

MUTUAL AGREEMENT
PROCEDURES
for the resolution of
international tax disputes

GUIDELINES
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Table of contents

Part 1 INTRODUCTION	1
Part 2. LEGAL BASIS	2
Sec. 2.1 International legal basis	2
Sec. 2.2 Domestic legal basis	3
Part 3. INSTITUTIONAL STAKEHOLDERS	4
Part 4 ARTICLE 25 OF THE OECD MODEL	5
Sec. 4.1 Mutual agreement procedure initiated by the competent authorities	5
Sec. 4.2 Mutual agreement procedure initiated by the taxpayer	5
Sec. 4.2.1 Subjective scope	5
Sec. 4.2.2 Objective scope	6
Sec. 4.2.3 Time limits for filing a MAP request	6
Sec. 4.2.4 Content and procedures for filing a MAP request	7
Sec. 4.2.5 Relation with the domestic dispute	8
Sec. 4.2.6 Arbitration clause	9
Sec. 4.2.7 Suspension of collections	10
Sec. 4.2.8 How MAP works	10
Sec. 4.2.9 Role of the taxpayer	11
Sec. 4.2.10 Conclusion of the MAP	11
Sec. 4.2.11 Extension of the effects of the MAP	12
Part 5 ROLE OF THE TAX OFFICE	13
Part 6 MAP AND REMEDIES FOR DISPUTES	14

Part 1 INTRODUCTION

These guidelines provide clarifications on the management of tax disputes subject to Mutual Agreement Procedures (hereinafter "MAP"), governed by Article 25 of the OECD Model Convention for the Avoidance of Double Taxation on Income and on Capital (hereinafter referred to as the "OECD Model") and its Commentary¹, which involve taxpayers resident and non-resident in the territory of the Republic of San Marino.

Despite the fact that the Republic of San Marino has not, to date, been involved in international disputes connected with the mutual agreement procedures established to remedy double taxation cases, the commitment of the Tax Office in relation to the technical consultancy provided to the Finance Department - the institutional reference point for the political and negotiating management of the mutual agreement procedures - is confirmed for the purposes of defining the position of San Marino with respect to its foreign counterparts.

Therefore with the aim of guaranteeing a favourable investment environment for companies operating across borders and ensuring adequate consistency of administrative practice with the principles set out in the international sources of reference, the characteristics of the MAP are illustrated, with specific reference to the subjective and objective requirements, the access procedures, the various stages of the procedure and the respective links with domestic law.

These guidelines may be supplemented in the light of any new agreements, new legislative updates or on the basis of any requests for adjustments made by the OECD or to provide further clarifications following the application of the above-mentioned Article 25 of the OECD Model.

¹OECD Committee on Fiscal Affairs, *Model Tax Convention on Income and on Capital*, [as of 21 November 2017].

Part 2. LEGAL BASIS

Sec. 2.1 International legal basis

The international source of reference is constituted by the Conventions for the avoidance of double taxation in force between the Republic of San Marino and the Treaty Partner States (hereinafter "Bilateral Conventions").

The Bilateral Conventions, in addition to containing specific provisions aimed at primarily removing or mitigating international double taxation, provide, as a means of resolving any disputes that may arise between the States, the mutual agreement procedure, governed by Article 25 of the OECD Model.

The mutual agreement procedure provides for direct consultation between the tax administrations of the Contracting States, which dialogue through their respective "competent authorities", in the forms considered most appropriate, with the aim of reaching an agreement on the subject of the procedure. In this sense, the MAP is the instrument for resolving international disputes in situations where a resident of one of the two Contracting States considers that the measures adopted by one or both financial administrations have resulted or will result for him in taxation not in accordance with the provisions of the Convention.

The Republic of San Marino has concluded 23 Bilateral Conventions, all in force, having as their objective the elimination of juridical and economic double taxation² through the allocation of taxing powers between the Contracting States. Each Convention includes a provision equivalent to Article 25 of the OECD Model, dealing with mutual agreement procedures.

In order to favour more effective and transparent management of the MAP, as of 2004 the OECD has launched a project aimed at improving the functioning of mechanisms for the resolution of international tax disputes. This project has led, inter alia, to the drafting of the *OECD Manual on Effective Mutual Agreement Procedures* ("MEMAP"³), which provides tax administrations and taxpayers with basic information on the functioning of the MAP and identifies some best practices with which the tax administrations of member countries should comply.

