



STATUTORY INSTRUMENTS.

S.I. No. 460 of 2019



DOUBLE TAXATION RELIEF (TAXES ON INCOME AND ON CAPITAL)
(SWISS CONFEDERATION) ORDER 2019

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WHEREAS it is enacted by section 826(1) (as amended by section 157 of the Finance Act 2010 (No. 5 of 2010)) 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, granting relief from taxation under the laws of that territory to persons who are resident in the State for the purposes of tax or collecting and recovering tax (including interest, penalties and costs in connection with such tax) for the purpose of the prevention of tax evasion, 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 of 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 amended by section 157 of the Finance Act 2010 (No. 5 of 2010)) of the Taxes Consolidation Act 1997, hereby order as follows:

1. This Order may be cited as the Double Taxation Relief (Taxes on Income and on Capital) (Swiss Confederation) Order 2019.

2. It is declared that -

- (a) the arrangements specified in the Protocol, the text of which is set out in the Schedule, have been made with the Swiss Federal Council in relation to -
 - (i) affording relief from double taxation and the prevention from fiscal evasion with respect to taxes on income, 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 Swiss Confederation, and
 - (ii) in the case of taxes of any kind or description imposed by the laws of the State or the laws of the Swiss Federation, exchanging information for the purposes of the prevention and detection of tax evasion, granting relief from taxation under the laws of the Swiss Federation 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 BETWEEN IRELAND AND THE SWISS CONFEDERATION
AMENDING THE CONVENTION FOR THE AVOIDANCE OF DOUBLE
TAXATION WITH RESPECT TO TAXES ON INCOME AND ON
CAPITAL SIGNED AT DUBLIN ON 8 NOVEMBER 1966, AS AMENDED
BY THE PROTOCOLS SIGNED AT DUBLIN ON 24 OCTOBER 1980 AND
AT DUBLIN ON 26 JANUARY 2012**

The Government of Ireland and the Swiss Federal Council;

Desiring to conclude a Protocol to amend the Convention between Ireland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital signed at Dublin on 8 November 1966, as amended by the protocols signed at Dublin on 24 October 1980 and at Dublin on 26 January 2012 (hereinafter “the Convention”);

Have agreed as follows:

ARTICLE I

The preamble of the Convention shall be deleted and replaced by the following:

“The Swiss Federal Council and the Government of Ireland;

Desiring to conclude a Convention for the avoidance of double taxation with respect to taxes on income and on capital;

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

Intending to eliminate double taxation with respect to taxes on income and on capital 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 II

The following new paragraph 6A shall be added to Article 6 (Business profits) of the Convention:

“6A. A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after 5 years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.”

ARTICLE III

The following new paragraph 3 shall be added to Article 8 (Associated enterprises) of the Convention:

“3. A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after 5 years from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.”

ARTICLE IV

The following new paragraph 7 shall be added to Article 22 (Elimination of double taxation) of the Convention:

“7. The provisions of paragraph 2 shall not apply to income derived by a resident of Switzerland where Ireland applies the provisions of this Convention to exempt such income from tax or applies the provisions of paragraph 2 of Article 9 to such income.”

ARTICLE V

Paragraph 1 of Article 25 (Mutual agreement procedure) of the Convention shall be deleted and 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 VI

The following new Article 25A (Arbitration) shall be added to Chapter VI (Special provisions) of the Convention:

“ARTICLE 25A

Arbitration

1. Where:
 - a) under paragraph 1 of Article 25 a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention; and
 - b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 of Article 25 within a period of three years beginning on the start date referred to in paragraphs 8 or 9, as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting States have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Article, according to any rules or procedures agreed upon by the competent authorities of the Contracting States pursuant to the provisions of paragraph 10.

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in subparagraph b of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b of paragraph 1 will stop running until the suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b of paragraph 1, the period provided in subparagraph b of paragraph 1 shall be extended for an amount of time equal to

the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4.
 - a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1. The arbitration decision shall be final.
 - b) The arbitration decision shall be binding on both Contracting States except in the following cases:
 - (i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.
 - (ii) if a final decision of the courts of one of the Contracting States holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of paragraphs 16, 17 and 21). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.
 - (iii) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.
5. The competent authority that received the initial request for a mutual agreement procedure as described in subparagraph a of paragraph 1 shall, within two calendar months of receiving the request:
 - a) send a notification to the person who presented the case that it has received the request; and
 - b) send a notification of that request, along with a copy of the request, to the competent authority of the other Contracting State.

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6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting State) it shall either:

- a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or
- b) request additional information from that person for that purpose.

7. Where pursuant to subparagraph b of paragraph 6, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

- a) that it has received the requested information; or
- b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to subparagraph b of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

- a) the date on which both competent authorities have notified the person who presented the case pursuant to subparagraph a of paragraph 6; and
- b) the date that is three calendar months after the notification to the competent authority of the other Contracting State pursuant to subparagraph b of paragraph 5.

