

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE SWISS CONFEDERATION AND THE RUSSIAN FEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL SIGNED AT MOSCOW ON NOVEMBER 15, 1995

The Swiss Federal Council

and

The Government of the Russian Federation

Desiring to conclude a Protocol to amend the Agreement between the Swiss Confederation and the Russian Federation for the avoidance of double taxation with respect to taxes on income and on capital signed at Moscow on November 15, 1995 (hereinafter referred to as “the Protocol” and “the Agreement”),

Have agreed as follows:

ARTICLE I

The list of the Russian taxes in paragraph 3 of Article 2 (Taxes covered) of the Agreement, shall be modified as follows:

- “(i) the tax on profits of organisations;
 - (ii) the tax on income of individuals;
 - (iii) the tax on property of organisations and
 - (iv) the tax on property of individuals
- (hereinafter referred to as “Russian tax”);”

ARTICLE II

Paragraph 1 of Article 4 (Resident) of the Agreement shall be replaced by the following paragraph:

“1. For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

ARTICLE III

1. The existing paragraphs 3 and 4 of Article 10 (Dividends) of the Agreement shall be deleted and replaced by the following:

“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 Government of the other State, a political subdivision or local authority thereof, or
 - (i) in the case of Russia - the Central Bank of the Russian Federation (Bank of Russia);
 - (ii) in the case of Switzerland – the Swiss National Bank.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph and paragraph 2 of this Article shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

4. The term “dividends” as used in this Article means income from shares and other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident. This term also means any payments on units of real estate investment funds as well as on units of mutual investment funds deriving more than 50 per cent of their income from shares.

5. The provisions of paragraphs 1, 2 and 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 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.”

2. The existing paragraph 5 of Article 10 (Dividends) of the Agreement shall be renumbered as paragraph 6.

ARTICLE IV

Article 11 (Interest) of the Agreement shall be deleted and replaced by the following:

“Article 11
Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State if such resident is the beneficial owner of the interest.

2. The term “interest” as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor’s profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purposes of this Article.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of the Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is 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. Where, by reason or by special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.”

ARTICLE V

1. A new paragraph 3 shall be added to Article 13 (Capital gains) of the Agreement that shall read as follows:

“3. Gains derived by a resident of a Contracting State from the alienation of shares in a company deriving more than 50 per cent of its asset value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State. However, this paragraph shall not apply to gains derived from the alienation of shares:

- a) quoted on a stock exchange established in and recognized by a Contracting State or on any other stock exchange as may be agreed between the competent authorities of the Contracting States; or
- b) in a company deriving more than 50 per cent of its asset value from immovable property, in which it carries on its business.”

2. The existing paragraph 3 of Article 13 (Capital gains) of the Agreement shall be renumbered as paragraph 4.

ARTICLE VI

The following sentence shall be inserted at the end of subparagraph a) of Article 23 (Elimination of double taxation) of the Agreement:

“However, such exemption shall apply to gains referred to in paragraph 3 of Article 13 (Capital gains) of the Agreement only if actual taxation of such gains in the Russian Federation is demonstrated.”

ARTICLE VII

The following Article 25a (Exchange of information) shall be added after Article 25 (Mutual agreement procedure) of the Agreement:

“Article 25a 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 Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by the Agreement as well as the value-added taxes, insofar as the taxation thereunder is not contrary to the Agreement. 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, if necessary to comply with the obligations under this paragraph, 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 VIII

The following Article 25b (Anti conduit) shall be added after Article 25a (Exchange of information) of the Agreement:

"Article 25b Anti conduit

The provisions of Articles 10, 11 and 12 shall not apply in respect to any dividend, interest or royalty paid under, or as part of a conduit arrangement. The term "conduit arrangement" means a transaction or series of transactions which is structured in such a way that a resident of a Contracting State entitled to the benefits of the Agreement receives an item of income arising in the other Contracting State but that resident pays, directly or indirectly, all or substantially all of that income (at any time or in any form) to another person who is not a resident of either Contracting State and who, if it received that item of income directly from the other Contracting State, would not be entitled under an agreement for the avoidance of double taxation between the State in which that other person is resident and the Contracting State in which the income arises, or otherwise, to benefits with respect to that item of income which are equivalent to, or

more favorable than, those available under this Agreement to a resident of a Contracting State; and the main purpose of such structuring is obtaining benefits under this Agreement. The competent authorities, under the mutual agreement procedure, may agree on the cases or circumstances where the structuring of a conduit arrangement has as main purpose the obtaining of benefits under these Articles.”