Mutual agreement procedures have also been the subject of Action 14⁴ of the *Base Erosion and Profit Shifting* ("BEPS")⁵ project of the OECD, which pursues the objective of making international dispute resolution mechanisms more effective through the identification of certain minimum standards and best practices. With a view to achieving this objective and to ensuring the effective implementation of the previously mentioned minimum standards, the OECD has also set up a process of evaluation and monitoring⁶ of the initiatives adopted by the member countries of the "FTA MAP Forum", which include San Marino.

In addition, in order to transpose the measures developed in the BEPS project into Bilateral Conventions, the implementation of the "*Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*" (so-called "MLI", signed by San Marino on 7 July 2017 and entered into in force for San Marino on 1 July 2020 with Parliamentary Decree no. 36 of 2 March 2020 -

²Juridical double taxation can be defined as the imposition of income taxes in two or more states on the same taxpayer in respect of the same income (e.g. dividends or interest). Economic double taxation is where two different persons are taxed on the same income (e.g. profits of associated companies) by more than one state. See Commentary to Article 23 A and B of the OECD Model, paragraphs 1 and 2.

³OECD – Centre for Tax Policy and Administration, *Manual on Effective Mutual Agreement Procedures (MEMAP)* - February 2007 Version, available at www.oecd.org/ctp/memap.

⁴ Entitled "*Making Dispute Resolution Mechanisms More Effective*," published on 5 October 2015.

⁵ Project joined by Republic of San Marino in July 2016. This is the document called "Action Plan on Base Erosion and Profit Shifting" which aims at defining, through fifteen actions, concrete proposals that can be adopted by individual states to combat tax avoidance, harmful tax practices and aggressive tax planning.

⁶ See OECD, "*BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer Review Documents*", published in October 2016.

Ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting)⁷, has been envisaged within the BEPS project. This Convention contains, among others, specific provisions for the mutual resolution of international disputes.

The OECD Transfer Pricing Guidelines⁸, in Chapter IV on administrative approaches to avoiding and resolving transfer pricing disputes, also devote a specific paragraph to the use of the MAP. It highlights both the general aspects and those more closely connected with the issue of corresponding adjustments to be made in the case of primary transfer adjustments.

Sec. 2.2 Domestic legal basis

As regards the domestic regulatory framework, the legal basis for the establishment of a MAP is to be found in the individual Bilateral Conventions entered into by the Republic of San Marino⁹, which, once ratified domestically, acquire the status of primary law pursuant to Law no. 174 of 27 November 2015.

Moreover, in the San Marino tax system an express reference to mutual agreement procedures can be found in paragraph 4 of Article 46 (*Determination of income*) of Law no. 166 of 16 December 2013, where it is stated that the rules of determination at normal value apply "*even if they result in a decrease in income, but only in execution of the agreements concluded with the competent authorities of foreign States, following the special mutual agreement procedures provided for by international conventions against double taxation on income*". Therefore, the aforesaid provision confirms the correlation between transfer pricing and the international treaty on double taxation.

⁷ The MLI implements BEPS Action 15 ("*A Mandate for the development of a multilateral instrument on tax treaty measures to tackle BEPS*") and was published by the OECD on 24 November 2016.

⁸ *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, the revised and supplemented text of which was published by the OECD on 10 July 2017.

⁹ Please find the updated list of the Double Taxation Agreements signed by the Republic of San Marino at: <http://www.esteri.sm/on-line/home/affari-esteri/trattati-internazionali/convenzioni-bilaterali/accordi-in-materia-di-doppia-imposizione-fiscale-e-scambio-dinformazioni-in-materia-fiscale/articolo1001384.html>.

Part 3. INSTITUTIONAL STAKEHOLDERS

Mutual agreement procedures managed by the Ministry of Finance and Budget, the Department of Finance and Budget, as the competent authority for the Republic of San Marino, and the Tax Office.

In general, the term "competent authority" refers to the body representing a Contracting State in the relations arising from a treaty. With specific reference to the MAP, the competent authority is the body that exercises the functions of state representation with regard to both domestic aspects concerning relations with the taxpayer and external aspects concerning relations with the other state involved in the procedure.

The competent authority undertakes, under conditions of full independence and discretion, also with respect to the tax administration¹⁰, to ensure the application in good faith of the Convention, by negotiating with the other Contracting State solutions that are inspired by principles of fairness and transparency.

