

TREATY USA - SOUTH AFRICA

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF SOUTH AFRICA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS, SIGNED AT CAPE TOWN FEBRUARY 17, 1997

GENERAL EFFECTIVE DATE UNDER ARTICLE 28: 1 JANUARY 1998

ARTICLE 22

Limitation on Benefits

- 1) A resident of a Contracting State shall be entitled to benefits otherwise accorded to residents of a Contracting State by this Convention only to the extent provided in this Article.
- 2) A resident of a Contracting State shall be entitled to all the benefits of this Convention if the resident is:
 - a) an individual;
 - b) a Contracting State, political subdivision or local authority thereof;
 - c) a company, if:
 - i) all the shares in the class or classes of shares representing more than 50 per cent of the voting power and value of the company are regularly traded on a recognized stock exchange, or
 - ii) at least 50 per cent of each 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 person entitled to benefits of the Convention under this paragraph;
 - d) a legal person organized under the laws of a Contracting State that is generally exempt from tax in that State under laws relating to charitable and other similar organizations;
 - e) a legal person organized under the laws of a Contracting State that is generally exempt from tax in that State, and is established and maintained in that State to provide pensions or other similar benefits to employees pursuant to a plan, provided that more than 50 per cent of the beneficiaries, members or participants are individuals resident in either Contracting State;
 - f) a person other than an individual or a trust, if:

- i) on at least half the days of the taxable year persons described in subparagraphs a), b), c), d) or e) own, directly or indirectly (through a chain of ownership in which each person is entitled to benefits of the Convention under this paragraph), at least 50 per cent of each class of shares or other beneficial interests in the person, and
 - ii) less than 50 per cent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State (unless the payment is attributable to a permanent establishment situated in either State), in the form of payments that are deductible for income tax purposes in the person's State of residence;
 - g) a trust, if:
 - i) on at least 274 days of the taxable year persons described in subparagraphs a), b), c), d), e) or f) own directly or indirectly (through a chain of ownership in which each person is entitled to benefits of the Convention under this paragraph), at least 50 per cent of the aggregate beneficial interests in the trust, and
 - ii) less than 50 per cent of the trust's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State (unless the payment is attributable to a permanent establishment situated in either State), in the form of payments that are deductible for income tax purposes in the trust's State of residence.
- 3)
 - a) A resident of a Contracting State not otherwise entitled to benefits shall be entitled to the benefits of this Convention with respect to an item of income derived from the other State, if:
 - i) the resident is engaged in the active conduct of a trade or business in the first-mentioned State,
 - ii) the income is connected with or incidental to the trade or business, and
 - iii) the trade or business is substantial in relation to the activity of the resident (and any related parties) in the other State generating the income.
 - b) For purposes of this paragraph, the business of making or managing investments will not be considered an active trade or business unless the activity is banking, insurance or securities activity conducted by a bank, insurance company or registered securities dealer, respectively.
 - 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 deemed substantial if, for the preceding taxable year, or for the average 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 State equal at least 7.5 per cent of the resident's (and any related parties) proportionate share of the asset value, gross income and payroll

expense, respectively, that are related to the activity that generated the income in the other State, and the average of the three ratios exceeds 10 per cent.

- d) Income is derived in connection with a trade or business if the activity in the other State generating the income is a line of business that forms a part of or is complementary to the trade or business. Income is incidental to a trade or business if it facilitates the conduct of the trade or business in the other State.
- 4) A resident of a Contracting State not otherwise entitled to benefits may be granted benefits of the Convention if the competent authority of the State from which benefits are claimed so determines.
- 5) For purposes of this Article the term "recognized stock exchange" means:
- a) the NASDAQ System owned by the National Association of Securities Dealers, Inc. 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;
 - b) the Johannesburg Stock Exchange; and
 - c) any other exchange agreed upon by the competent authorities of the Contracting States.
- 6) Notwithstanding the other provisions of this Convention:
- a) where an enterprise of South Africa derives income from the United States;
 - b) that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction; and
 - c) the enterprise is not liable to tax in South Africa on the profits attributable to the permanent establishment; the United States tax benefits that otherwise would apply under the other provisions of this Convention will not apply to any item of income on which the combined tax in South Africa and in the third jurisdiction is less than 50 per cent of the tax that would be imposed in South Africa if the income were earned by the South African enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any interest or royalties to which this paragraph applies will be subject to United States tax at a rate not exceeding 15 per cent of the gross amount thereof.

The preceding sentences of this paragraph shall not apply:

- a) to interest derived 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, respectively);
- b) to royalties that are received as a compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; and
- c) to income derived by an enterprise of South Africa if the United States taxes the profits of such enterprise according to the provisions of subpart F of part III of subchapter N of chapter 1 of subtitle A of the Internal Revenue Code of 1986, as it may be amended from time to time without changing the general principle thereof.