

MEXICO'S CURRENT POSITION BEFORE INTERNATIONAL TAX ARBITRATION

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1. Introduction

International tax arbitration is an issue that has concerned tax authorities, taxpayers, professional associations, and arbitral institutions since the beginning of the twenty-first century.

Very little has been written and less published in relation to the results of the resolution of international tax disputes; perhaps because the confidentiality provisions surrounding these matters make it almost impossible to make them publicly known.

In 2002, the International Chamber of Commerce submitted a draft article to be inserted into tax treaties by countries wishing to accept arbitration as a means of resolving disputes. In 2006 the Chamber itself organized an event entitled "Resolution of International Tax Disputes through Arbitration" where international tax experts and arbitration practitioners discussed the issue extensively.

The Organization for Economic Cooperation and Development (OECD) included since the 2008 version, a paragraph "5" to article 25 of its "Model Income Tax Treaty" for arbitration

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within the chapter of mutual agreement procedures and an annex to an "Example of Mutual Agreement in Arbitration."

This paper discusses only the international tax arbitration of the "last best offer" under the Multilateral Convention, since it is the tax arbitration that Mexico will be adopting in the treaties to avoid double taxation that are subject to the Multilateral Convention.

2. The Multilateral Convention

On November 2, 2022, the Federal Executive published in the Official Gazette of the Federation the decree approving the "Multilateral Convention to Implement Measures Related to Tax Treaties Aimed at Preventing Base Erosion and Profit Shifting" made in Paris, France, on November 24, 2016 ("Multilateral Convention"), as well as their "reservations and notifications".

The decree approving the "Status of the List of Reservations and Notifications when Depositing the Instrument of Ratification of the Multilateral Convention to Implement Tax Treaty-Related Measures Aimed at Preventing Base Erosion and Profit Shifting" ("List of Reservations and Notifications") was also published.

At the time of signing the Multilateral Convention, Mexico presented a list of 61 tax treaties concluded by our country with other States ("Covered Tax Treaties"), treaties that will be modified through the Multilateral Convention.

The provisions of the Multilateral Convention affect only international tax treaties listed by the two Contracting Jurisdictions as treaties which will be covered by the Convention as Covered Tax Treaties. A bilateral tributary treaty under the Multilateral Convention will enter into force only after both States signatories to the respective treaty have deposited their instruments of ratification, and a certain specified time has elapsed.

In the case of Mexico, the Multilateral Convention has been published in the Official Gazette of the Federation, and in order to take effect with respect to each of the Covered Tax Treaties, it must continue with the deposit process with the OECD.

According to the "Objective and Description of the Instrument" contained in the decree publishing the "Multilateral Convention": "Specifically, the development of a multilateral instrument with an innovative approach was provided to allow countries to quickly modify their bilateral tax treaties and implement the measures developed on BEPS, to have tools

to ensure that profits are taxed where the economic activities that the economic activities are carried out, generate and produce value, while giving companies greater certainty by reducing disputes over the application of international tax rules and standardizing compliance requirements."

The decree continues by stating that: "The result of the negotiations between a group of 99 countries, including Mexico, 4 jurisdictions and 7 international organizations that participated as observers, is embodied in the Convention, from which the existing instruments are modified to avoid double taxation in a synchronized and efficient manner, while combating their abuse, Dispute settlement is improved, and various provisions are also envisaged to strengthen the global treaty network, which amounts to more than 3,000 worldwide.

Although the United States initially broadly supported BEPS initiatives in relation to a multilateral instrument, Treasury Department officials had stated that the United States did not need to participate in the BEPS process, relying on its own chain of treaties, although it had not said that it would sign a treaty negotiated by other countries.

To reflect the current status of the List of Reservations and Notifications and in response to some adjustments recommended by the OECD, as depositary of the Multilateral Convention, according to the respective decree "the Status of the List of Reservations and Notifications is transcribed when depositing the instrument of ratification".

The Multilateral Convention contains 39 articles, and Mexico made "reservations and notifications" on 13 of those articles.

"Part VI" of the Multilateral Convention regulates "Arbitration" in Articles 18 to 26.

3. Provisional Reservation

Although Mexico had initially made a provisional reservation on the non-applicability of "Part VI", that is, arbitration to settle disputes arising from treaties to which the Multilateral Convention applied, in the publication of the List of Reservations and Notifications in the Official Gazette of the Federation, no mention is made of "reservations" on "Part VI".

4. Part VI of the Multilateral Convention

Part VI of the Multilateral Convention, in its articles 18 to 26, allows Contracting Jurisdictions to include "binding and binding treaty arbitration" ("MBTA") in their

Included Tax Agreements, in accordance with the procedures provided for in the same Multilateral Convention, which are "last best offer" arbitration and arbitration with "reasoned resolution" or "independent opinion".