The Tax Office provides the San Marino competent authority with the technical support and the necessary cooperation throughout the entire preliminary activity of the MAP, by interacting in particular during the stage relating to the drafting of the "*position paper*"¹¹ and the relevant exchange of correspondence to illustrate, to the competent authority of the other State, the factual and legal elements underlying the case under examination. The role of the Tax Office is also important because of the need to ensure maximum consistency between the technical positions taken during the procedure and those expressed in other contexts, specifically during interpretation or control.

¹⁰ As provided for by the "*Terms BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*" (C.4).

¹¹ The term "*position paper*" refers to the document through which the tax administration indicate the technical and legal grounds for its position.

Part 4 ARTICLE 25 OF THE OECD MODEL

As already mentioned, all the bilateral Agreements entered into by the Republic of San Marino contain a clause, corresponding to Article 25 of the OECD Model, establishing the mutual agreement procedure.

Article 25, paragraphs 1 and 2, introduces such procedure as a remedy available on request by a taxpayer who considers that he is or may be damaged by a taxation not in accordance with the Convention.

Moreover, pursuant to Article 25, paragraph 3, a mutual agreement procedure may be initiated directly by the competent authorities of the Contracting States.

The two cases are analysed separately below.

Sec. 4.1 Mutual agreement procedure initiated by the competent authorities

Paragraph 3 of Article 25 of the OECD Model provides, in its first sentence, that a MAP may also be initiated by the competent authorities of the Contracting States with a view to resolving by mutual agreement difficulties or doubts concerning the interpretation or application of the Convention¹².

Such difficulties mainly concern certain categories rather than individual taxpayers, although they may arise as to specific cases covered by paragraphs 1 and 2 of Article 25.

Furthermore, according to the second sentence of paragraph 3, the two administrations may enter into consultations with a view to eliminating double taxation in cases not provided for in the Convention. This would include, for example, the case of an enterprise resident in a third State with permanent establishments in both Contracting States.

Consequently, besides a MAP aimed at resolving specific cases of taxation contrary to the Convention rules, it is provided for the possibility that a MAP is initiated at the initiative of the competent authorities, with a view to resolving issues related to the interpretation or application of the Convention or to resolving cases not covered by the Convention.

The agreement reached by the competent authorities in the context of a MAP initiated pursuant to Article 25, paragraph 3 of the OECD Model affects a large number of taxpayers and, therefore, must be properly made public.

Sec. 4.2 Mutual agreement procedure initiated by the taxpayer

Sec. 4.2.1 Subjective scope

Article 25, paragraph 1 of the OECD Model provides that if a person considers that he has been or may be subjected to taxation not in accordance with the Convention, he may present his case to the competent authority of his State of residence or, in the case provided for in Article 24 (Non-discrimination), paragraph 1 of the same model, to the competent authority of the State of which he is a national¹³.

Double taxation does not need to have already been imposed; for a person to present his present his case it is sufficient that he considers that the tax measures taken against him will have that effect.

The word "person" includes natural persons, legal persons, companies and any other association or entity that has tax liability and is resident, for tax purposes, in the territory of one of the two Contracting States.

¹² "The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention".

¹³ Please note that not all bilateral Agreements entered into by the Republic of San Marino contain a specific reference to nationality in addition to residence. Therefore, should the taxpayer avail himself of the principle of non-discrimination, he shall consider the individual bilateral Agreements entered into by the Republic of San Marino with different Contracting States, in order to verify whether or not he may be entitled to initiate the MAP (see the Bilateral Convention with Vietnam).

Sec. 4.2.2 Objective scope

Article 25, paragraphs 1 and 2 of the OECD Model covers all situations that may result in juridical or economic double taxation affecting both natural and legal persons and other entities to which the Convention applies.

With regard to natural persons, this may concern, for example, cases of double tax residence, incorrect application of withholding taxes on dividends, interest and royalties, controversial qualification of employment income received by a taxpayer, etc.

With regard to persons other than natural ones, for example, the following issues may fall into the scope of the procedure: existence of a permanent establishment, classification of income as business profits or as a different category governed by specific contractual provisions, or correct allocation of profits to associated companies of a multinational group.

With regard to the latter case, double taxation arising from the adjustment of profits of associated enterprises - in application of the "transfer pricing" rules - is one of the most recurring cases among those falling within the scope of the MAP, also due to the fact that assessing compliance with the conditions of free competition in the field of intercompany transactions is very complex and technical.

