

## **PROTOCOL**

### **AMENDING THE CONVENTION BETWEEN THE SWISS CONFEDERATION AND THE UNITED STATES OF AMERICA FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME, SIGNED AT WASHINGTON ON OCTOBER 2, 1996**

THE SWISS CONFEDERATION

AND

THE UNITED STATES OF AMERICA

Desiring to conclude a Protocol to amend the Convention between the Swiss Confederation and the United States of America for the Avoidance of Double Taxation with respect to Taxes on Income, signed at Washington on October 2, 1996 (hereinafter referred to as the "Convention"),

Have agreed as follows:

#### **Article 1**

Paragraph 3 of Article 10 of the Convention shall be deleted and replaced by the following:

"3. Notwithstanding paragraph 2, dividends may not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner of the dividends is a pension or other retirement arrangement which is a resident of the other Contracting State, or an individual retirement savings plan set up in, and owned by a resident of, the other Contracting State, and the competent authorities of the Contracting States agree that the pension or retirement arrangement, or the individual retirement savings plan, in a Contracting State generally corresponds to a pension or other retirement arrangement, or to an individual retirement savings plan, recognized for tax purposes in the other Contracting State. This paragraph shall not apply if such pension or retirement arrangement, or such individual retirement savings plan, controls the company paying the dividend."

#### **Article 2**

Paragraph 6 of Article 25 of the Convention shall be deleted and replaced by the following paragraphs:

"6. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 7 and any rules or procedures agreed upon by the Contracting States if:

- a) tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;
- b) the case is not a particular case that both competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; and

c) all concerned persons agree according to provisions of subparagraph d) of paragraph 7.

An unresolved case shall not, however, be submitted to arbitration if a decision on such case has already been rendered by a court or administrative tribunal of either Contracting State.

7. For the purposes of paragraph 6 and this paragraph, the following rules and definitions shall apply:

- a) the term “concerned person” means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement, arising from that consideration;
- b) the “commencement date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities;
- c) arbitration proceedings in a case shall begin on the later of:
  - i) two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and
  - ii) the earliest date upon which the agreement required by subparagraph d) has been received by both competent authorities;
- d) the concerned person(s), 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 Contracting State or the arbitration panel, other than the determination of such panel;
- e) unless any concerned person does not accept the determination of an arbitration panel the determination shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case only; and
- f) for purposes of an arbitration proceeding under paragraph 6 and this paragraph, the members of the arbitration panel and their staffs shall be involved “persons or authorities” to whom information may be disclosed under Article 26 of the Convention.”

### **Article 3**

Article 26 (Exchange of Information) of the Convention shall be deleted and replaced by the following provisions:

#### “ARTICLE 26

#### Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the administration, assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the requested State authorizes such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic use.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State, if necessary to comply with its obligations under this paragraph, shall have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

#### **Article 4**

Paragraph 10 of the Protocol to the Convention shall be deleted and replaced by the following new paragraph 10.

“10. With reference to Article 26 (Exchange of Information)

- a) It is understood that the competent authority of a Contracting State shall provide the following information to the competent authority of the requested State when making a request for information under Article 26 of the Convention:
  - i) information sufficient to identify the person under examination or investigation (typically, name and, to the extent known, address, account number or similar identifying information);

- ii) the period of time for which the information is requested;
  - iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;
  - iv) the tax purpose for which the information is sought; and
  - v) the name and, to the extent known, the address of any person believed to be in possession of the requested information.
- b) The purpose of referring to information that may be relevant is intended to provide for exchange of information in tax matters to the widest possible extent without allowing the Contracting States to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While paragraph 10(a) contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs (i) through (v) of paragraph 10(a) nevertheless are to be interpreted in order not to frustrate effective exchange of information.
- c) If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under Article 26 of the Convention in the form of authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).
- d) Although Article 26 of the Convention does not restrict the possible methods for exchanging information, it shall not commit a Contracting State to exchange information on an automatic or spontaneous basis. The Contracting States expect to provide information to one another necessary for carrying out the provisions of the Convention.
- e) It is understood that in the case of an exchange of information under Article 26 of the Convention, the administrative procedural rules regarding a taxpayer’s rights (such as the right to be notified or the right to appeal) provided for in the requested State remain applicable before the information is exchanged with the requesting State. It is further understood that these rules are intended to provide the taxpayer a fair procedure and not to prevent or unduly delay the exchange of information process.”

## **Article 5**

1. This Protocol shall be subject to ratification in accordance with the applicable procedures of each Contracting State and instruments of ratification shall be exchanged as soon as possible.
2. This Protocol shall enter into force upon the exchange of instruments of ratification. Its provisions shall have effect:
  - a) in respect of tax withheld at source, for amounts paid or credited on or after the first January of the year following the entry into force of this Protocol;
  - b) in respect of Articles 3 and 4 of this Protocol, to requests made on or after the date of entry into force of this Protocol:
    - i) regarding information described in paragraph 5 of Article 26 of the Convention, to information that relates to any date beginning on or after the date of signature of this Protocol, and

- ii) in all other cases, to information that relates to taxable periods beginning on or after the first January of the year following the date of signature of this Protocol.
- c) in respect of paragraphs 6 and 7 of Article 25 of the Convention, with respect to
  - i) cases that are under consideration by the competent authorities as of the date on which this Protocol enters into force, and
  - ii) cases that come under such consideration after that time,

and the commencement date for a case described in clause i) of this subparagraph shall be the date on which this Protocol enters into force.

DONE at Washington, in duplicate, this 23rd day of September, 2009, in the German and English languages, the two texts having equal authenticity.

FOR THE SWISS CONFEDERATION:

FOR THE UNITED STATES OF AMERICA: