

FINAL PROTOCOL OF 28TH JULY, 1997

United States

At the time of signing the Convention between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, the undersigned have agreed that the following provisions shall form an integral part of the Convention:

- 1.** With reference to income, profit or gain derived by fiscally transparent persons.

For the purposes of the Convention, where a resident of a Contracting State is entitled to income, profit or gain in respect of an interest in a person that derives income, profit or gain from the other Contracting State, any income, profit or gain so derived will be considered to be income, profit or gain of that resident to the extent it is treated as such for purposes of the taxation laws of the first-mentioned Contracting State.

The aforementioned reference to “person” shall not include a resident of a Contracting State within the meaning of subparagraph 1 d) of Article 4 (Residence).

- 2.** With reference to Article 2 (Taxes Covered).

For the purposes of paragraph 1, it is understood that this Convention shall not apply to the Federal Excise Taxes imposed on insurance premiums paid to foreign insurers where such premiums are not subject to the generally applicable tax imposed on insurance corporations in the Contracting State in which such insurers are resident.

- 3.** With reference to Article 6 (Income From Immovable Property (Real Property)).

A resident of a Contracting State who is liable to tax in the other Contracting State on income from immovable property situated in the other Contracting State may elect for any taxable year to compute the tax on such income on a net basis in accordance with the law of that other Contracting State. Any such election shall be binding for the taxable year of the election and all subsequent taxable years unless the competent authority of the other Contracting State, pursuant to a request by the taxpayer, agrees to terminate the election.

- 4.** With reference to Articles 7 (Business Profits), 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Capital Gains), 14 (Independent Personal Services) and 22 (Other Income).

In applying paragraphs 1 and 2 of Article 7, paragraph 6 of Article 10, paragraph 3 of Article 11, paragraph 3 of Article 12, paragraph 3 of Article 13, Article 14 and paragraph 2 of Article 22, any income or gain attributable to a permanent establishment or fixed base during its existence is taxable in the Contracting State where such permanent establishment or fixed base is situated even if the payments are deferred until such permanent establishment or fixed base has ceased to exist.

- 5.** With reference to Article 10 (Dividends).

For the purposes of paragraph 5, the term “dividends” shall not include interest which, by reason of the fact that it was paid to a non-resident company, is treated as dividends under the domestic laws of either Contracting State, to the extent that such interest does not exceed the amount which would be expected to be paid between independent parties dealing at arm's length.

- 6.** With reference to Article 11 (Interest).

In accordance with section 871(h)(4) and 881(c)(4) of the Internal Revenue Code, interest arising in the United States that is determined with reference to the profits of the issuer or of one of its associated enterprises, and paid to a resident of Ireland also may be taxed in the United States, and according to the laws of the United States, but if the beneficial owner is a resident of Ireland, the gross amount of the interest may be taxed at a rate not exceeding the rate prescribed in subparagraph b) of paragraph 2 of Article 10 (Dividends). Interest that is an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit may be taxed by each State in accordance with its domestic law.

7. With reference to Article 14 (Independent Personal Services).

In determining the income described in paragraph 1 that is taxable in the other Contracting State, the principles of paragraph 3 of Article 7 (Business Profits) shall apply.

8. With reference to Article 21 (Offshore Exploration and Exploitation Activities).

Where a permanent establishment is deemed to exist by virtue of that Article, a “balancing charge” under Chapter II of Part XVI of the Income Tax Act, 1967 will not be imposed for the reason only that the trade carried on through the permanent establishment is treated as having permanently ceased because of the termination of the relevant activities in Ireland, except to the extent that the person carrying on the activities referred to in that Article has made a claim under the laws of Ireland for accelerated capital allowances in respect of machinery or plant used for the purposes of the permanent establishment. Normal wear and tear allowances would, however, be granted in respect of the machinery or plant concerned and no balancing charge would be imposed with respect to such allowances.

9. With reference to Article 23 (Limitation on Benefits).

a) For the purposes of paragraph 2,

i) the shares in a class of shares or the units in a class of units are considered to be substantially and regularly traded on one or more recognized stock exchanges in a fiscal year if:

A) trades in such class are effected on one or more of such stock exchanges other than in de minimis quantities during every quarter; and

B) the aggregate number of shares or units of that class traded on such stock exchange or exchanges during the previous fiscal year is at least 6 percent of the average number of shares or units outstanding in that class during that taxable year, provided that if such class was not listed on a recognized stock exchange in the previous fiscal year the shares or units will be considered to have satisfied the requirement of this subparagraph B);

ii) a Building Society incorporated in Ireland shall be deemed to be a company the principal class of shares in which:

A) is listed on the Irish Stock Exchange, and

B) which in any fiscal year is substantially and regularly traded on such exchange.

b) For the purpose of paragraph 3,

i) whether a resident of a Contracting State is engaged in the active conduct of a trade or business will be determined on the basis of an analysis of all the relevant facts and circumstances. In any case, however,

A) a bank will be considered to be engaged in the active conduct of a trade or business if it regularly accepts deposits from the public or makes loans to the public. It is understood that a resident of a Contracting State that, as of the date of signature of this Convention, is licensed by the banking authorities in that State to engage in the business of banking satisfies this requirement; and

B) an insurance company will be considered to be engaged in the active conduct of a trade or business if its gross income consists

primarily of insurance or reinsurance premiums and investment income attributable to such premiums;

- ii) in determining whether a person is “engaged in the active conduct of a trade or business” in a Contracting State, activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such 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, directly or indirectly, 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;
- iii) a resident of a Contracting State does not have an ownership interest in an activity in the other State merely because it supplies goods, provides services or grants other facilities to that activity. For example, a lessor who would not otherwise have an ownership interest in an activity in the other State would not acquire such an interest merely because it leased property for use by that activity.

10. With reference to Article 27 (Exchange of Information and Administrative Assistance).

For the purposes of paragraph 3, the Contracting States consider that, at the date of signature of this Convention, the laws and practices of Ireland do not permit its tax authorities to carry out enquiries on behalf of any state where no liability to Ireland's taxes as covered by this Convention are at issue. However, if, after the date of signature of this Convention, the laws and practices of Ireland in this respect change to permit such enquiries, on behalf of any state, then, subject to the provisions of Article 27, the tax authorities of Ireland shall carry out such enquiries on behalf of the United States and exchange the information so obtained.