Indeed, a transfer pricing adjustment made by the tax authorities of one of the Contracting States may give rise to both economic and juridical double taxation (e.g. when the adjustment concerns income components relating to the relations between a permanent establishment located in one State and its parent company resident in the other State). To avoid such phenomena, Article 7, paragraph 3 (on business profits) and Article 9 paragraph 2 (on associated enterprises) of the OECD Model provide that, if a Contracting State challenges a higher taxable income resulting from a primary adjustment, the other State shall accordingly adjust the same income of the resident entity which acted as counterpart in the transaction under assessment in the first State (i.e., the corresponding adjustment).

However, this adjustment is not automatic, but is subject to verification that the primary adjustment is qualitatively and quantitatively correct.

Some bilateral Agreements entered into by the Republic of San Marino do not include a clause similar to the one contained in Article 9, paragraph 2 of the OECD Model. In this regard, San Marino has expressly reserved to include the content of such paragraph in the MLI¹⁴, thus reserving to apply the corresponding adjustments only in the context of a MAP.

Therefore, in accordance with the policy of the Republic of San Marino expressed at international level, even where the applicable Bilateral Convention does not contain provisions complying with Article 9, paragraph 2, of the OECD Model, in case of transfer pricing adjustments the taxpayer will still be allowed to initiate a MAP.

Finally, in line with its policy expressed at international level, the taxpayer will be allowed to initiate a MAP in cases relating to the correct application by the Contracting States of the anti-abuse clauses contained in the various bilateral Conventions.

Sec. 4.2.3 Time limits for filing a MAP request

The time limits within which a taxpayer may filing a MAP request are indicated in the individual bilateral Convention applicable to the case.

Although according to the OECD Model the time limits for making a request is three years from the first notification of the measure resulting in taxation not in accordance with the provisions of the Convention, some of the bilateral Agreements entered into by the Republic of San Marino contain a time limit of two years. Since a time limit of no less than three years from the notification of the action resulting in taxation not in accordance with the Convention represents a minimum standard for Action 14 of the

¹⁴ In particular, Article 17, paragraph 3.

BEPS¹⁵ Project, the Republic of San Marino has changed its MLI in order to amend the Bilateral Conventions which do not currently meet the above mentioned minimum standard, provided that there is reciprocity of notifications with the other contracting jurisdictions, and has started the necessary bilateral negotiations in the event that the MLI does not allow the above mentioned amendments to be made.

Therefore, to fix the starting point of the time limit, the wording "first notification of the action resulting in taxation not in accordance with the provisions of the Convention" should be interpreted in the way most favourable to the taxpayer, in accordance with the interpretation contained in paragraph 21 of the Commentary to Article 25 of the OECD Model.

A distinction should be made between (i) the situation where the not-in-accordance taxation objected by a taxpayer results from the application of a domestic tax or withholding tax (e.g., withholding taxes applied on dividend, interest and royalty payments) and (ii) the situation where the taxation objected by the taxpayer results from adjustments made by the tax administration (e.g., audits, objections or transfer pricing adjustments applied in transactions between associated enterprises).

In case (i) the time limit for making a MAP request starts from the date of the notification by the Tax Administration of the denial of the refund requested for the withholding tax imposed, or starts from the 90th day following the date of submission of the request for refund without a decision of the Tax Office having been taken, in accordance with the provisions of Article 6, paragraph 2, of Law no. 160 of 5 October 2011, without prejudice to the time limits provided for by Article 133, paragraph 6, of Law no. 166 of 13 December 2013.

As regards case (ii), in line with the position expressed by the Republic of San Marino, the starting point of the time limit for making a request coincides - also for the purposes of a bilateral MAP - with the date of notification of the assessment notice which led to the taxation not in accordance with the Convention.

It should be noted, however, that the taxpayer may still make a request before the notification of a formal assessment notice: it is possible, for instance, to file a MAP request following the notification of an audit report. In such a case, the mutual agreement procedure is deemed to be initiated from the date on which the competent authority receives the request and the minimum information necessary to initiate the procedure.

Sec. 4.2.4 Content and procedures for filing a MAP request

In principle, the filing a MAP request must be submitted directly by the taxpayer in his State of residence.

However, as far as transfer pricing adjustments are concerned, the filing a MAP request is usually submitted in the State that issued the act at the origin of the double taxation, by the resident company subject to tax assessment. This being said, with regard to these cases, the MAP can in any case be validly initiated by the foreign associated company, whose taxable item, which was adjusted, has already been subject to taxation. In this case, the associated company turns to the competent authority of its country of residence to complain about the double taxation generated within the multinational group.

