

PROTOCOL

AMENDING

THE CONVENTION OF 26 FEBRUARY 2010

BETWEEN

THE SWISS CONFEDERATION

AND

THE KINGDOM OF THE NETHERLANDS

FOR THE AVOIDANCE OF DOUBLE TAXATION

WITH RESPECT TO TAXES ON INCOME

*The Swiss Federal Council
and*

The Government of the Kingdom of the Netherlands,

Desiring to conclude a Protocol to amend the Convention between the Swiss Confederation and the Kingdom of the Netherlands for the avoidance of double taxation with respect to taxes on income, with Protocol, signed at The Hague on 26 February 2010, (hereinafter referred to as “the Convention” and “the Protocol to the Convention”, respectively),

Have agreed as follows:

Article 1

The Title and Preamble of the Convention shall be replaced by the following Title and Preamble:

“Convention between the Swiss Confederation and the Kingdom of the Netherlands for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance

*The Swiss Federal Council
and*

The Government of the Kingdom of the Netherlands,

Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States),

have agreed as follows: ”.

Article 2

1. In clause (i) of subparagraph h) of paragraph 1 of Article 3 of the Convention a comma shall be added after ”Netherlands”.

2. Clause (ii) of subparagraph h) of paragraph 1 of Article 3 of the Convention shall be replaced by the following clause:

“(ii) in Switzerland, the Head of the Federal Department of Finance or his authorised representative;”.

3. The following subparagraph shall be inserted after subparagraph i) of paragraph 1 of Article 3 of the Convention:

“j) the term “pension fund” means any plan, scheme, fund, trust or other arrangement established in a Contracting State which is:

- (i) regulated by and generally exempt from taxes on income in that State; and
- (ii) operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements.”.

Article 3

1. Subparagraph b) of paragraph 3 of Article 10 of the Convention shall be replaced by the following subparagraph:

“b) the beneficial owner of the dividends is a pension fund.”.

2. Subparagraph c) of paragraph 3 of Article 10 of the Convention shall be deleted.

Article 4

Article 18 shall be deleted and replaced by the following Article:

“Article 18 Pensions, annuities and social security payments

1. Pensions and other similar remuneration, as well as annuities, including lump-sum payments made in lieu of a pension or another similar remuneration or an annuity, arising in a Contracting State and paid to a resident of the other Contracting State, and payments under the provisions of the social security legislation of the first-mentioned State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State. However, if such payments are periodic in nature (except lump-sum payments made in lieu of a pension or another similar remuneration or an annuity), the tax so charged shall not exceed 15 per cent of the gross amount of the payment.

2. A pension, other similar remuneration or an annuity shall be deemed to arise in a Contracting State insofar as the contributions or payments associated with that pension or other similar remuneration or annuity, or the entitlements received from that pension or other similar remuneration or annuity, qualified for relief from tax in that State.

3. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth and to the extent that the entitlement or the contribution associated with the annuity qualified for tax relief in the Contracting State from which the annuity is derived.”

Article 5

Article 22 (Elimination of double taxation) shall be deleted and replaced by the following Article:

“Article 22 Elimination of double taxation

1. The Netherlands, when imposing tax on its residents, may include in the basis upon which such taxes are imposed the items of income which, according to the provisions of this Convention, may be taxed in Switzerland.

2. However, where a resident of the Netherlands derives items of income which according to paragraphs 1, 3 and 4 of Article 6, paragraph 1 of Article 7, paragraphs 1 and 2 of Article 8, paragraph 7 of Article 10, paragraph 4 of Article 11, paragraph 4 of Article 12, paragraphs 1, 2, 3 and 4 of Article 13, paragraph 1 of Article 14, paragraphs 1 and 3 of Article 15, paragraph 1 (subparagraph a) of Article 19 and paragraph 2 of Article 21 of this Convention may be taxed in Switzerland and are included in the basis referred to in paragraph 1, the Netherlands shall exempt such items of income by allowing a reduction of its tax. This reduction shall be computed in conformity with the provisions of the Netherlands law for the elimination of double taxation. For that purpose the said items of income shall be deemed to be included in the amount of the items of income which are exempt from Netherlands tax under those provisions.

3. Further, the Netherlands shall allow a deduction from the Netherlands tax so computed for the items of income which according to paragraph 2 of Article 10, paragraph 1 of Article 16, paragraphs 1 and 2 of Article 17 and paragraph 1 of Article 18 of this Convention may be taxed in Switzerland to the extent that these items are included in the basis referred to in paragraph 1. The amount of this deduction shall be equal to the tax paid in Switzerland on these items of income, but shall, in case the provisions of the Netherlands law for the elimination of double taxation provide so, not exceed the amount of the deduction which would be allowed if the items of income so included were the sole items of income which are exempt from Netherlands tax under the provisions of the Netherlands law for the elimination of double taxation.

This paragraph shall not restrict allowance now or hereafter accorded by the provisions of the Netherlands law for the elimination of double taxation, but only as far as the calculation of the amount of the deduction of Netherlands tax is concerned with respect to the aggregation of income from more than one jurisdiction and the carry forward of the tax paid in Switzerland on the said items of income to subsequent years.

