CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF MALTA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

Article 22
LIMITATION ON BENEFITS

1. Except as otherwise provided in this Article, a resident of one of the Contracting States that derives income from the other Contracting State shall be entitled, in that other Contracting State, to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 of this Article and satisfies any other conditions specified in the Convention for the obtaining of such benefits.

2. A resident of one of the Contracting States is a qualified person for a taxable year only if such resident is either:

a) an individual;

b) a Contracting State, political subdivision or local authority thereof;

c) a company, if:

  i) A) its principal class of shares (and any disproportionate class of shares) is listed on a recognized stock exchange located in the Contracting State of which the company is a resident;

  B) its principal class of shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident;

  C) its principal class of shares is primarily traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident; and

  D) the company satisfies the requirements of clause ii) of subparagraph f) of this paragraph; or

  ii) A) at least 75 percent of each such class of shares in the company is owned directly or indirectly by companies entitled to benefits under clause i), provided that in the case of indirect ownership, each intermediate owner is a resident of the same Contracting State entitled to benefits of the Convention under this clause ii); and

  B) the company satisfies the requirements of clause ii) of subparagraph f) of this paragraph;

d) an entity described in subparagraph b) of paragraph 2 of Article 4 (Resident) that is generally exempt from income taxation in its Contracting State of residence;

e) a pension fund, provided that more than 75 percent of the beneficiaries, members or participants of the pension fund are individuals who are residents of either Contracting State; or

f) a person other than an individual, if:

  i) on at least half the days of the taxable year at least 75 percent of each class of shares or other beneficial interests in the person is owned, directly or indirectly, by residents of that Contracting State that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause i) of subparagraph c), subparagraph d), or subparagraph e) of this paragraph, provided that, in the case of indirect ownership, each intermediate owner is a qualified person that is a resident of that Contracting State; and

  ii) less than 25 percent of the person's gross income for the taxable year, as determined in the person's State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause i) of subparagraph c), subparagraph d), or subparagraph e) of this paragraph (other than in the form of arm's length payments in the ordinary course of business for services or tangible property).

3. Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, it shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income if it satisfies any other specified conditions for the obtaining of such benefits and:

a) at least 95 percent of each class of shares of the company are owned, directly or indirectly, by seven or fewer persons who are equivalent beneficiaries; and

b) less than 25 percent of the company's gross income for the taxable year in which the item of income arises is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries (other than in the form of arm's length payments in the ordinary course of business for services or tangible property).

4. a) A resident of a Contracting State will be entitled to benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is a qualified person, if:

i) the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking or insurance activities carried on by a bank or insurance company), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business; and

ii) the resident satisfies the requirements of clause ii) of subparagraph f) of paragraph 2.

b) If a resident of a Contracting State derives an item of income from a trade or business activity conducted by that resident in the other Contracting State, or derives an item of income arising in the other Contracting State from a related person, the conditions described in clause i) of subparagraph a) shall be considered to be satisfied with respect to such item only if the trade or business activity carried on by the resident in the first-mentioned Contracting State is substantial in relation to the trade or business activity carried on by the resident or such person in the other Contracting State. A trade or business will be deemed substantial if, for each of the three preceding taxable years, the asset value, the gross income, and the payroll expense that are related to the trade or business in the first-mentioned Contracting State each equals at least 10 percent of the resident's (and any related parties') proportionate share of the asset value, gross income and payroll expense, respectively, related to the activity that generated the income in the other Contracting State, and the average of the three ratios in each such year exceeds 15 percent.

c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

5. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the combined tax that is actually paid with respect to such income in the first-mentioned Contracting State and in the third jurisdiction is less than 60 percent of the tax that would have been payable in the first-mentioned State if the income were earned in that Contracting State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply will be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention.

6. A person that is a resident of one of the Contracting States, who is not entitled to some or all of the benefits of this Convention because of the foregoing paragraphs, may, nevertheless, be granted

benefits of this Convention if the competent authority of the Contracting State in which the income in question arises so determines.

7. Where under any provision of this Convention income or gains arising in one of the Contracting States are relieved from tax in that Contracting State and, under the law in force in the other Contracting State, a person, in respect of the said income or gains, is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the relief to be allowed under this Convention in the first-mentioned Contracting State shall apply only to so much of the income or gains as is taxed in the other Contracting State.

8. For the purposes of this Article:

a) the term "recognized stock exchange" means:
   - i) the NASDAQ System and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
   - ii) the Malta Stock Exchange; and
   - iii) any other stock exchange agreed upon by the competent authorities of the Contracting States;

b) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;

c) the term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments or otherwise, in the earnings generated in the other State by particular assets or activities of the company;

d) For purposes of this paragraph an equivalent beneficiary is a resident of a member state of the European Union or of a European Economic Area state or of Australia or of a party to the North American Free Trade Agreement but only if that resident:
   - i) A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between any member state of the European Union or a European Economic Area state or any party to the North American Free Trade Agreement or Australia and the State from which the benefits of this Convention are claimed under provisions analogous to subparagraph a), subparagraph b), clause i) of subparagraph c), subparagraph d), or subparagraph e) of paragraph 2 of this Article, provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be a qualified person under subparagraph a), subparagraph b), clause i) of subparagraph c), subparagraph d), or subparagraph e) of paragraph 2 of this Article if such person were a resident of one of the States under Article 4 (Resident) of this Convention; and
     - B) with respect to income referred to in Articles 10 (Dividends), 11 (Interest) or 12 (Royalties) of this Convention, would be entitled under such convention to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or
   - ii) is a resident of a Contracting State that is a qualified person by reason of subparagraph a), subparagraph b), clause i) of subparagraph c), subparagraph d), or subparagraph e) of paragraph 2 of this Article;

e) With respect to dividends, interest or royalties arising in Malta and beneficially owned by a company that is a resident of the United States, a company that is a resident of a member state of the European Union will be treated as satisfying the requirements of clause i) B) of subparagraph d) for purposes of determining whether such United States resident is entitled to benefits under this paragraph if a payment of dividends, interest or royalties arising in Malta and paid directly to such resident of a member state of the European Union would have been exempt from tax pursuant to any directive of the European Union, notwithstanding that the income tax convention between Malta and that other member state of the European Union would provide for a higher rate of tax with respect to such payment than the rate of tax applicable to such United States company under Article 10 (Dividends), 11 (Interest), or 12 (Royalties) of this Convention.