It is important to clarify that any of these types of arbitration, following the provisions of the Multilateral Convention itself, only occur within the framework of a mutual assistance procedure between the Contracting Jurisdictions, at the request of the affected taxpayer.

5. "Last Best Offer" Arbitration

Pursuant to Article 23 of the Multilateral Convention, where the Contracting Jurisdictions do not make any reservation to Part VI, nor do they agree to the arbitration procedure of Article 19 "Compulsory and Binding Arbitration", an arbitration procedure shall be conducted under the "last best offer" scheme.

Article 23(1) provides that once a case is referred to arbitration, the competent authority of each Contracting Jurisdiction shall, within a period to be agreed, submit to the arbitration panel a proposal for a resolution covering all matters not resolved in the mutual assistance procedure.

6. Initial Determination

The proposed resolution will be limited to the determination of: (i) specific monetary amounts (e.g., income or expenses) or (ii) where specified, the maximum rate of tax levied under the Included Tax Agreement for each adjustment or similar situation in the case.

Where the competent authorities of the Contracting Jurisdictions have been unable to reach agreement on a matter relating to the conditions for the application of a provision of the respective Comprised Tax Agreement ("initial determination"), such as whether or not an individual is a resident, or whether there is a permanent establishment, the competent authorities may submit alternative resolution proposals, in relation to matters the resolution of which depends on such an initial determination.

7. Position Document

The competent authorities of each Contracting Jurisdiction may also submit a position document for consideration by the arbitration panel, a copy of which shall

be sent to the other competent authority within the deadline for submission of such proposed resolution or position document.

8. Argumentative Response

Likewise, the competent authorities may send to the arbitration panel, within the period agreed for that purpose, an argumentative response in relation to the proposed resolution and position document sent by the other competent authority and will send a copy of it to the other competent authority within the delivery period provided for its presentation.

9. Decision of the Arbitration Panel

The arbitration panel shall adopt as its own one of the proposals for resolutions submitted by the competent authorities, for each issue raised, including the initial determinations, without attaching any reasons or other explanation for its decision.

The arbitral decision shall be taken by a simple majority of its members and shall be sent in writing to the competent authorities of the Contracting Jurisdictions. The arbitral decision shall have no precedent status.

10. Non-disclosure of information

Before initiating arbitral proceedings, the competent authorities of the Contracting Jurisdictions of an Included Tax Agreement shall ensure that each person bringing the case and his or her advisers agree in writing not to disclose to any other person information received from the competent authorities or the arbitration panel during the arbitral proceedings.

11. Formation of the Arbitration Panel

Under the Multilateral Convention, in accordance with its Article 20, the arbitration panel shall consist of three individuals with knowledge or experience in international tax matters.

Each competent authority shall appoint a member of the arbitration panel within 60 days from the date of the request to initiate arbitration. The two members so appointed shall, within 60 days of the last of their appointments, appoint a third member to act as Chairperson of the arbitration panel. The President shall not be a national or resident of any of the Contracting Jurisdictions.

In accepting appointment, the members of the arbitral tribunal shall be impartial and independent of: (i) the competent authorities; (ii) tax administrations; (iii) of the ministries of finance of the Contracting Jurisdictions; (iv) all persons directly affected by the case (and their advisors).

The arbitrators shall maintain their impartiality and independence throughout the proceedings and for a reasonable period after the proceedings; avoid any action that could prejudice the appearance of impartiality and independence of the arbitrators with respect to the procedure.

In the absence of the appointment of an arbitrator by any of the Contracting Jurisdictions or where the appointees do not agree on the nomination of the third arbitrator, the missing arbitrator shall be appointed by the highest-ranking member of the OECD Centre for Tax Policy and Administration.

12. Costs of the Arbitration Procedure

The Contracting Jurisdictions shall bear the fees and expenses of the members of the arbitration panels, as well as the costs incurred by the Contracting Jurisdictions thereon, as agreed by the competent authorities of the Contracting Jurisdictions.

In the absence of such an agreement, each Contracting Jurisdiction shall bear its own expenses and those incurred by the member it appoints to the arbitration panel. The Contracting Jurisdictions shall bear equally the costs of the President and other expenses associated with the conduct of the arbitral proceedings.

13. Conclusion

Mexico's accession to the Multilateral Convention is a very important step towards updating and modernizing the treaties to avoid double taxation concluded by our country; and the removal of the 2016 provisional reservation is also an important step for the resolution of international tax disputes through arbitration.