4. Notwithstanding the provisions of paragraph 2, the Netherlands shall allow a deduction from the Netherlands tax for the tax paid in Switzerland on items of income which according to paragraph 1 of Article 7, paragraph 7 of Article 10, paragraph 4 of Article 11, paragraph 4 of Article 12, paragraph 4 of Article 13 and paragraph 2 of Article 21 of this Convention may be taxed in Switzerland to the extent that these items are included in the basis referred to in paragraph 1, insofar as the Netherlands under the provisions of the Netherlands law for the elimination of double taxation allows a deduction from the Netherlands tax of the tax levied in another jurisdiction on such items of income. For the computation of this deduction the provisions of paragraph 3 of this Article shall apply accordingly.

5. In the case of Switzerland, double taxation shall be eliminated as follows:

- a) Where a resident of Switzerland derives income which, in accordance with the provisions of this Convention, may be taxed in the Netherlands, Switzerland shall, subject to the provisions of subparagraphs b) and c), exempt such income from tax but may, in calculating tax on the remaining income of that resident, apply the rate of tax which would have been applicable if the exempted income had not been so exempted. However, such exemption shall apply to gains and income referred to in paragraph 4 of Article 13 and paragraphs 1 and 2 of Article 17 only if actual taxation of such gains and income in the Netherlands is demonstrated.
- b) Where a resident of Switzerland derives dividends which, in accordance with the provisions of Article 10, may be taxed in the Netherlands, Switzerland shall allow, upon request, a relief to such resident. The relief may consist of:
 - (i) a deduction from the tax on the income of that resident of an amount equal to the tax levied in the Netherlands in accordance with the provisions of Article 10; such deduction shall not, however, exceed that part of the Swiss tax, as computed before the deduction is given, which is appropriate to the income which may be taxed in the Netherlands; or
 - (ii) a lump sum reduction of the Swiss tax; or
 - (iii) a partial exemption of such dividends from Swiss tax, in any case consisting at least of the deduction of the tax levied in the Netherlands from the gross amount of the dividends.

Switzerland shall determine the applicable relief and regulate the procedure in accordance with the Swiss provisions relating to the carrying out of international conventions of the Swiss Confederation for the elimination of double taxation.

- c) Where a resident of Switzerland derives periodic payments in accordance with the provisions of the second sentence of paragraph 1 of Article 18, which may be taxed in the Netherlands, Switzerland shall allow, upon request, a relief consisting of the deduction of one-third of the net amount of such pensions or annuities.

6. The provisions of paragraph 2 and of subparagraph a of paragraph 5 shall not apply to items of income derived by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such items of income from tax or applies the provisions of paragraph 2 of Article 10 to such income.”

Article 6

Paragraphs 6 and 7 of Article 24 of the Convention shall be replaced by the following:

“6. Contributions made by or on behalf of an individual who exercises employment or self-employment in a Contracting State (“the host state”) to a pension fund that is recognised for tax purposes in the other Contracting State (“the home state”) shall, for the purposes of:

- a) determining the individual's tax payable in the host state; and
- b) determining the profits of his employer which may be taxed in the host state;

be treated in the host state in the same way and subject to the same conditions and limitations as contributions made to a pension fund that is recognised for tax purposes in that State, to the extent that they are not so treated by the home state.

7. Paragraph 6 shall apply only if the following conditions are met:

- a) the individual is subject to the legislation of the home state in accordance with the Agreement on Freedom of the Movement of Persons signed on 21 June 1999, between the Swiss Confederation on one side and the European Community and its Member States on the other side; and
- b) the individual was not a resident of the host state, and was participating in the pension fund (or in another similar pension fund for which the first-mentioned pension fund was substituted), immediately before he began to exercise employment or self-employment in the host state; and
- c) the pension fund is accepted by the competent authority of the host state as generally corresponding to a pension fund recognised as such for tax purposes with respect to individuals by that State.

8. The provisions of paragraph 6 and 7 shall apply accordingly to contributions to Dutch pension (insurance) schemes, which include arrangements with an insurance company in which an individual participates in order to secure pension or retirement benefits.

9. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.”.

Article 7

1. Paragraph 1 of Article 25 of the Convention shall be replaced by the following:

“1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.”.

Article 8

The following Article shall be inserted after Article 27 of the Convention:

“Article 27A Entitlement to benefits

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.”.

Article 9

The Preamble of the Protocol to the Convention shall be replaced by the following Preamble of the Protocol to the Convention:

“With respect to the Convention concluded between the Swiss Confederation and the Kingdom of the Netherlands for the elimination of double taxation with respect to taxes on income and the prevention of tax evasion and avoidance, the undersigned have agreed that the following provisions shall form an integral part of the Convention.”.

Article 10

1. The existing Articles II, III, IV, V, VI and VII of the Protocol to the Convention shall be renumbered Articles III, IV, V, VI, VII and VIII.

