

Amending Protocol to the Convention of 26th April 1966 between the Swiss Confederation and Spain for the avoidance of double taxation with respect to taxes on income and on capital

*The Swiss Federal Council
and
the Government of the Kingdom of Spain*

Desiring to amend the convention of 26th April 1966 between the Swiss Confederation and Spain for the avoidance of double taxation with respect to taxes on income and on capital (here after “the Convention”) have agreed on the following:

Article 1

Paragraph 2 of Article 10 is deleted and replaced by the following provisions:

- “2. a) 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 State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.
- b) Notwithstanding the provisions of the subparagraph above, the Contracting State of which the company paying the dividends is a resident shall exempt from tax the dividends paid by that company to a company the capital of which is wholly or partly divided into shares and which is a resident of the other Contracting State, as long as it holds directly at least 25 per cent of the capital of the company paying the dividends for, at least, two years, and, the paying company is subject to and not exempt from the taxes covered by Article 2 of the Convention and under any double tax agreements with any third State, none of the companies is resident in that third State. Both companies must adopt the form of a limited company.

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

The provisions in this paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.”

Article 2

Article 11 is deleted and replaced by the following provisions:

“ 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.

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 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 purpose of this Article.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, and the debt claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

4. Where, by reason of a 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 Convention.”

Article 3

A new paragraph 7 is added to Article 12 of the Convention:

“7. Notwithstanding paragraphs 1 and 2, royalties arising in a Contracting State and paid between associated companies shall not be subject to taxation in the source State, where:

- such companies are affiliated by a direct minimum holding of 25 per cent for at least two years or are both held by a third company which has directly a minimum holding of 25 per cent both in the capital of the first company, and in the capital of the second company for at least two years; and
- such companies are resident in a Contracting State; and
- under any double tax agreements with any third State none of the companies is resident in that third State; and
- all companies are subject to corporation tax without being exempted in particular on royalty payments and each adopts the form of a limited company.”

Article 4

Paragraph 5 of Article 23 of the Convention is deleted and replaced by the following provision:

“For the purpose of paragraph 3, interest from loans contracted after January 1, 1966 and entitled to a reduction of the Spanish tax in accordance with the Decree-Law of October 19, 1961 or any other provisions in addition to or in the place of this Decree, shall be deemed to have been subjected to the Spanish tax at a rate of 10 per cent.”

Article 5

A new Article 25 bis concerning exchange of information is inserted into the Convention:

“Article 25 bis

1. The competent authorities of the Contracting States shall exchange, on request, such information as is necessary:

- a) for carrying out the provisions of this Convention in relation to the taxes which are the subject of this Convention;
- b) for the administration or enforcement of the domestic laws in the case of holding companies, in relation to taxes which are the subject of this Convention;
- c) for the administration or enforcement of the domestic laws in cases of tax fraud or the like which have been committed by a resident of a Contracting State or by a person subjected to a limited tax liability in a Contracting State, in relation to taxes which are the subject of this Convention.

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 covered by the Convention. 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.

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 cases of tax fraud or the like the provisions of paragraphs 1 and 3 shall not be construed so as 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.”

Article 6

The following Protocol shall be added to the Convention:

“Protocol to the Convention of 26 April 1966 between the Swiss Confederation and Spain for the avoidance of double taxation with respect to taxes on income and on capital.

On the occasion of signing the Amending Protocol to the Convention for the avoidance of double taxation with respect to taxes on income and on capital signed by the Swiss Confederation and Spain on 26 April 1966, the authorized signatories hereto agreed upon the following provisions, which form an integral part of the Convention:

I. Entitlement to treaty benefits

- (i) The Contracting States declare that their domestic rules and procedures with respect to the abuses of law (including tax treaties) may be applied to the treatment of such abuses. In the case of Spain, abuses of law include situations covered by Article 15 of Ley General Tributaria (Law 58/2003 of 17th December), (General Tax Code) or any other similar provision in any tax law in force or to be enacted.
- (ii) It is understood that the benefits under this Convention shall not be granted to a person, which is not the beneficial owner of the items of income derived from the other Contracting State or items of capital situated therein.
- (iii) This Convention does not prevent Contracting States to apply domestic Controlled Foreign Company rules.