The instance must be drawn up on plain paper and delivered by hand, or sent by registered letter with acknowledgment of receipt, or using the electronic certified delivery service referred to in Delegated Decree 15 June 2018 n. 65, to:

*Ministry of Finance and Budget of the Republic of San Marino
Contrada Omerelli, 31
47890 - San Marino City
Republic of San Marino*

¹⁵ As provided for under B.1 in section *Terms of Reference to Monitor and Review the Implementing of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective Of the OECD document "Terms BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer Review Documents"*.

It is possible - and equally appropriate in the case of substantial material - to provide the supporting documentation to the application in electronic format.

The presentation of the request to open the mutual agreement procedure is not subject to any type of contribution.

The application must be drawn up in Italian or accompanied by an official translation in Italian. The documentation attached to the application is accompanied by a translation in Italian or, alternatively, in English. However, the authority of San Marino has the right to request an official translation into Italian, where deemed appropriate.

In order to speed up the evaluation process and the consequent activation of contacts with the foreign competent authority, the application must contain the following information elements:

- 1) the name, address, address, tax identification code and other information necessary for the identification of the taxpayer submitting the application;
- 2) the tax periods concerned;
- 3) detailed information elements:
 - a) on the facts and circumstances of the specific case, including details relating to the structure of the transaction and the relationships between the parties concerned (by this means any person resident for tax purposes in the territory of the State or in the other contracting State of the bilateral agreement and the whose taxation is directly concerned in a controversial issue);
 - b) on the type and date of the deed or other document or equivalent measure that gave rise to or could give rise to the double taxation ("controversial issue"), possibly including the details of the income received in San Marino or in the other Contracting State and of the inclusion of such income in taxable income in San Marino or in the other Contracting State;
 - c) on the taxes collected or due on the said income in national law or in the other Contracting State;
 - d) on the relative amounts in the currencies of the Contracting States;
- 4) a copy of any supporting documents relating to the information referred to in point no. 3);
- 5) the applicable national and conventional provisions;
- 6) the following additional information elements together with a copy of any supporting documents:
 - a) an explanation of why the claimant taxpayer believes there is a contentious issue;
 - b) the details of any petitions, lawsuits and appeals initiated regarding the disputed issue and any judgments or decisions of the courts relating to such disputed issue both in the Republic of San Marino and in the other Contracting State;
 - c) a declaration of commitment by the taxpayer to respond in the most complete and rapid way possible to the requests received from the competent authority during the mutual agreement procedure and to make available any additional documentation that may be necessary for the purposes of the preliminary investigation;
 - d) a copy of the assessment notice, control report or other equivalent document showing the disputed issue and a copy of any other document issued by the Tax Office or by the tax administration of the other Contracting State, where relevant.
- 7) the indication of the domicile of the taxpayer or of any domiciliary address where the communications of the Tax Administration must be made;
- 8) declaration in lieu of notarial deed, to be made pursuant to Law no. 159 of 5 October 2011, that all information and documentation provided with the application are true.

Sec. 4.2.5 Relation with the domestic dispute

Article 25, paragraph 1 of the OECD Model Tax Convention provides that a taxpayer may request to access a MAP *"irrespective of the remedies provided by the domestic law"*.

Making a MAP request does not prevent the taxpayer from having access to the remedies available under the domestic law, in accordance with national provisions.

The MAPs initiated in the Republic of San Marino pursuant to a bilateral Convention are usually

accompanied by judicial proceedings initiated pursuant to domestic legislation. Presenting the case to the tax court ensures that, pending the MAP, the tax assessed in the Republic of San Marino does not become final and, therefore, cannot be modified pursuant to the possible agreement reached between the competent authorities.

However, presenting the case to be resolved by mutual agreement and resorting to a domestic proceedings may lead to a judgement that is contradictory to the provisions of the mutual agreement which may have been reached between the competent authorities. In such a case, the tax administration could not be able to legitimately fulfil the international obligation undertaken with the MAP, given that San Marino legal system is based on the principle of hierarchy of norms, as in other countries, so that an administrative agreement reached within the framework of a MAP cannot derogate from the previous decision of a national judicial body which has become final.

As a consequence, should a judgement be delivered prior to the mutual agreement, the San Marino competent authority will only have to communicate such judgement to the other competent authority. In such a case, if the judgement does not result in the elimination of double taxation, double taxation will continue to exist unless the foreign competent authority conforms its position to the decision expressed by the national court.

