

**NEW ARTICLE 22 (LIMITATION ON BENEFITS):**

**Article 22**

**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 of this Article at the time when the benefit would be accorded.

2. A resident of a Contracting State shall be a qualified person at a time when a benefit otherwise would be accorded by this Convention if, at that time, the resident is:

- a) an individual;
- b) a Contracting State, or a political subdivision or local authority thereof;
- c) a company, if:
  - i) the principal class of its 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;
- d) a company if:
  - i) at least 50 percent of the aggregate vote and value of the shares (and at least 50 percent of the aggregate vote and value of any disproportionate class of shares) in the company is owned directly or indirectly by five or fewer companies entitled to benefits under subparagraph (c) of this paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State; and
  - ii) with respect to benefits under this Convention other than under Article 10 (Dividends), less than 50 percent of the company's gross income, and less than 50 percent of the tested group's gross income, is paid or accrued, directly or indirectly, in the form of payments that are deductible for purposes of the taxes covered by this Convention in the company's Contracting State of residence (but not including arm's length payments in the ordinary course of business for

services or tangible property<sup>1</sup>), either to persons that are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph (a), (b), (c) or (e) of this paragraph or to persons that meet this requirement but that benefit from a special tax regime in their Contracting State of residence with respect to the deductible payment;

e) a person described in paragraph 2 of Article 4 (Residence) of this Convention, provided that, in the case of a person described in subclause (A) of clause (ii) of subparagraph (k) of paragraph 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

f) a person other than an individual, if:

i) on at least half the days of the taxable period that includes the time when the benefit would be accorded, persons that are residents of that Contracting State entitled to the benefits of this Convention under subparagraph (a), (b), (c), or (e) 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 the aggregate vote and value 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, and less than 50 percent of the tested group's gross income, is paid or accrued, directly or indirectly, in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's Contracting State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property), either to persons that are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph (a), (b), (c), or (e) of this paragraph or to persons that meet this requirement but that benefit from a special tax regime in their Contracting State of residence with respect to the deductible payment.

3. a) A resident of a Contracting State shall be entitled to benefits under this Convention with respect to an item of income derived from the other Contracting 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 Contracting 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 respectively), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business.

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<sup>1</sup> The Treasury Department invites comments regarding the appropriateness of including an exception for payments in respect of financial obligations to a bank that is not related to the payor for purposes of the base erosion tests in this subparagraph and subparagraphs (2)(f)(ii)(A) and (4)(b)(i).

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) of this paragraph shall be considered to be satisfied with respect to such item only if the trade or business actively conducted 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 related person in the other Contracting State. Whether this requirement is met shall be determined based on all the facts and circumstances.

c) For purposes of applying this paragraph, activities conducted by persons connected to a resident of a Contracting State shall be deemed to be conducted by such resident; however, a resident seeking to qualify for benefits under this paragraph will be deemed to conduct activities conducted by a connected person only to the extent both persons are engaged in the same or complementary lines of business.<sup>2</sup> 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. A company that is a resident of a Contracting State shall be entitled to a benefit under this Convention, regardless of whether the resident is a qualified person if, at the time when the benefit would be accorded:

a) at least 95 per cent of the aggregate voting power and value of its shares (and at least 50 percent of any disproportionate class of shares) is owned, directly or indirectly, by seven or fewer persons that are equivalent beneficiaries, provided that in the case of indirect ownership, each intermediate owner is a qualifying intermediate owner, and

b) less than 50 percent of the company's gross income, and less than 50 percent of the tested group's gross income, is paid or accrued, directly or indirectly, in the form of payments (but not including arm's length payments in the ordinary course of business for services or tangible property) that are deductible for purposes of the taxes covered by this Convention in the company's Contracting State of residence, either to persons that are not equivalent beneficiaries or to persons that are equivalent beneficiaries but that benefit from a special tax regime in their state of residence with respect to the deductible payment.

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<sup>2</sup> The 2006 U.S. Model did not include this restriction on attribution. Under this draft of the new U.S. Model, the "derivative benefits" test set forth in paragraph 4 of this Article sets forth the appropriate standard for determining whether a holding company or financing entity qualifies for benefits.

5. If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 of this Article, nor entitled to benefits under paragraph 3 or 4 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 such resident demonstrates a substantial nontax nexus to its State of residence and that neither its establishment, acquisition or maintenance, nor the conduct of its operations had as one of its principal purposes the obtaining of benefits under this Convention.

6. For purposes of this Article:

- a) the term “recognized stock exchange” means:
  - i) 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 \_\_\_\_\_ Stock Exchange \_\_\_\_\_; and
  - iii) any other stock exchange agreed upon by the competent authorities of the Contracting States;
- 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 Contracting State;
- d) a company's “primary place of management and control” is 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 Contracting 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 Contracting State than in any other state;
- e) the term “equivalent beneficiary” means:
  - i) a resident of any state, provided that:
    - A) the resident would be entitled to all the benefits of a

comprehensive convention for the avoidance of double taxation between that state and the Contracting State from which the benefits of this Convention are claimed, under provisions analogous to subparagraph (a), (b), (c) or (e) of paragraph 2 of this Article, provided that if such convention does not contain a comprehensive limitation on benefits article, the resident would be entitled to the benefits of this Convention by reason of subparagraph (a), (b), (c) or (e) of paragraph 2 of this Article if such resident were a resident of one of the Contracting States under Article 4 of this Convention, and with respect to an individual, such individual is not liable to tax in his state of residence with respect to foreign source income or gains only on a remittance basis;

B) 1) with respect to income referred to in Article 10 (Dividends), 11 (Interest) or 12 (Royalties) of this Convention, the resident would be entitled under such convention to a rate of tax with respect to the particular category of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention if such resident had received such income directly. For purposes of this clause, any reduced rates of tax that are available by virtue of a state's membership in an economic bloc shall be taken into account; or

2) with respect to an item of income, profit or gain referred to in Article 7 (Business Profits), 13 (Gains) or 21 (Other Income) of this Convention, the resident would be entitled to benefits under such convention that are at least as favorable as the benefits that are being claimed under this Convention, if such resident had received such income, profit or gain directly; or

ii) a resident of the same Contracting State as the company claiming benefits under paragraph 4 of this Article that is entitled to the benefits of this Convention by reason of subparagraph (a), (b), (c) or (e) of paragraph 2 of this Article;

f) the term "qualifying intermediate owner" means an intermediate owner that is a resident of a state that has in effect with the Contracting State from which a benefit under this Convention is being claimed a comprehensive convention for the avoidance of double taxation that includes provisions addressing special tax regimes analogous to the provisions included in this Convention, provided that:

i) with respect to income referred to in Article 10, 11 or 12 of this Convention, such convention provides a rate of tax with respect to the particular category of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention. For purposes of this clause, any reduced rates of tax that are available by virtue of a state's membership in an economic bloc shall be taken into account; or

- ii) with respect to an item of income, profit or gain referred to in Article 7, 13 or 21 of this Convention, such convention provides benefits that are at least as favorable as the benefits that are being claimed under this Convention;
- g)
  - i) the term “tested group” means the resident of a Contracting State that is applying the test under subparagraph (d) or (f) of paragraph 2 or paragraph 4 of this Article to determine whether it is eligible for benefits under the Convention (the “tested resident”), and any intermediate owner of the tested resident that is both:
    - A) a resident of the same Contracting State as the tested resident, and
    - B) a member with the tested resident of a tax consolidation regime or similar group regime that allows members of the group to share profits or losses;
  - ii) there is no “tested group” if the tested resident has no intermediate owner; and
- h) the term “gross income” means gross income as determined in the person’s Contracting State of residence for the taxable period that includes the time when the benefit would be accorded, provided that:
  - i) except when relevant for determining benefits under Article 10 of this Convention, gross income shall not include any dividends that are effectively exempt from tax in the person’s Contracting State of residence, whether through deductions or otherwise; and
  - ii) a tested group’s gross income shall not include any income received or accrued from any persons within the same tested group.

**AT THIS TIME THE TREASURY DEPARTMENT DOES NOT ANTICIPATE  
RELEASING AN ADVANCE DRAFT TECHNICAL EXPLANATION OF REVISED  
ARTICLE 22, SINCE THE RULES ARE OBJECTIVE AND MECHANICAL IN  
NATURE AND THUS ARE SELF-EXPLANATORY.**