

TREATY USA - LUXEMBOURG

CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE GRAND DUCHY OF LUXEMBOURG FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL, SIGNED AT LUXEMBOURG ON APRIL 3, 1996

GENERAL EFFECTIVE DATE UNDER ARTICLE 30: 1 JANUARY 2001

Article 24 Limitation on Benefits

1. A resident of a Contracting State shall be entitled to all the benefits of this Convention only if it is a "qualified resident" as defined in this Article. A person that is not a qualified resident may be entitled to benefits of this Convention with respect to certain items of income under paragraphs 3, 4 and 6.
2. A resident of a Contracting State is a qualified resident for a taxable year only if:
 - a) that person is an individual;
 - b) that person is a Contracting State, a political subdivision or a local authority thereof or any agency or instrumentality of any such government, subdivision or authority;
 - c) that person is a company, if:
 - (i) at least 50 percent of the principal class of shares in the company is ultimately owned by persons that are qualified residents or U.S. citizens pursuant to this paragraph; and
 - (ii) amounts paid or accrued by the company during its taxable year
 - A) to persons that are neither qualified residents nor U.S. citizens, and
 - B) that are deductible for income tax purposes in the company's state of residence (but not including arm's length payments in the ordinary course of business for services or purchases or rentals of tangible property including immovable property), do not exceed 50 percent of the gross income of the company for that year;
 - d) that person is a company whose principal class of shares is substantially and regularly traded on one or more recognized stock exchanges; the shares in a

class of shares are considered to be substantially and regularly traded on one or more recognized stock exchanges in a taxable year if the aggregate number of shares of that class traded in such stock exchange or exchanges during the previous taxable year is at least 6 percent of the average number of shares outstanding in that class during that taxable year;

- e) that person is a company that is controlled, directly or indirectly, by publicly-traded corporations described in subparagraph d), which are residents of one of the Contracting States, provided its payments to persons who are neither qualified residents nor U.S. citizens satisfy the requirements of subparagraph c)(ii); or
 - f) that person is a not-for-profit organization that, by virtue of that status, is generally exempt from income taxation in its Contracting State of residence, provided that more than half of the beneficiaries, members or participants, if any, in such organization are qualified residents.
3. a) A resident of a Contracting State that is not a qualified resident shall be entitled to the benefits of this Convention with respect to an item of income derived from the other State, if such resident is directly (or indirectly through an associated enterprise) engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments, unless such business is conducted by a banking or insurance company), and:
- (i) the item of income is derived in connection with the trade or business in the first-mentioned State, and such trade or business is substantial in relation to the resident's proportionate interest in the activity in the other State that generated the income; or
 - (ii) the item of income derived from the other State is incidental to that trade or business in the first-mentioned State.
- b) The item of income is derived in connection with a trade or business if:
- (i) such item of income accrues in the ordinary course of such trade or business and the beneficial owner owns, directly or indirectly, less than 5 percent of the shares (or other comparable rights) in the payer of the item of income; or
 - (ii) the activity in the other State that generated the item of income is a line of business that forms a part of or is complementary to the trade or business conducted in the first-mentioned State by the income recipient.
- c) Whether a trade or business is substantial for purposes of this paragraph will be determined based on all the facts and circumstances. In any case, however, a

trade or business will be considered to be substantial if, for the preceding taxable year, each of the following three ratios for factors that are related to the trade or business within the first-mentioned State equals at least 7.5 percent and the average equals at least 10 percent:

(i) the asset value;

(ii) gross income; and

(iii) payroll expense in relation to the proportionate share of the asset value, the gross income and the payroll expense, respectively, that are related to the activity that generated the income in the other State. If any separate factor does not meet the 7.5 percent test in the first preceding taxable year, the average of the ratios for that factor for the three preceding taxable years may be substituted. If the resident owns, directly or indirectly, less than 100 percent of an activity conducted in either State, only the resident's proportionate interest in such activity will be taken into account for purposes of the test described in this subparagraph c).

d) The item of income derived from the other State is incidental to a trade or business conducted in the first- mentioned State if the income is not described in subparagraph b) and the production of such item of income facilitates the conduct of the trade or business in the first-mentioned State (for example, the investment of working capital of such trade or business).

4. Except as provided in subparagraph c), a company that is a resident of a Contracting State shall also be entitled to all the benefits of this Convention if:

a) 95 percent of the company's shares is ultimately owned by seven or fewer residents of a state that is a party to NAFTA or that is a member State of the European Union and with which the other State has a comprehensive income tax convention; and

b) amounts paid or accrued by the company during its taxable year
(i) to persons that are not residents of a state that is a party to NAFTA, residents of a member State of the European Union, or U.S. citizens, and
(ii) that are deductible for income tax purposes in the company's state of residence (but not including arm's length payments in the ordinary course of business for services or purchases or rentals of tangible property), do not exceed 50 percent of the gross income of the company for that year.

b) Notwithstanding the other provisions of this paragraph 4, a resident described in this paragraph will be entitled to the benefits of Articles 10 (Dividends), 11 (Branch Tax), 12 (Interest), and 13 (Royalties) with respect to an item of income

described in one of such articles only if the comprehensive income tax convention referred to in subparagraph a) between one of the States and a third state provides a rate of tax equal to or less than the rate provided under this Convention with respect to the item of income derived from the other State.

d) (i) The term "resident of a member State of the European Union" means a person that would be entitled to the benefits of a comprehensive income tax convention in force between any member State of the European Union and the Contracting State from which the benefits of this Convention are claimed, provided that if such convention does not contain a comprehensive Limitation on Benefits article (including provisions similar to those of subparagraphs 2(c) and 2(d) and paragraph 3), the person would be entitled to the benefits of this Convention under the principles of paragraphs 2 or 3 if such person were a resident of one of the Contracting States under Article 4 (Resident) of this Convention.

