

PROTOCOL

BETWEEN THE SWISS FEDERAL COUNCIL AND THE GOVERNMENT OF THE REPUBLIC OF KAZAKHSTAN AMENDING THE CONVENTION BETWEEN THE SWISS FEDERAL COUNCIL AND THE GOVERNMENT OF KAZAKHSTAN FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL AND THE PROTOCOL, SIGNED AT BERNE OCTOBER 21ST 1999.

The Swiss Federal Council

and

The Government of the Republic of Kazakhstan

Desiring to conclude a Protocol to amend the Convention between the Swiss Federal Council and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed at Berne October 21ST 1999 (hereinafter referred to as “the Convention”) and the Protocol signed at Berne October 21ST 1999 (hereinafter referred to as “the Protocol to the Convention”),

Have agreed as follows:

ARTICLE I

The term “local authorities” as used in paragraph 1 of Article 2 (Taxes covered) will be replaced by the term “central or local authorities“ wherever the term is used in the Convention.

ARTICLE II

Clause (i) of subparagraph a) of paragraph 1 of Article 3 (General definitions) of the Convention shall be replaced by the following:

“(i) “Kazakhstan” means the Republic of Kazakhstan. For the purpose of use in geographical means the term “Kazakhstan” includes the State territory of the Republic of Kazakhstan and zones where Kazakhstan exercises its sovereign rights and jurisdiction according to its legislation and international law including international agreements to which Kazakhstan is a party;”

ARTICLE III

Subparagraph d) of paragraph 2 of Article 4 (Resident) of the Convention shall be replaced by the following:

“(d) if his status cannot be determined in accordance with the provisions of subparagraphs a) to c) the competent authorities of the Contracting States shall settle the question by mutual agreement.”

ARTICLE IV

1. Paragraph 2 of Article 10 (Dividends) of the Convention shall be replaced by the following:

“2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

- a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;
- b) 15 per cent of the gross amount of the dividends in all other cases.

3. Notwithstanding the provisions of paragraph 2, dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State if the beneficial owner is

- a) a pension fund or other similar institution providing pension schemes in which individuals may participate in order to secure retirement, disability and survivors' benefits, where such pension fund or other similar institution is established, recognized for tax purposes and controlled in accordance with the laws of that other State; or
 - b) the central (national) bank of that other State.
4. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

Paragraphs 2 and 3 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.”

2. Paragraph 3 of Article 10 (Dividends) of the Convention shall be renumbered as paragraph 5.

3. Paragraph 4 of Article 10 (Dividends) of the Convention shall be replaced by the following:

“6. The provisions of paragraphs 1 through 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.”

4. Paragraphs 5 and 6 of Article 10 (Dividends) of the Convention shall be renumbered as paragraphs 7 and 8.

ARTICLE V

Paragraph 5 of Article 25 (Mutual Agreement Procedure) of the Convention shall be replaced by the following paragraph:

“5. Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States

have resulted for that person in taxation not in accordance with the provisions of this Convention, and

- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues have already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

The Contracting States may release to the arbitration board, established under the provisions of this paragraph, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations of disclosure described in paragraph 2 of Article 26 with respect to the information so released.”

ARTICLE VI

Article 26 (Exchange of information) of the Convention shall be replaced by the following Article:

“Article 26

Exchange of Information

“1. The competent authorities of the Contracting States shall exchange such information as is foreseeably 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) concerned with the 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. 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 supplying State authorises 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 interest in such information.

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 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 VII

1. The following new subparagraph d) shall be added to paragraph 2 of the Protocol to the Convention:

“d) In subparagraph a) of paragraph 3 of Article 10 (Dividends) the terms “pension fund or other similar institution providing pension schemes” include the following and any identical or substantially similar schemes which are established pursuant to legislation introduced after the date of signature of this Protocol:

(i) in the Republic of Kazakhstan, any plans and schemes covered by the Law of the Republic of Kazakhstan on pensions provisions of 20. June 1997 N. 136.

(ii) in Switzerland, any plans and schemes covered by

(aa) the Federal Act on old age and survivors’ insurance, of 20 December 1946;

(bb) the Federal Act on disabled persons’ insurance of 19 June 1959;

(cc) the Federal Act on supplementary pensions in respect of old age, survivors’ and disabled persons’ insurance of 6 October 2006;

(dd) the Federal Act on old age, survivors’ and disabled persons’ insurance payable in respect of employment or self-employment of 25 June 1982, including the non-registered pension schemes which offer professional pension plans, and

(ee) the forms of individual recognised pension schemes comparable with the professional pension plans, in accordance with Article 82 of the Federal Act on old age, survivors’ and disabled persons’ insurance payable in respect of employment or self-employment of 25 June 1982.

It is further understood that the term “pension fund or pension scheme” includes investment funds, trusts or foundations where all of the interest of the funds, trusts or foundations are held by pension funds or pension schemes.”

2. The following new paragraphs 4 through 6 shall be inserted after paragraph 3 of the Protocol to the Convention:

“4. With reference to Articles 18 and 19

It is understood that the term „pensions“ as used in Articles 18 and 19, respectively, do not only cover periodic payments, but also include lump sum payments.

5. With reference to Article 26

- a) It is understood that an exchange of information will only be requested once the requesting Contracting State has exhausted its normal procedures under domestic law to obtain the information.
- b) It is understood that the standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.
- c) It is understood that the tax authorities of the requesting Contracting State shall provide the following information to the tax authorities of the requested Contracting State when making a request for information under Article 26 of the Convention:
 - (i) the name and address of the person(s) under examination or investigation and, if available, other particulars facilitating that person’s identification, such as date of birth, marital status, tax identification number;
 - (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 Contracting State wishes to receive the information from the requested Contracting State;
 - (iv) the tax purpose for which the information is sought;
 - (v) the name and address of any person believed to be in possession of the requested information.
- d) It is understood that Article 26 of the Convention does not require the Contracting States to exchange information on an automatic or a spontaneous basis.
- e) It is understood that in case of an exchange of information, the administrative procedural rules regarding taxpayers’ rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State. It is further understood that this provision aims at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process.

6. With reference to all Articles

Both Contracting States expect that provisions of the Convention which are drafted according to the corresponding provisions of the OECD Model Convention on income and on capital shall have the same meaning as expressed in the OECD Commentaries thereon and accordingly be applied by each of the Contracting States. The Commentaries – as they may be revised from time to time – constitute a means of interpretation in the sense of the Vienna Convention of 23 May 1969 on the Law of Treaties.”

ARTICLE VIII

1. Each of the Contracting States shall notify through diplomatic channels to the other the completion of the constitutional formalities required in each of the Contracting States for bringing this Protocol into force.

2. This Protocol shall enter into force on the date of receipt of the later of these notifications and shall have effect:
 - a) with respect to tax withheld at source, on amounts paid or credited on or after the first day of January of the year next following the entry into force of this Protocol;

 - b) with respect to other taxes for fiscal years beginning on or after the first day of January of the year next following the entry into force of this Protocol.

3. Notwithstanding paragraph 2 of this Article, with respect to Article 26 of the Convention, the exchange of information provided for in this Protocol will be applicable for information that relates to any calendar year or any period beginning on or after the first day of January of the year next following the entry into force of this Protocol.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Protocol.

Done in duplicate at this day of in the German, Kazakh, Russian and English languages, all texts being equally authentic. In case of divergence between the texts, the English text shall prevail.

For the Swiss Federal Council:

For the Government of the Republic of Kazakhstan:

