



STATUTORY INSTRUMENTS.

S.I. No. 33 of 2011

DOUBLE TAXATION RELIEF (TAXES ON INCOME AND CAPITAL
GAINS) (REPUBLIC OF SOUTH AFRICA) ORDER 2011

(Prn. A11/0128)

DOUBLE TAXATION RELIEF (TAXES ON INCOME AND CAPITAL GAINS) (REPUBLIC OF SOUTH AFRICA) ORDER 2011

WHEREAS it is enacted by section 826(1) (as amended by section 35 of the Finance Act 2007 (No. 11 of 2007)) of the Taxes Consolidation Act 1997 (No. 39 of 1997) that where the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to affording relief from double taxation in respect of income tax, corporation tax in respect of income and chargeable gains, capital gains tax or any taxes of a similar character imposed by the laws of the State or by the laws of that territory and, in the case of taxes of any kind or description imposed by the laws of the State or the laws of that territory, in relation to exchanging information for the purposes of the prevention and detection of tax evasion or granting relief from taxation under the laws of that territory to persons who are resident in the State for the purposes of tax, and that it is expedient that those arrangements should have the force of law, and that the order so made is referred to in Part 1 of Schedule 24A to the Taxes Consolidation Act 1997, then, subject to section 826 of that Act, the arrangements shall, notwithstanding any enactment, have the force of law as if such order were an Act of the Oireachtas on and from the date of the insertion of a reference to the order into Part 1 of Schedule 24A:

AND WHEREAS it is further enacted by section 826(6) of the Taxes Consolidation Act 1997 that where such an order is proposed to be made, a draft of the order shall be laid before Dáil Éireann and the order shall not be made until a resolution approving of the draft has been passed by Dáil Éireann:

AND WHEREAS a draft of the following Order has been laid before Dáil Éireann and a resolution approving of the draft has been passed by Dáil Éireann:

NOW, the Government, in exercise of the powers conferred on them by section 826(1) (as substituted by section 35 of the Finance Act 2007) (No. 11 of 2007)) of the Taxes Consolidation Act 1997(No. 39 of 1997), hereby order as follows:

1. This Order may be cited as the Double Taxation Relief (Taxes on Income and Capital Gains) (Republic of South Africa) Order 2011.
2. It is declared—
 - (a) that the arrangements specified in the Protocol, the text of which is set out in the Schedule, have been made with the Government of the Republic of South Africa in relation to—

Notice of the making of this Statutory Instrument was published in "Iris Oifigiúil" of 21st January, 2011.

- (i) affording relief from double taxation in respect of income tax, corporation tax in respect of income and chargeable gains, capital gains tax and any taxes of a similar character, imposed by the laws of the State or by the laws of the Republic of South Africa, and
- (ii) in the case of taxes of any kind or description imposed by the laws of the State or the laws of the Republic of South Africa, exchanging information for the purposes of the prevention and detection of tax evasion and granting relief from taxation under the laws of the Republic of South Africa to persons who are resident in the State for the purposes of tax,

and

- (b) it is expedient that those arrangements should have the force of law.

SCHEDULE

PROTOCOL
AMENDING THE CONVENTION
BETWEEN
THE GOVERNMENT OF IRELAND
AND
THE GOVERNMENT OF 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,
WITH PROTOCOL

The Government of Ireland and the Government of the Republic of South Africa, desiring to amend the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, with Protocol, signed at Pretoria on 7 October 1997 (in this Protocol referred to as “the Convention”),

HAVE AGREED as follows:

Article I

Paragraph 4 of Article 2 shall be deleted and replaced by the following:

“4. The Convention shall apply also to any identical or substantially similar taxes that are imposed by either Contracting State after the date of signature of the Convention in addition to, or in place of, the existing taxes, including taxes on dividends. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws.”

Article II

Article 4 shall be amended by:

(a) deleting paragraph 1 and replacing it by the following:

“1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of that person’s domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.”

(b) adding after paragraph 3 the following paragraph:

“4. A Common Contractual Fund established in Ireland shall not be regarded as a resident of Ireland and shall be treated as fiscally transparent for the purposes of granting tax treaty benefits.”

Article III

Article 10 shall be deleted and replaced by the following:

“Article 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 per cent of the capital of the company paying the dividends; or

(b) 10 per cent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term “dividends” as used in this Article means income from shares or other rights participating in profits (not being debt-claims), as well as income from other corporate rights and any income or distribution assimilated to income from shares by the laws of the Contracting State of which the company paying the income or making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except in so far

as such dividends are paid to a resident of that other State or in so far as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State."

Article IV

Paragraph 6 of Article 23 shall be deleted.

Article V

Article 26 shall be deleted and replaced by the following:

"Article 26

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.”

Article VI

Paragraph 3 of the Protocol signed on 7 October 1997 shall be deleted.

Article VII

If, in a convention for the avoidance of double taxation that may subsequently be concluded between South Africa and a third State, the rates for taxation of dividends in the source State are lower than those specified in sub-paragraphs 2 (a) and (b) of Article 10 as amended by Article III of this Protocol, South Africa shall immediately inform the Government of Ireland in writing through the diplomatic channel and shall enter into negotiations with the Government of Ireland with a view to providing comparable treatment as may be provided for the third State.

Article VIII

1. Each of the Contracting States shall notify to the other in writing, through the diplomatic channel, of the completion of the procedures required by its law for the bringing into force of this Protocol, which shall form an integral part of the Convention. The Protocol shall enter into force on the date of receipt of the later of these notifications.

2. (a) Subject to subparagraph (b), the provisions of the Protocol shall thereupon have effect beginning on the first day of January next following the year in which the Protocol enters into force.

(b) Articles III and VI of the Protocol shall thereupon have effect beginning on the date on which a system of taxation at shareholder level of dividends declared enters into force in South Africa.

Article IX

This Protocol shall remain in force for as long as the Convention remains in force.

IN WITNESS WHEREOF the undersigned, duly authorised thereto by their respective Governments, have signed and sealed this Protocol in two originals in the English language.

DONE at Cape Town, this 17th day of March 2010

**For the Government of
Ireland**

Colin Wrafter

**For the Government of
the Republic of South Africa**

Pravin Gordhan



GIVEN under the Official Seal of the Government,
11 January 2011.

BRIAN COWEN,
Taoiseach.

EXPLANATORY NOTE.

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

This Order gives the force of law to the Protocol to the Double Taxation Convention between the Government of Ireland and the Government of the Republic of South Africa. The existing Double Taxation Convention and a Protocol between Ireland and South Africa was signed at Pretoria on 7 October 1997 and entered into force in 1998.

This Protocol was signed at Cape Town on 17 March 2010.

The Protocol incorporates a number of provisions reflecting changes in the tax policies of both countries since the Convention was signed. It also incorporates changes made to the OECD Model Tax Convention.

For example, the Protocol provides for the new tax laws in South Africa concerning the taxation of dividends paid by South African companies to foreign shareholders. The new South African tax on dividends is a shareholder level tax, which replaces a company level tax on company distributions. The Protocol provides also that should South Africa agree in a tax convention with another State to lower rates of taxation on dividends that those in Article III of this Protocol, then it shall immediately enter into negotiations with a view to providing comparable treatment to Ireland.

The Protocol also amends the rules for determining whether a person is a resident of one State or the other, by replacing the existing text with the current OECD Model text. This reflects the fact that South Africa has moved to a system of worldwide taxation of its residents since the Convention was signed.

In addition, the Protocol updates the Article on Exchange of Information to fully conform to the OECD standard on exchange of information.

It also recognises the transparent status of the Common Contractual Fund.

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
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