(ii) The term "resident of a state that is a party to NAFTA" means a person that would be entitled to the benefits of a comprehensive income tax convention in force between any member State of the North American Free Trade Agreement and the Contracting State from which the benefits of this Convention are claimed, provided that if such convention does not contain a comprehensive Limitation on Benefits article (including provisions similar to those of subparagraphs 2(c) and 2(d) and paragraph 3), the person would be entitled to the benefits of this Convention under the principles of paragraphs 2 or 3 if such person were a resident of one of the Contracting States under Article 4 (Resident) of this Convention.

(iii) When applying the principles of paragraph 3, an item of income derived from one of the Contracting States with respect to which treaty benefits are claimed must be derived in connection with an active trade or business conducted by the resident of the third state in that state.

5. Notwithstanding the other provisions of this Convention, where:

- a) an enterprise of a Contracting State derives income from the other Contracting State,
- b) that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, and
- c) the enterprise is exempt from tax in the first- mentioned State on the profits attributable to the permanent establishment, the tax benefits that otherwise would apply under the Convention will not apply to any item of income on which the combined tax in the first-mentioned State and in the third jurisdiction is less than 50 percent of the tax that would be imposed in the first-mentioned State if the

income were earned in that State by the enterprise and were not attributable to the permanent establishment. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax in the other State at a rate not exceeding 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply shall be subject to tax under the provisions of the domestic law of the other Contracting State. The provisions of this paragraph shall not apply if the income derived from the other Contracting State is in connection with or incidental to the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making or managing investments unless these activities are banking or insurance activities carried on by a bank or insurance company).

6. Notwithstanding the other provisions of this Article, the benefits of this Convention shall not apply to the disproportionate part of the income (i.e., that part of the income exceeding the income that would have been received absent the terms or arrangements mentioned in subparagraph a) of this paragraph) derived from a Contracting State by a company that is resident of the other Contracting State if that company, or a company that controls that company, has outstanding a class of shares:
 - a) the terms of which, or which is subject to other arrangements that, entitle its holders to a portion of the income of the company derived from the first-mentioned State that is larger than the portion such holders would receive absent such terms or arrangements; and
 - b) 50 percent or more of the vote and value of which is owned by persons who are not qualified residents of either a Contracting State or of a State that is a party to NAFTA or that is a member State of the European Union.
7. A resident of a Contracting State that is not entitled to the benefits of the Convention under the preceding paragraphs of this Article shall, nevertheless, be granted the benefits of the Convention if the competent authority of the other Contracting State so determines.
8. The following provisions apply for purposes of this Article:
 - a) The term "a recognized stock exchange" means:
 - (i) Any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange for purposes of the U.S. Securities Exchange Act of 1934;
 - (ii) the Luxembourg stock exchange;

(iii) the NASDAQ System owned by the National Association of Securities Dealers; and

(iv) any other stock exchange agreed upon by the competent authorities.

With respect to closely-held companies, the term "recognized stock exchange" shall not include the stock exchanges mentioned under subparagraphs (ii) and (iii), and if so indicated in mutual agreement between the competent authorities, under subparagraph (iv).

b) The term "closely-held company" means a company of which 50 percent or more of the principal class of shares is owned by persons, other than qualified residents, residents of a member State of the European Union, or residents of a State that is a party to NAFTA, each of whom beneficially owns, directly or indirectly, alone or together with related persons, more than 5 percent of such shares for more than 30 days during a taxable year.

9. The competent authorities of the Contracting States shall consult together with a view to developing a commonly agreed application of the provisions of this Article, including the publication of regulations or other public guidance. The competent authorities shall, in accordance with the provisions of Article 28 (Exchange of Information), exchange such information as is necessary for carrying out the provisions of this Article.

10. Notwithstanding the other provisions of this Article, Luxembourg holding companies, within the meaning of the Act (loi) of July 31, 1929 and the Decree (arrete grand-ducal) of December 17, 1938, or any subsequent revision thereof, or such other companies that enjoy a similar special fiscal treatment by virtue of the laws of Luxembourg, are not residents.

III. With Reference to Article 24 (Limitation on Benefits)

- A. It is understood that the term "any other securities exchange" includes the principal stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, London, Madrid, Milan, Paris, Sydney, Tokyo and Toronto.
- B. It is understood that the term "such other companies which enjoy a similar special fiscal treatment by virtue of the laws of Luxembourg" includes investment companies within the meaning of the Act dated March 30, 1988.
- C. For purposes of determining under subparagraph 4(c) if a comprehensive income tax Convention between one of the Contracting States and a third State provides

with respect to dividends a rate of tax that is equal to or less than the rate of tax provided under the Convention, it is understood that the following two tax rates must be compared:

- a) the rate of tax to which each of the persons described in subparagraph 4 a) would be entitled if they directly held their proportionate share of the shares that gave rise to the dividends; and
 - b) the rate of tax to which the same persons, if they would be residents of the Contracting State of which the recipient is a resident, would be entitled if they directly held their proportionate share of the shares that gave rise to the dividends.
- D. With respect to subparagraphs 2(c) and 2(d) and paragraph 4, it is understood that a Contracting State may consider a person not to be a qualified resident, unless such person demonstrates that a percentage of its shares (including shares not issued in registered form) necessary to satisfy the ownership threshold specified in subparagraphs 2(c) and 2(d) or paragraph 4 is beneficially owned by qualified residents, or, where relevant, residents of a member State of the European Union or a State that is a party to NAFTA.