbitration proceedings begin, the competent authorities agree to apply the transfer pricing method described in the Proposed Resolution or Position Paper that serves as the basis for the board's determination.
- d. Once the information necessary to undertake substantive consideration is provided, the Commencement Date of the case, for purposes of any subsequently necessary arbitration, will be the earlier of i) the date on which the competent authorities have exchanged position papers setting forth their initial negotiating positions or ii) two years from the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities.
- e. For cases for which the competent authorities agree to apply the transfer pricing method that serves as the basis for the board's determination under paragraph (c) above, the rules regarding administering an APA still apply to taxpayers and the tax authorities. See Section 11 of Revenue Procedure 2006-9 and Part IX of Canada Revenue Agency's Information Circular 94-4, and any other guidance relevant for competent authority assistance.

- f. The other provisions of the Agreement also apply, as appropriate, with such modifications as are necessary.

20. Transitional Provision

- a. Cases under consideration by the competent authorities as of the date on which the Protocol entered into force (December 15, 2008) as referred to in 3(d)(1)(f)(i) of Article 27 of the Protocol are cases where the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities at the date that the Protocol entered into force.
- b. The competent authorities will confirm the Commencement Date in accordance with the provisions of paragraph 4(d) of the Agreement within 90 days of the effective date of the Agreement

21. Implementation

- a. The Agreement sets forth rules and procedures to be applied in implementing the arbitration proceedings under paragraph 6 and 7 of Article XXVI (Mutual Agreement Procedure) of the Convention. Nothing in the Agreement shall be construed as affecting a taxpayer's rights under applicable domestic law.
- b. The Agreement is effective on the date of the later of the 2 signatures below. In accordance with paragraph 17 of the Arbitration Note, the Agreement may be modified at any time by agreement of the competent authorities.

22. Use of Terms

Terms that are capitalized but not defined in the Agreement have the same meaning set forth in the Convention or Protocol.

Agreed:

For Canada

For the United States of America

Mickey Sarazin
Canadian Competent Authority
Director General
Legislative Policy Directorate

Michael Danilack
United States Competent Authority
Deputy Commissioner (International)
Large Business & International Division

Date:

Date: