

## Section 89a Advance mutual agreements<sup>1</sup>

(1) In cases where a double taxation agreement applies that provides for mutual agreement procedures between the Federal Republic of Germany and another state or jurisdiction (contracting state) for the purpose of avoiding double taxation, the competent authority under section 5 subsection (1), first sentence, number 5 of the Fiscal Administration Act may – upon request by a party covered by the double taxation agreement (applicant) and in accordance with the rules set out in this provision – initiate, in consultation with the competent highest *Land* revenue authority or the authority it authorises to act on its behalf, an intergovernmental process with the competent authority of the other contracting state regarding the tax treatment of precisely defined, as yet unrealised circumstances for a specific period generally not exceeding five years (advance mutual agreement process [AMA process]). Sentence 1 shall apply only if

1. there is a risk of double taxation relating to the specific circumstances and
2. it is likely that
  - a) the advance mutual agreement will prevent double taxation and
  - b) a mutually agreed interpretation of the double taxation agreement will be reached with the competent authority of the other contracting state.

The initiation of the AMA process shall be contingent upon the final determination and payment of a fee in accordance with subsection (7). If the facts concern multiple parties covered by a double taxation agreement who must be given uniform tax treatment, the AMA process may only be requested collectively by all affected parties covered by the agreement; in such cases, procedural actions may only be taken collectively. The applicants shall appoint a representative for this purpose. In cases where sentence 4 applies, the applicants shall appoint an authorised recipient who has the authority to receive all administrative acts and notifications on their behalf. If the question of tax treatment concerns a tax withholding procedure, the withholding agent may also request the initiation of an AMA process. If the circumstances relate to tax treatment by multiple contracting states, the applicant may file a request for the initiation of multiple AMA processes.

(2) A request under subsection (1) must include:

1. the precise designation of the applicant and all other involved parties,
2. designation of the revenue authority with local jurisdiction and the relevant tax number,
3. the identification number as per section 139b or the business identification number as per section 139c; if no business identification number has been issued, then the tax number,
4. the involved contracting states,
5. a comprehensive and complete description of the facts, including the desired period of validity for the advance mutual agreement,
6. a description of why there is a risk of double taxation, and
7. an explanation of whether an advance ruling under section 89, a binding commitment under section 204, wages tax information under section 42e of the Income Tax Act, or

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<sup>1</sup> This translation is provided merely for information purposes. Only the German language version is authoritative for the application of the law.

similar information or rulings from the other affected contracting state(s), have been requested or issued.

Requests must include the necessary documents, especially those documents that are necessary in order to assess the facts. Requests must be submitted in written or electronic form to the competent authority under subsection (1), first sentence.

(3) In consultation with the competent highest *Land* revenue authority, the competent authority under subsection (1), first sentence, shall sign an advance mutual agreement with the other contracting state only if the agreement is subject at least to the condition that the applicant

1. assents to the terms of the advance mutual agreement and
2. waives, within the territorial scope of this Code, the right to seek legal remedies against tax assessment notices, insofar as such notices accurately implement the advance mutual agreement for the specified period of validity (waiver of appeal).

After the advance mutual agreement is signed, the competent authority under subsection (1), first sentence, shall notify the applicant of the agreement's terms and shall set a deadline by which the applicant must fulfil the conditions stipulated in the first sentence above. The applicant's waiver of appeal must be filed separately with the competent authority under subsection (1), first sentence, either in writing or as a documented oral statement. If no advance mutual agreement is signed, the AMA process has failed. This is the case, in particular, if the competent authority of the other contracting state does not commence the AMA process or the competent authorities fail to reach a mutually agreed interpretation of the double taxation agreement. The AMA process also fails if the applicant does not fulfil the conditions under the first sentence by the stipulated deadline. AMA processes shall be conducted in consultation with the competent highest *Land* revenue authority or the authority it authorises to act on its behalf.

(4) The revenue authority with local jurisdiction shall not be bound by the advance mutual agreement if

1. the terms of the advance mutual agreement are not fulfilled or are no longer fulfilled,
2. the other participating contracting state does not comply with the advance mutual agreement or
3. the legal provisions upon which the advance mutual agreement is based are rescinded or amended.

The responsibility for reviewing the conditions under the first sentence above shall lie with the competent authority under subsection (1), first sentence, in consultation with the competent highest *Land* revenue authority or the authority it authorises to act on its behalf. The binding effect of the advance mutual agreement shall end at the point in time when one of the conditions under the first sentence above applies.

(5) If an advance mutual agreement conflicts with an advance ruling under section 89, a binding commitment under section 204 or wages tax information under section 42e of the Income Tax Act that has already been issued, the competent revenue authority under section 131 subsection (4) may retract the advance ruling, binding commitment or wages tax information in consultation with the competent authority under subsection (1), first sentence. If no retraction in accordance with the first sentence is made and an advance mutual agreement was already signed, the competent revenue authority may, in consultation with the competent authority under subsection (1), first sentence,

declare to the applicant that the revenue authority is not bound by the signed advance mutual agreement.

(6) Upon request, the competent authority under subsection (1), first sentence, may extend a signed advance mutual agreement beyond the specified period of validity. Upon request, advance mutual agreements may be applied to assessment periods that precede the period of validity; the time limits for mutual agreement procedures stipulated in the applicable double taxation agreement must be heeded. The first and second sentences are contingent upon consultation with the competent highest *Land* revenue authority or the authority it authorises to act on its behalf and with the competent authority of the other contracting state.

(7) To process the applications referred to in subsection (1) or subsection (6), first sentence, the competent authority under subsection (1), first sentence, shall impose fees that must be determined before an AMA process commences or an extension request is processed. An AMA process or the processing of an extension request is initiated when the initial letter is sent to the other contracting state. The fee shall be payable by the applicant within one month following notification that the fee has been set. The AMA process or the processing of an extension request shall not commence until the fee determination has become final and the fee has been paid. The fee shall be €30,000 for each application within the meaning of subsection (1) and €15,000 for each extension request under subsection (6), first sentence. If an application does not concern transfer pricing, the fee for each application is 25% of the amounts under the fifth sentence; transfer pricing cases are cases that concern the cross-border apportionment of profits between related parties and the allocation of profits to permanent establishments. If an application refers to the tax treatment of circumstances for which a coordinated bilateral or multilateral field audit has already been conducted at the time the application is submitted, and such field audit led to consensus regarding the circumstances and their tax treatment, the fee shall be reduced by 75%. If the total value of the business transactions in a transfer pricing case covered by an AMA process is not expected to exceed the amounts specified in section 6 (2), first sentence, of the Ordinance on the Documentation of Profit Allocations of 12 July 2017 (Federal Law Gazette I, p. 2367), the fee shall be €10,000 for each application referred to in subsection (1) and €7,500 for each application referred to in subsection (6), first sentence. In the cases referred to in subsection (1), fourth and seventh sentences, applications shall require the determination and payment of only one fee. In the cases referred to in subsection (1), eighth sentence, each AMA process shall require the determination and payment of a separate fee.

(8) If an applicant withdraws an application under subsection (1), first sentence, before notification of the fee has been given, the competent authority may refrain from setting a fee. If an application is withdrawn or denied, any fee that has become final by this time shall not be reimbursed; the same shall apply in cases where the AMA process fails.