ARTICLE IX

The Exchange of Letters of November 15, 1995 between the Ambassador of the Swiss Confederation in the Russian Federation and the Deputy Minister of Finance of the Russian Federation shall be abrogated.

ARTICLE X

A Protocol, which is contained in the Annex to this Protocol, shall be added to the Agreement.

ARTICLE XI

1. Each of the Contracting States shall notify to the other, through the diplomatic channels, the completion of the procedures required by its domestic law for the bringing into force of this Protocol.
2. This Protocol shall enter into force on the date 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;
 - c) with respect of Article 25a (Exchange of information), to requests made on or after the date of entry into force to information that relates to taxable periods beginning on or after the first day of January next following the entry into force of this Protocol.

In witness whereof the undersigned, duly authorised thereto, have signed this Protocol.

Done in duplicate at this day of in the German, Russian and English languages, each text being equally authoritative. In case there is any divergence of interpretation between the German and the Russian texts the English text shall prevail.

For the Swiss Federal Council:

For the Government of the Russian Federation:

PROTOCOL

The Swiss Federal Council

and

The Government of the Russian Federation

Have agreed at the signing of the Protocol amending the Agreement between the Swiss Confederation and the Russian Federation for the avoidance of double taxation with respect to taxes on income and capital, signed at Moscow on November 15, 1995, upon the following provisions which shall form an integral part of the Agreement.

1. General

It is understood that any information received under Article 25a (Exchange of information) of the Agreement or a certificate of residence shall not require legalisation or apostille for the purposes of application in the other Contracting State, including its use in the courts and administrative bodies. This also applies to any other document issued by the competent authority of a Contracting State or its (his) authorised representative.

2. Regarding paragraph 3 of Article 4 (Resident) of the Agreement

It is understood that the place of effective management of a person other than an individual is situated where the key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can only have one place of effective management at any one time.

3. Regarding subparagraph b) of paragraph 3 of Article 10 (Dividends) of the Agreement

It is understood that the term "pension fund or other similar institution providing pension schemes" includes the following and any identical or substantially similar schemes which are established pursuant to legislation introduced after the date of signature of this Protocol:

- a) in the Russian Federation, any plans and schemes covered by:
 - (i) the Federal Law of 7 May 1998 № 75-FZ "On non-state pension funds";
 - (ii) the Federal Law of 15 December 2001 № 167-FZ "On obligatory pension insurance in the Russian Federation";

- b) in Switzerland, any plans and schemes covered by:
 - (i) the Federal Act on old age and survivors' insurance, of 20 December 1946;
 - (ii) the Federal Act on disabled persons' insurance of 19 June 1959;
 - (iii) the Federal Act on supplementary pensions in respect of old age, survivors' and disabled persons' insurance of 6 October 2006;
 - (iv) 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
 - (v) 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.

4. Regarding Articles 10 (Dividends) and 11 (Interest) of the Agreement

- a) It is understood that the provisions of Articles 10 and 11 do not prevent the application by a Contracting State of the generally applicable "thin capitalisation" rules set forth in its domestic legislation;
- b) it is understood that payments on units of mutual investment funds deriving less than 50 per cent of their income from shares are considered as interest.

5. Regarding Articles 18 (Pensions) and 19 (Government service) of the Agreement

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

6. Regarding Article 25 (Mutual agreement procedure) of the Agreement

It is understood that in the event that pursuant to an agreement or convention for the avoidance of double taxation concluded with a third country after the date of signature of this Protocol, Russia agrees to include an arbitration provision in such agreement or convention, the competent authorities of the Russian Federation and the Swiss Confederation will start negotiations, as soon as possible, in view of concluding an amending Protocol aiming at inserting an arbitration provision into this Agreement.

7. Regarding Article 25a (Exchange of information) of the Agreement

- a) It is understood that an exchange of information will only be requested once the requesting State has exhausted its normal procedures under domestic law to obtain the information.

- b) It is understood that the tax authorities of the requesting State shall provide the following information to the tax authorities of the requested State when making a request for information under Article 25a of the Agreement:
 - (i) the identity of the person under examination or investigation;
 - (ii) the period of time for which the information is requested;
 - (iii) a statement of the information sought including 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;
 - (v) to the extent known, the name and address of any person believed to be in possession of the requested information.
- c) 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. While subparagraph 7(b) contains important procedural requirements that are intended to ensure that “fishing expeditions” do not occur, clauses (i) through (v) of subparagraph 7(b) nevertheless are not to be interpreted in order to frustrate effective exchange of information.
- d) It is understood that Article 25a of the Agreement 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.