On the contrary, where competent authorities reach an agreement eliminating double taxation before the delivery of a judgement, a necessary condition for the implementation of the MAP is the acceptance of its contents by the taxpayer and the simultaneous waiver of the judicial remedy.

The taxpayer will also decide whether to propose the suspension of the judicial proceedings pending the implementation of a MAP.

Finally, it should be noted that in the event of an adjustment made in the other Contracting State, the proceedings that has been possibly initiated and pending abroad does not hinder the initiation and implementation of a MAP, provided that the other tax administration agrees with that.

Sec. 4.2.6 Arbitration clause

A distinctive feature of the mutual agreement procedure initiated under a bilateral convention is that the competent authorities involved are not obliged to achieve a result to ensure the elimination of the alleged double taxation. The tax administrations concerned are only under a duty to use their best endeavours to reach an agreement that eliminates taxation not in accordance with the Convention. In this respect, it should be noted that, at present, some Agreements entered into by the Republic of San Marino provide that the mutual agreement procedure will expire by the end of the third or fourth year following the year when the case was presented by the taxpayer, thus not complying with the minimum standard set forth by Action 14.

In order to strengthen the effectiveness of MAPs, the Republic of San Marino has decided to modify its MLI and has expressed its intention to open bilateral negotiations with the interested partner States.

The OECD Commentary on Article 25 (paragraph 37) states, "*Paragraph 2 no doubt entails a duty to negotiate; but as far as reaching mutual agreement through the procedure is concerned, the competent authorities are under a duty merely to use their best endeavours and not to achieve a result*".

In practice, it may therefore happen that the case presented to the competent authorities of a Contracting State cannot be resolved.

In this respect, it is worth recalling the amendment introduced in 2008 in Article 25 of the OECD Model, which now provides, in paragraph 5, that if the Contracting States have not reached a mutual agreement to resolve the case within two years, that case shall be submitted to arbitration.

The new paragraph 5 of Article 25 is applicable provided that its inclusion in new (or existing) double taxation agreements is negotiated (or renegotiated) at the bilateral level. This depends on the will of the states involved in the negotiation, which may prefer to introduce such a clause in the Agreements concluded with certain partner states rather than with others, based on a number of factors.

Where a bilateral convention includes a clause corresponding to paragraph 5 of Article 25, the effectiveness of the mutual agreement procedure is certainly enhanced. It should be noted that, at present,

six Agreements in force between the Republic of San Marino and Partner States contain an arbitration clause¹⁶. This clause generally provides that the case shall be submitted to arbitration only with consent of the taxpayer and of both States. It does not, therefore, impose a mandatory arbitration for Contracting States in the event of failure to reach an agreement to resolve the case.

The exchange of notes between Contracting States shall express their willingness to apply the arbitration clause and define the relevant operational modalities (process of forming the advisory commission, criteria for selecting members, sharing of costs, choice of the working language, etc.).

Sec. 4.2.7 Suspension of collections

In the event of mutual agreement procedures entered into under bilateral conventions, no *ad hoc* suspension of collections procedures are provided for. In any case, the taxpayer has the possibility to benefit from the ordinary measures of suspension of collections provided for by Article 119, paragraph 6 of Law no. 166 of 16 December 2013 or, in court proceedings, by Law no. 68 of 28 June 1989.

Sec. 4.2.8 How MAP works

Article 25, paragraph 2 of the OECD Model provides that if the objection of its taxpayer appears to the competent authority to be justified, and if it is not itself able to arrive at a satisfactory solution, it shall endeavour to resolve the case by mutual agreement with the competent authority of the other State. There are, therefore, two stages in the MAP.

As a first step, the competent authority that received the objection must rule on its admissibility. To this end, it has to assess whether the subjective and objective requirements for the initiation of a MAP are met and in particular whether the applicant correctly considers that the actions of one or both States result or will result in taxation not in accordance with the Convention. If a MAP concerns the refund of taxes levied in breach of the provisions of the Convention, San Marino's competent authority together with the Tax Office shall verify the admissibility requirement of the objection - including the valid submission of a request for refund as well as the receipt of a decision of denial or the expiry of the time limit for the implied decision of rejection.

If the request has been found admissible and grounded, the competent authority shall consider whether it can itself resolve the taxation not in accordance with the Convention by taking unilateral measures. Otherwise, the taxpayer's objection is notified to the competent authority of the other State to arrive to an agreed solution.