2. The following new Article II shall be added to the Protocol to the Convention:

“II. Ad Article 3 paragraph 1 j)

It is understood that the term “pension fund” includes the following funds and any identical or substantially similar funds which are established pursuant to legislation introduced after 1 January 2018:

- a) in the Netherlands, any pension fund covered by:-
 - (i) the Pension Act (*Pensioenwet*);
 - (ii) the Mandatory Participation in an Industry-wide Pension Fund (*Wet verplichte deelneming in een bedrijfstakpensioenfonds 2000*);
 - (iii) the Mandatory Pensions for Professional Groups Act (*Wet verplichte beroepspensioenregeling*);
 - (iv) the Act on the Notary Office (*Wet op het notarisambt*);
 - (v) the Act on Financial Supervision (*Wet op het financieel toezicht*);
- b) in Switzerland, any pension fund covered by:
 - (i) the Federal Act on old age and survivors’ insurance of 20 December 1946;
 - (ii) the Federal Act on disabled persons’ insurance of 19 June 1959;
 - (iii) the Federal Act on supplementary pensions in respect of old age, survivors’ and disabled persons’ insurance of 6 October 2006;

- (iv) the Federal Act on income compensation allowances in case of service and in case of maternity of 25 September 1952;
- (v) the Federal Act on old age, survivors' and disabled persons' insurance payable in respect of employment or self-employment of 25 June 1982, including pension funds which offer individual recognised pension plans comparable with occupational pension plans and non-registered pension funds which offer occupational pension plans in the meaning of:
 - the Federal Act on Vested Benefits of 17 December 1993.
 - paragraph 6 and paragraph 7 of Article 89a of the Swiss Civil Code of 10 December 1907;
 - paragraph 1 of Article 331 of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911."

Article 11

The existing Article III (renumbered Article IV) of the Protocol to the Convention shall be replaced by the following Article:

“IV. Ad Article 4, paragraph 1

1. The term "resident of a Contracting State" shall include an organisation that is established and is operated exclusively for religious, charitable, scientific, cultural, sporting or educational purposes (or for more than one of those purposes) and that is a resident of that State according to its laws, notwithstanding that all or part of its income or gains may be exempt from tax under the domestic law of that State.

2. The term "resident of a Contracting State" shall also include a pension fund.”.

Article 12

The existing Article VIII of the Protocol to the Convention shall be deleted.

Article 13

Article IX of the Protocol to the Convention shall be replaced by the following Article:

“IX. Ad Article 4, Article 10, paragraphs 1 and 2 and Article 21

1. It is understood that a Dutch tax exempt Investment Institution (“*vrijgestelde beleggingsinstelling*”), a Swiss contractual fund (“*fonds commun de placement*”), a Swiss open ended investment fund (“*société d’investissement à capital variable*”) and a Swiss limited partnership for collective capital investment (“*société en commandite de placements collectifs*”) are not residents of one or both of the Contracting States.

2. Notwithstanding paragraph 1 and paragraphs 1 and 2 of Article 10 and Article 21:

- a) the Netherlands shall not be prevented from applying its domestic tax law with respect to an interest in a tax exempt Investment Institution (“*vrijgestelde beleggingsinstelling*”), but if the beneficial owner of such an interest is a resident of Switzerland, the tax so charged shall not exceed 15 per cent of the gross amount of the income so taxed.
- b) Switzerland shall not be prevented from applying its domestic tax law with respect to income on an interest in a Swiss contractual fund (“*fonds commun de placement*”), a Swiss open ended investment fund (“*société d’investissement à capital variable*”) and a Swiss limited partnership for collective capital investment (“*société en commandite de placements collectifs*”) under the Federal Act on Collective Investment Schemes of 23 June 2006, but if the beneficial owner of such income is a resident of the Netherlands, the tax so charged shall not exceed 15 per cent of the gross amount of the income so taxed.

3. In respect to paragraph 2, subparagraphs a and b, the provisions of Article XIII and Article 22 shall apply accordingly.”.

Article 14

The existing Articles X, XI, XII, XIII, XIV, XV and XVI of the Protocol to the Convention shall be renumbered Articles XI, XII, XIII, XIV, XV, XVI and XVII.

Article 15

The following new Article X shall be inserted after Article IX of the Protocol to the Convention:

“X. Ad Article 10, paragraph 3

1. The provisions of paragraph 3 of Article 10 shall not apply to a person who is a fiscal investment institution (“*fiscale beleggingsinstelling*”) for the purposes of the Netherlands company tax.
2. Further, the provisions of paragraph 3 of Article 10 shall apply to a premium pension institution only to the extent that the dividend income relates to a pension plan of an employer which is a resident of the Netherlands”.

Article 16

This Protocol shall enter into force on the last day of the month following the month in which the later of the notifications has been received in which the Contracting States have notified each other in writing that the formalities constitutionally required in their respective States have been complied with, and its provisions shall have effect for taxable years and periods beginning on or after the first day of January in the calendar year following that in which the Protocol has entered into force.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Protocol.

DONE at..... this.....day of....., in duplicate, in the French, Netherlands and English languages, the three texts begin equally authentic. In case there is any divergence of interpretation between the French and Netherlands texts, the English text shall prevail.

For the Swiss Confederation

For the Kingdom of the Netherlands

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