9. Where additional information has been requested pursuant to subparagraph b of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

- a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a of paragraph 7; and
- b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b of paragraph 7, such notification shall be treated as a request for additional information under subparagraph b of paragraph 6.

10. The competent authorities of the Contracting States shall by mutual agreement pursuant to paragraph 3 of Article 25 settle the mode of application of the provisions contained in this Article, including the minimum information

necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. Notwithstanding the provisions of the preceding paragraphs of this Article:

- a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by this Article shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting State;
- b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting States, the arbitration process shall terminate.

12. Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, paragraphs 13 through 15 shall apply for the purposes of this Article.

13. The following rules shall govern the appointment of the members of an arbitration panel:

- a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.
- b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1. The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting State.
- c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

14. In the event that the competent authority of a Contracting State fails to appoint a member of the arbitration panel in the manner and within the time

periods specified in paragraph 13 or agreed to by the competent authorities of the Contracting States, a member shall be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting State.

15. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 13 or agreed to by the competent authorities of the Contracting States, the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting State.

16. Solely for the purposes of the application of this Article and of Article 26 and of the provisions of the domestic laws of the Contracting States related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under Article 26.

17. The competent authorities of the Contracting States shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in paragraph 2 of Article 26 and under the applicable laws of the Contracting States.

18. For the purposes of this Article and of Article 25, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States:

- a) the competent authorities of the Contracting States reach a mutual agreement to resolve the case; or
- b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

19. Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to this Article:

- a) After a case is submitted to arbitration, the competent authority of each Contracting State shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the Contracting States). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to the Convention, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting States have been unable to reach agreement on an issue regarding the conditions for application of a provision of the Convention (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.
- b) The competent authority of each Contracting State may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.
- c) The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the Contracting States. The arbitration decision shall have no precedential value.

20. Prior to the beginning of arbitration proceedings, the competent authorities of the Contracting States shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under Article 25, as well as the arbitration proceeding under this Article, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States, a person that presented the case or one of that person’s advisors materially breaches that agreement.

21. In an arbitration proceeding under this Article, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the Contracting States, shall be borne by the Contracting States in a manner to be settled by mutual agreement between the competent authorities of the Contracting States. In the absence of such agreement, each Contracting State shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the Contracting States in equal shares.

22. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Article shall not be submitted to arbitration if the issue falls within the scope of a case with respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

23. Nothing in this Article shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the Contracting States are or will become parties.”.

ARTICLE VII

The following new Article 27A (Entitlement to benefits) shall be added to Chapter VI (Special provisions) 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 or capital 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 VIII

1. The existing paragraph 4 of the Protocol to the Convention shall be deleted.

2. The following new paragraph 4A shall be added to the Protocol to the Convention:

“4A. Regarding Article 25A

Notwithstanding paragraph 1 of Article 25A of the Convention a case may not be submitted to arbitration if:

- (a) in the case of Ireland:
 - (i) the case is connected with actions for which the taxpayer or a related person (or a person acting for either the taxpayer or a related person) is liable to a penalty as a result of deliberate behaviour in accordance with Section 1077E Taxes Consolidation Act 1997;
 - (ii) the case involves the application of Ireland’s domestic anti-avoidance rules contained in Section 811 and Section 811A Taxes Consolidation Act 1997; and
- (b) in the case of Switzerland:
 - (i) the case is connected with fraud, gross negligence or wilful default;
 - (ii) the case involves the application of tax avoidance as defined under case law by the Swiss Federal Court.”.

ARTICLE IX

1. Each of the Contracting States shall notify to the other via diplomatic channels the completion of the procedures required by its law for the bringing into force of this Protocol.

2. The Protocol shall enter into force on the date of the receipt of the later of these notifications and shall thereupon have effect:

- (a) in the case in respect of taxes withheld at source, for amounts paid or credited on or after the first day of January of the year next following the date on which the Protocol enters into force;
- (b) in respect of other taxes, for taxation years beginning on or after the first day of January of the year next following the date on which the Protocol enters into force.

3. Notwithstanding the provisions of subparagraphs (a) and (b) of paragraph 2, the amendments made by Articles II, III, V, VI and VIII of this Protocol shall have effect from the date of entry into force of this Protocol, without regard to the taxable period to which the matter relates.

In witness whereof the undersigned, duly authorised thereto, have signed this Protocol.

Done in duplicate at Dublin this 13th day of June 2019 in the French and English languages, each version being equally authentic.

For the Government of Ireland

For the Swiss Federal Council

Michael D'Arcy

Louis-José Touron



GIVEN under the Official Seal of the Government,
3 September, 2019.

LEO VARADKAR,
Taoiseach.

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