Consequently, once the request is received, the Ministry for Finance and Budget, Finance Department of the Republic of San Marino, assesses, based on the information gathered, the admissibility of the request, i.e. whether it meets the subjective and objective requirements set out in the previous points for access to the procedure and involves - where necessary - the Tax Office in order to obtain an opinion on doubtful issues.

At this stage, the competent authority may also request from the taxpayer any additional information and supporting documents that may be necessary for the initiation and implementation of the MAP.

If the taxpayer has not already done so, the competent authority, where appropriate through the foreign competent authority, shall invite him to make a request for refund.

Finally, the competent authority informs the applicant about the admissibility of the request and the valid initiation of the procedure.

Where the double taxation results from a document issued by San Marino's Tax Office, the latter shall assess whether, *prima facie*, there are grounds for eliminating the double taxation unilaterally, i.e. by way of self-assessment pursuant to Article 44 of Law No. 160 of 5 October 2011. Similarly, if the double taxation results from a document issued by a foreign administration, San Marino's Tax Office assesses the

¹⁶ At present, the States Parties to the Conventions containing an arbitration clause are: Austria, Azerbaijan, Italy, Liechtenstein, Luxembourg and the United Arab Emirates.

possibility of granting a refund or relief to the resident taxpayer, in view of the fact that the foreign document is fully compliant with the relevant provision of the Convention.

On the contrary, should a unilateral elimination of double taxation not be deemed feasible, the competent San Marino authority shall inform the authority of the other Contracting State of its decision to initiate a MAP; at the same time, the Tax Office shall be informed.

The date of initiation of a MAP coincides with the first date when the request was made by of the application and the accompanying documentation was submitted, unless it is necessary to obtain additional documentation; in this case, the procedure starts from the date of submission of the requested documents.

If the request for a MAP was made by an associated entity in the other Contracting State (i.e. transfer pricing adjustments), the date communicated in a timely manner by the foreign competent authority is relevant.

Relations between competent authorities with a view to resolving the case of double taxation usually take the form of an exchange of positions in writing and, where necessary, of negotiations. As a rule, the competent authority which first sends its position paper is that of the State which has taken the measure likely to result in double taxation. In general, English is used in the drafting of position papers.

Sec. 4.2.9 Role of the taxpayer

The mutual agreement procedure is a means of resolving disputes between Contracting States in the exercise of their respective taxing powers. The only parties involved in the procedure are the competent authorities of the two States, which are entitled to sign any bilateral agreement reached.

This does not prevent the taxpayer from playing an active role, especially when asked to describe the case accurately and truthfully, thus providing all the necessary information to ensure the case is addressed in a comprehensive manner. In this respect, the taxpayer, as a rule, is bound to be cooperative, transparent and in good faith.

On the other hand, the taxpayer is granted the right to be provided with information.

In particular, in MEMAP (Section 3.3.3 and related best practice No. 14) it is recommended that taxpayer is fully informed by the competent authority of the state of the procedure and may also request to be heard on the dispute.

In the case of a MAP resulting from transfer pricing adjustments, the Commentary to Article 25 of the OECD Model further recommends (paragraph 40, letter (c)) that the taxpayer concerned - considering the specificity of the matter - should be given every reasonable opportunity to present to the competent authority, either orally or in writing, the relevant facts and arguments.

Both practices are, as a rule, complied with by the San Marino tax authorities. The facts and arguments presented may be jointly assessed by the Finance Department and the Tax Office.

Sec. 4.2.10 Conclusion of the MAP

In the event of an agreement between the competent authorities, the competent authority that received the request to access the MAP generally communicates the contents of the agreement to the taxpayer, while the Tax Office arranges for its execution and provides - where appropriate - for the refund or remission of the tax not due and the related sanctions and interest. In case of a MAP resulting from a transfer pricing adjustment, the San Marino competent authority generally communicates the content of the agreement to the resident taxpayer, even if the request to access the MAP has been submitted to the foreign competent authority by the non-resident taxpayer.

In the event that mutual agreement has been reached while judicial proceedings are pending, the taxpayer may accept the decision made during negotiations (with simultaneous waiver of judicial appeal) or reject it, thus continuing with the proceedings. In any case, the taxpayer must inform the competent authority and, at the same time, the Tax Office, Central Directorate for Assessment, in writing of the choice made.

