

TREATY USA - AUSTRALIA

*CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF AUSTRALIA FOR THE AVOIDANCE OF DOUBLE TAXATION
AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME,
SIGNED AT SYDNEY ON AUGUST 6, 1982*

GENERAL EFFECTIVE DATE UNDER ARTICLE 28: 1 DECEMBER 1983

ARTICLE 16 Limitation on Benefits

PROTOCOL

AMENDING THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

EFFECTIVE DATE FOR WITHHOLDING TAX ON DIVIDENDS AND INTEREST: 1 SEPTEMBER 2003

ARTICLE 10

Article 16 of the Convention is omitted and the following Article is substituted:

“ARTICLE 16 Limitation on Benefits

- (1) Except as otherwise provided in this Article, a resident of one of the Contracting States that derives income from the other Contracting State shall not be entitled to the benefits of this Convention otherwise accorded to residents of one of the Contracting States unless such resident is a "qualified person" as defined in paragraph (2).
- (2) A resident of one of the Contracting States shall be a qualified person for a taxable year if the resident is:
 - (a) an individual;
 - (b) that State, any political subdivision or local authority thereof or any agency or instrumentality of such State;
 - (c) a company, if:

- (i) the principal class of its shares is listed on a recognized stock exchange specified in sub-paragraph (a) or (b) of paragraph (6) of this Article and is regularly traded on one or more recognized stock exchanges; or
 - (ii) at least 50 percent of the aggregate vote and value of the shares in the company is owned directly or indirectly by five or fewer companies entitled to benefits under clause (i) of this sub-paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;
- (d) a person other than an individual or a company, if:
- (i) the principal class of units in that person is listed or admitted to dealings on a recognized stock exchange specified in sub-paragraph (a) or (b) of paragraph (6) of this Article and is regularly traded on one or more of the recognized stock exchanges; or
 - (ii) the direct or indirect owners of at least 50 percent of the beneficial interests in that person are qualified persons by reason of clause (i) of subparagraph (c) or clause (i) of this sub-paragraph;
- (e) an entity organized under the laws of one of the Contracting States and established and maintained in that State exclusively for a religious, charitable, educational, scientific, or other similar purpose, even if the entity is generally exempt from tax in that State;
- (f) an entity organized under the laws of one of the Contracting States and established and maintained in that State to provide, pursuant to a plan, pensions or other similar benefits to employed and self-employed persons, even if the entity is generally exempt from tax in that State, provided that more than 50 percent of the entity's beneficiaries, members or participants are individuals resident in either Contracting State;
- (g) a person other than an individual, if:
- (i) on at least half the days of the taxable year persons that are qualified persons by reason of sub-paragraph (a), (b), (c)(i), or (d)(i) of this paragraph own, directly or indirectly, at least 50 percent of the aggregate vote and value of the shares or other beneficial interests in the person; and
 - (ii) less than 50 percent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a resident of one of the Contracting States such payment is attributable to a permanent establishment of that bank located in one of the Contracting States); or
- (h) a recognized headquarters company for a multinational corporate group. For purposes of this paragraph, a person shall be considered a recognized headquarters company if:

- (i) it provides in its State of residence a substantial portion of the overall supervision and administration of a group of companies (which may be part of a larger group of companies), which may include, but cannot be principally, group financing;
- (ii) the group of companies consists of corporations resident in, and engaged in an active business in, at least five countries (or groupings of countries), and the business activities carried on in each of the five countries (or groupings of countries) generate at least 10 percent of the gross income of the group;
- (iii) the business activities carried on in any one country other than the Contracting State of residence of the headquarters company generate less than 50 percent of the gross income of the group;
- (iv) no more than 25 percent of its gross income is derived from the other Contracting State;
- (v) it has, and exercises, independent discretionary authority to carry out the functions referred to in sub-paragraph (i);
- (vi) it is subject to generally applicable rules of taxation in its country of residence; and
- (vii) the income derived in the other Contracting State either is derived in connection with, or is incidental to, the active business referred to in subparagraph (ii). If the income requirements for being considered a recognized headquarters company (sub-paragraphs (ii), (iii), or (iv)) are not fulfilled, they will be deemed to be fulfilled if the required percentages are met when averaging the gross income of the preceding four years.

(3)

- (a) A resident of one of the Contracting States will be entitled to the benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or a registered, licensed or authorized securities dealer), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business.
- (b) If the resident or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, subparagraph (a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned State is substantial in relation to the trade or business activity in the other State. Whether a trade or business activity is substantial for purposes of this paragraph will be determined based on all the facts and circumstances.
- (c) In determining whether a person is "engaged in the active conduct of a trade or business" in a Contracting State under subparagraph (a) of this paragraph, 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.

- (4) Notwithstanding the preceding provisions of this Article, if a company that is a resident of one of the Contracting States, or a company that owns at least 50 percent of the aggregate vote or value of such a company, has outstanding a class of shares:
 - (a) which is subject to terms or other arrangements which entitle its holders to a portion of the income of the company derived from the other Contracting State that is larger than the portion such holders would receive absent such terms or arrangements (“the disproportionate part of the income”); and
 - (b) 50 percent or more of the voting power and value of which is owned by persons who are not qualified persons, the benefits of this Convention shall not apply to the disproportionate part of the income.
- (5) A resident of one of the Contracting States that is not a qualified person pursuant to the provisions of paragraph (2) of this Article shall, nevertheless, be granted benefits of the Convention if the competent authority of the other Contracting State determines, in accordance with the law of that other State, that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under the Convention.
- (6) For purposes of this Article the term "recognized stock exchange" means:
 - (a) the NASDAQ System owned by the National Association of Securities Dealers, Inc., and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
 - (b) the Australian Stock Exchange and any other Australian stock exchange recognized as such under Australian law; and
 - (c) any other stock exchange agreed upon by the competent authorities.
- (7) Nothing in this Article shall be construed as restricting, in any manner, the right of a Contracting State to apply any anti-avoidance provisions of its taxation law.”.