II. Ad Article 10, paragraph 2, subparagraph b)

With reference to Article 10, paragraph 2, subparagraph b) of this Convention, a company resident of a Contracting State shall not benefit from the total relief of the withholding tax regarding dividends from the other Contracting State, where the majority of its shares is held principally, directly or indirectly by persons that are not resident of a Contracting State or of a Member State of the European Union, unless the company receiving the dividends:

- exercises directly a real business activity in relation with the business of the company paying the dividends, or
- has as a main object the control and management of the company paying the dividends through sufficient material and human means, or
- proves that it has been constituted for valid economic reasons and not just in order to benefit from this Article 10, paragraph 2, subparagraph b).

Regarding the abovementioned limitation on benefits in this Protocol provision, in any case, Spain will grant to a company resident of Switzerland the same treatment as to a company, resident of an European Union Member State, which is in a comparable situation.

III. Ad Article 10, paragraph 2, subparagraph b) and Article 12, paragraph 7

As regards the application of Article 10, paragraph 2, subparagraph b) and of Article 12, paragraph 7, the terms used therein shall be defined according to Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States and Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

With regard to Switzerland, the term "limited company" covers:

- société anonyme/Aktiengesellschaft/società anonima;
- société à responsabilité limitée/Gesellschaft mit beschränkter Haftung/società a responsabilità limitata;
- société en commandite par actions/Kommanditaktiengesellschaft/società in accomandita per azioni.

IV. Ad Article 25 bis

1. Both Contracting States agree that under subparagraph b) of paragraph 1 of Article 25 bis, only information may be exchanged which are in possession of the Tax Authorities and which do not necessitate specific investigation measures.

2. It is understood that, as regards subparagraph b) aforementioned, Swiss companies covered by Article 28, paragraph 2 of the Federal Law on Harmonization of direct taxes of 14 December 1994 and the Spanish companies covered by Articles 116 to 119 of the Spanish Corporate Income Tax Law, (Legislative Royal Decree 4/2004, of 5th March) are considered as holding companies.

3. It is understood that the term "tax fraud" means fraudulent conduct, which is deemed to be an offence under the laws of both States, and is punishable by imprisonment either at the time where the fraud has been committed or where the request has been submitted.

4. The term "tax fraud or the like" includes:

- a) Cases below the monetary limit as provided for in Article 305 of the Spanish Criminal Code (Organic Law 10/1995, of 23rd November) which imply the same

fraudulent conduct as it is the case for tax fraud under the law of the requested State.

- b) Cases substantiated under the simulation procedure as provided for in Article 16 of the Spanish Ley General Tributaria (Law 58/2003 of 17th December), (General Tax Code); simulation would be understood only with reference to Article 1275 of the Spanish Civil Code “(Código Civil español)”.

5. In particular, fraudulent conduct is assumed in situations when a taxpayer uses, or has the intention to use a false piece of documentary evidence, and in situations where the taxpayer uses, or has the intention to use a scheme of lies (“Lügengebäude”) to deceive the tax authority.

6. It is understood that, in determining whether tax fraud or the like exists in a case involving the active conduct of a profession or business (including a profession or business conducted through a sole proprietorship, partnership or similar entity), the requested State shall assume that the record keeping requirements applicable under the laws of the requesting State are the record-keeping requirements of the requested State.

7. In any case, the provision of information presupposes a direct connection between the fraudulent conduct and the requested administrative assistance measure.

8. It is understood moreover that the administrative assistance provided for in paragraph 1 of this Article does not include measures aimed only to simple collect of pieces of evidence (“fishing expeditions”).

