



Double Taxation Relief (United States of America) Amendment Order 2009

Anand Satyanand, Governor-General

Order in Council

At Wellington this 23rd day of November 2009

Present:

His Excellency the Governor-General in Council

Pursuant to section BH 1 of the Income Tax Act 2007, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following order.

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Order

1 Title

This order is the Double Taxation Relief (United States of America) Amendment Order 2009.

2 Commencement

This order comes into force on the 28th day after the date of its notification in the *Gazette*.

3 Principal order amended

This order amends the Double Taxation Relief (United States of America) Order 1983.

4 Giving effect to Convention

(1) Clause 2 is amended by—

- (a) omitting “the Schedule to this order” and substituting “Schedule 1”; and
- (b) omitting “and notwithstanding anything in that Act or any other enactment,”.

(2) Clause 2 is amended by adding the following subclauses as subclauses (2) and (3):

“(2) The Protocol set out in Schedule 2, which amends the Convention, comes into force on the date referred to in Article XVI of that Protocol.

“(3) The Convention has effect in accordance with section BH 1(4) of the Income Tax Act 2007.”

5 New Schedule 2 added

The Schedule 2 set out in the Schedule of this order is added.

Schedule 2—*continued*Article X—*continued*

6. Paragraph 3 of Article 19 (Government Service) shall be amended by deleting the words “14 (Independent Personal Services),”.

Article XI

Article 16 (Limitation on Benefits) of the Convention shall be deleted and replaced by the following:

“Article 16

Limitation on benefits

1. Except as otherwise provided in this Article, a resident of a Contracting State shall not be entitled to the benefits of this Convention otherwise accorded to residents of a Contracting State unless such resident is a ‘qualified person’ as defined in paragraph 2.
2. A resident of a Contracting State shall be a qualified person for a taxable year if the resident is:
 - (a) an individual;
 - (b) a Contracting State, or a political subdivision or local authority thereof;
 - (c) a company, if:
 - (i) its principal class of shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges; and either:
 - (A) its principal class of shares is primarily traded on one or more recognized stock exchanges located in the Contracting State of which the company is a resident; or
 - (B) the company’s primary place of management and control is in the Contracting State of which it is a resident; or
 - (ii) at least 50 percent of the aggregate vote and value of the shares (and at least 50 percent of any disproportionate class of shares) in the company is owned directly or indirectly by five or fewer com-

Schedule 2—*continued*Article XI—*continued*

panies entitled to benefits under clause (i) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

- (d) a person described in paragraphs 1(a) or 1(b) of Article 4 (Residence) of this Convention, provided that, in the case of a person described in subclause (A) of clause (i) of paragraph 1(1) of Article 3 (General Definitions), more than 50 percent of the person's beneficiaries, members or participants are individuals resident in either Contracting State; or
- (e) a person other than an individual, if:
 - (i) on at least half the days of the taxable year, persons who are residents of that Contracting State and that are entitled to the benefits of this Convention under subparagraph (a), subparagraph (b), clause (i) of subparagraph (c), or subparagraph (d) of this paragraph own, directly or indirectly, shares or other beneficial interests representing at least 50 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the person, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State, and
 - (ii) less than 50 percent of the person's gross income for the taxable year, as determined in the person's State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph (a), subparagraph (b), clause (i) of subparagraph (c), or subparagraph (d) of this paragraph 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

Schedule 2—*continued*Article XI—*continued*

payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank that is not related to the payor).

3. (a) A resident of a Contracting State will be entitled to 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 registered 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 a resident of a Contracting State derives an item of income from a trade or business activity conducted by that resident in the other Contracting State, or derives an item of income arising in the other Contracting State from a related person, the conditions described in subparagraph (a) shall be considered to be satisfied with respect to such item only if the trade or business activity carried on by the resident in the first-mentioned Contracting State is substantial in relation to the trade or business activity carried on by the resident or such person in the other Contracting State. Whether a trade or business activity is substantial for the purposes of this paragraph will be determined based on all the facts and circumstances.

Schedule 2—*continued*Article XI—*continued*

- (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 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. If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 nor entitled to benefits with respect to an item of income under paragraph 3 of this Article the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, if it determines 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 this Convention.

Schedule 2—*continued*Article XI—*continued*

5. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the combined tax that is actually paid with respect to such income in the first-mentioned Contracting State and in the third jurisdiction is less than 60 percent of the tax that would have been payable in the first-mentioned State if the income was earned in that Contracting State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax in the other Contracting State at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which the provisions of this paragraph apply shall be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention. The provisions of this paragraph shall not apply if:
 - (a) in the case of royalties, the royalties are received as compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; or
 - (b) in the case of any other income, the income derived from the other Contracting State is derived in connection with, or is incidental to, the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking or securities activities carried on by a bank or registered securities dealer).
6. For purposes of this Article:

Schedule 2—*continued*Article XI—*continued*

- (a) the term ‘recognized stock exchange’ means:
 - (i) 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;
 - (ii) the New Zealand Stock Market; and
 - (iii) any other stock exchange agreed upon by the competent authorities;
- (b) the term ‘principal class of shares’ means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the ‘principal class of shares’ are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;
- (c) the term ‘disproportionate class of shares’ means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments or otherwise, in the earnings generated in the other State by particular assets or activities of the company; and
- (d) a company’s ‘primary place of management and control’ will be in the Contracting State of which it is a resident only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) in that State than in any other state and the staff of such persons conduct more of the day-to-day activities necessary for preparing and making those decisions in that State than in any other state.”