
Swiss Agreement on Treaty Benefits

Announcement 2003–59

The following is a copy of the agreement concluded between the U.S. and Swiss competent authorities on August 20, 2003 and released on August 22, 2003 (IR–2003–103) regarding the Limitation of Benefits Article of the income tax treaty and accompanying Revised Memorandum of Understanding between the United States and the Swiss Confederation.

COMPETENT AUTHORITY AGREEMENT

The Competent Authorities of the United States and the Swiss Confederation enter into the following Agreement (“Agreement”) concerning the ownership requirements under paragraph 3 of Article 22 (Limitation on Benefits) and paragraph 7 (In reference to paragraph 6 of Article 22 (Limitation on Benefits)) of the Revised Memorandum of Understanding (“MOU”) of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed on October 2, 1996 (“Treaty”). The Agreement is entered into under paragraph 3 of Article 25 (Mutual Agreement Procedure).

It is understood that for purposes of this Agreement, “Article” refers to an Article of the Treaty.

Ownership requirements under Article 22(3) and paragraph 7 of the MOU

Article 22(3) allows a Swiss company to receive limited derivative benefits with respect to dividends, royalties, and interest if it meets an ownership, base reduction, and derivative benefits test. Article 22, subparagraphs 3(a)(i) and (ii), sets forth a combined ownership test. One of the ways in which a company can meet the test under subparagraph 3(a)(ii) is if greater than 70 percent of the aggregate vote and value of its shares are ultimately owned by persons that are residents of a party to the North American Free Trade Agreement (“NAFTA”), and that are also described in Article 22(3)(b).

Under Article 22(6), a person who is not entitled to benefits under Article 22, paragraphs 1 through 5, may nevertheless be granted benefits if the competent authority of the State in which the income arises so determines, after consultation with the competent authority of the other Contracting State. Under paragraph 7 of the MOU, a company that meets an ownership test and a base-erosion test will be granted treaty benefits under Article 22(6). A company can meet the ownership test if the ultimate beneficial owners of 95 percent or

more of the aggregate vote and value of all its shares are seven or fewer persons that are residents of a party to the European Union, the European Economic Area or a party to the North American Free Trade Agreement (NAFTA), and that are also described in Article 22(3)(b).

Under Article 22(3)(b), ultimate beneficial ownership by a resident of a country that is a party to NAFTA will be taken into account for purposes of Article 22(3)(a)(ii) and paragraph 7 of the MOU only if the ultimate beneficial owner meets three conditions, one of which is that the owner be a resident of a country with which the other Contracting State has a comprehensive income tax convention. While the United States is a party to NAFTA, the United States does not have a comprehensive income tax convention with itself. Thus, there has been doubt as to whether U.S. residents may be taken into account.

In order to address this concern and provide certainty to taxpayers, the Competent Authorities of United States and the Swiss Confederation have agreed that a U.S. resident will qualify as a resident of a party to NAFTA for purposes of Article 22(3)(b) if the person is a resident of the United States and is also described in Article 22(1), sub-paragraphs (a) or (b), or clause (i) of sub-paragraph (e). Accordingly, an individual who is a resident of the United States (as determined under Article 4); the United States or a political subdivision of the United States; an instrumentality of the United States or political subdivision thereof; and a company incorporated in the United States whose principal class of shares is primarily and regularly traded on a recognized stock exchange within the meaning of paragraph 22(1)(e)(i) will be treated as a resident of a country that is a party to NAFTA for purposes of Article 22(3)(b), and therefore taken into account for purposes of Article 22(3)(a)(ii) and paragraph 7 of the MOU.

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