9. Notwithstanding paragraph 2 of Article 25 bis, 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 the supplying State. In case of doubt, the competent authorities shall endeavour to resolve by mutual agreement any divergence related to the interpretation of the laws of the requested State.

10. The requested State shall provide information where the requesting State has a reasonable suspicion that a certain conduct would constitute tax fraud or the like. The requesting State's suspicion of tax fraud or the like may be based on:

- (a) Documents, whether authenticated or not, and including but not limited to business records, books of account, or bank account information;
- (b) Testimonial information from the taxpayer;
- (c) Information obtained from an informant or other third person that has been independently corroborated or otherwise is likely to be credible; or
- (d) Circumstantial evidence.

11.

- a) Should Switzerland conclude with a Member State of the European Union, in relation to exchange of information, any Agreement of whatever kind and nature or any

provision in a Double Taxation Agreement, related to taxes covered by this Convention, Switzerland shall give to Spain the same level of co-operation as in such Agreement or provision or the part of them and Spain will act accordingly.

- b) Notwithstanding paragraph 11, sub-paragraph a) here above, where Switzerland has defined in a Double Taxation Agreement with an other Member State of the European Union one or more individual categories of cases falling under tax fraud or the like according to Article 10, paragraph 4 of the Agreement between the Swiss Confederation and the European Community providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments and the respective Memorandum of Understanding and Spain would consider that there is a similar situation under the Spanish domestic laws, then the Spanish competent authorities will address the Swiss competent authorities in order to find an agreement to adapt that Protocol accordingly. The agreement will be submitted for approval to the respective Parliament of both Contracting States.

12. As regards the procedures followed in Spain for obtaining information, including banking information, in the case of tax fraud or the like under Article 25 bis, the Spanish competent authorities will apply the internal procedures provided for by the Spanish internal law in order to comply with the information request of the Swiss competent authorities.

The person involved in a Spanish proceeding may not invoke irregularities in the Swiss procedure for appealing his case before a Spanish Court.

Should the taxpayer appeal the decision of the Swiss Federal Tax Administration concerning the transmission of the information to the Spanish competent authority, any delay derived therefrom will not be considered in computing the applicable time-limits established by the Spanish Tax Legislation concerning fiscal tax administration proceedings.

In witness whereof the undersigned being duly authorised thereto have signed this Protocol and have affixed thereto their seals.

Done in duplicate at..... on.....in the English, French and Spanish languages, all texts being equally authoritative. In case of any divergence of interpretation, it shall be resolved in accordance with the English text.”

Article 7

1. The Governments of the Contracting States shall notify each other through diplomatic channels that the internal procedures required for the entry into force of this Amending Protocol have been complied with.

2. The Amending Protocol shall enter into force after the period of three months following the date of receipt of the latter of the notifications referred to in paragraph 1 and its provisions shall have effect:

- a) regarding taxes periodically accrued, in respect of taxes on income or capital relating to any tax year beginning on or after the date on which the Amending Protocol enters into force;
 - b) regarding all other taxes, the date on which the Amending Protocol enters into force.
3. Notwithstanding paragraph 2, this Amending Protocol will not have effect:
- (i) in respect of Articles 1 and 2 of this Amending Protocol, before the date of application of the Agreement between the Swiss Confederation and the European Community providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments;
 - (ii) in respect of Article 3 of this Amending Protocol, before the date following the expiration of the transitional period of six years starting on the aforementioned date of application of the Agreement mentioned in subparagraph (i).
4. The exchange of information shall be granted for cases of tax fraud or the like committed after the date of signature of this Amending Protocol.

In witness whereof the undersigned being duly authorised thereto have signed this Amending Protocol and have affixed thereto their seals.

Done in duplicate at..... on.....in the English, French and Spanish languages, all texts being equally authoritative. In case of any divergence of interpretation, it shall be resolved in accordance with the English text.

For the
Swiss Federal Council

For the Government
of the Kingdom of Spain