Sec. 4.2.11 Extension of the effects of the MAP

In the exclusive scope of application of the Bilateral Conventions and subject to assessment by the competent authorities, the effects of the agreement reached by the latter during the MAP may also be extended to tax periods immediately subsequent to those covered by the MAP, in relation to which the cases in question have remained identical.

This is the case, as a matter of practice, especially when the MAP initiated to resolve the dispute on the determination of an income in relation to the types provided for by the Convention, in order to establish the allocation of taxing powers to one or the other Contracting State.

Therefore, as a result of the negotiations carried out during the MAP and provided that the legal and factual conditions have remained unchanged also during the tax period(s) subsequent to those covered by the agreement, the San Marino competent authority may decide, in agreement with the other State, to temporarily extend the effects of the MAP, subject to the express consent of the taxpayer.

Part 5 ROLE OF THE TAX OFFICE

The Tax Office supports the competent authority in the various stages of the international dispute.

In particular, the Tax Office provides technical and regulatory support in the initial stage, when the position of the San Marino party is defined with respect to its foreign counterparts. Subsequently, it assists the competent authority during the discussions that are part of the negotiations, through the preparation of a proposal aimed at a possible bilateral agreement, even if the conclusion of such an agreement results in an adjustment reducing the income. Finally, during arbitration, if any, the Tax Office shall acquire the information and carry out the in-depth studies requested by the advisory commission.

From a strictly operational point of view, the Tax Office is responsible for taking action in order to suspend the collection or executive acts resulting from investigations and adopted by the Tax Administration. Likewise, at the end of the mutual agreement procedure, the Tax Administration shall implement any measures necessary to comply with the agreement concluded with the foreign competent authority.

In view of the above, it is necessary to define the scope of intervention of the Tax Office in order to participate fully and consciously in the handling of international disputes.

In this respect, a distinction must be made between a MAP deriving from an assessment act issued by the San Marino tax Administration and a MAP deriving from an adjustment made by a foreign Administration.

In the first case, it is clear that the Tax Office has all the information and documents in its files (assessment notice, control report, documents acquired during the control) that are useful for the preparation by the Office of a summary document highlighting the reasons for the administrative action. The document contains the necessary considerations on the arguments provided by the taxpayer when filing a MAP request. Ultimately, the contents of the summary document must enable a smooth preparation by San Marino of its *position paper*.

Moreover, in the course of the procedure the Tax Office may be involved again to carry out the in-depth investigations necessary to reply to the requests for clarification or to answer to specific questions posed by the foreign competent authority.

At a later point, it may also be necessary to re-examine the case as a whole, especially if an arbitration is involved, where the advisory commission usually carries out its own preliminary investigation.

If, on the other hand, the double taxation has resulted from a foreign assessment, the Tax Office must appropriately acquire all the information and documents useful for the analysis of the case. This generally entails the carrying out on-site inspections or, at least, sending questionnaires for the purposes both of verifying that the requirements at the basis of the foreign request are met and of establishing that this request is well founded.

Also in this case, on the basis of the elements acquired, the Tax Office prepares a summary document that is as complete as possible and directly usable for the purposes of a reply to the position paper of the foreign administration.

Finally, it is necessary to consider the case in which double taxation derives from denial or implicit rejection to a request for refund submitted in accordance with a Bilateral Convention. For the purposes of the investigation, this case is of particular importance when a foreign taxpayer has requested his own competent authority to obtain the elimination of double taxation resulting from the failure to refund withholding taxes or tax credits.

Part 6 MAP AND REMEDIES FOR DISPUTES

Pursuant to Article no. 113 of Law no. 166 of 16 December 2013, in case of acceptance of the control report, the remedies for the dispute under review and the consequent sanctions (in particular, to the extent of 1/4 of the minimum amount), shall lead to the same consequences of a failure to lodge an appeal. Indeed, the finality of the tax imposed by the control report shall prevent it from being modified because of a review through a MAP and of any agreement reached between the competent authorities.

The tax shall not be modified either if, following objection to the control report and initiation of cross-examination, the new control report is accepted, as provided for by Article no. 114 of Law no. 166 of 16 December 2013. In such cases, the acceptance of the new report shall affect the MAP, by precluding the possibility to resort to it in order to revise the tax resulting from the new control report.

In other words, acceptance of the control report shall result in filing the dispute, which cannot be opened or discussed again by the Administration in the framework of a MAP.

However, this is without prejudice - de facto and unilaterally - for the competent foreign authority to introduce a relevant adjustment in order to completely eliminate double taxation.