

Protocol

Amending the agreement between the Swiss confederation and the republic of India for the avoidance of double taxation with respect to taxes on income with protocol, signed at New Delhi on 2 November 1994, as amended by the supplementary protocol signed at New Delhi on 16 February 2000

*The Swiss Federal Council
and
the Government of the Republic of India;*

Desiring to conclude a Protocol (hereinafter referred to as “Amending Protocol”) to amend the Agreement between the Contracting Parties for the Avoidance of Double Taxation with respect to Taxes on Income, signed at New Delhi on 2 November 1994, as amended by the supplementary Protocol signed at New Delhi on 16 February 2000 (hereinafter referred to as “the Agreement”);

Have agreed as follows:

Article 1

Subparagraph (i) of paragraph 1 of Article 3 (General Definitions) of the Agreement shall be deleted and replaced by the following subparagraph:

“(i) the term “international traffic” means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;”

Article 2

Paragraph 1 of Article 7 (Business profits) of the Agreement shall be deleted and replaced by the following paragraph:

“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

Article 3

Article 8 (Air transport) of the Agreement shall be deleted and replaced by the following Article:

“Article 8 Shipping and air transport”

1. Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.
2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.”

Article 4

Paragraph 3 subparagraph c) of Article 11 (Interest) of the Agreement shall be deleted and replaced by the following paragraph:

- “c) interest arising in a Contracting State and paid to a resident of the other Contracting State engaged in the operation of ships or aircraft in international traffic shall be taxable only in that other State to the extent that such interest is paid on funds connected with such activity;”

Article 5

Paragraph 3 of Article 13 (Capital gains) of the Agreement shall be deleted and replaced by the following paragraph:

- “3. Gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that State.”

Article 6

Subparagraph c) of paragraph 2 of Article 23 (Elimination of double taxation) of the Agreement shall be deleted.

Article 7

Paragraph 2 of Article 24 (Non-discrimination) of the Agreement shall be deleted and replaced by the following paragraph:

- “2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.”

Article 8

Article 26 (Exchange of information) of the Agreement shall be deleted and replaced by the following Article:

“Article 26 Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by the Agreement insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order

to obtain such information, the tax authorities of the requested Contracting State shall, therefore, have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

Article 9

A new paragraph 1 of the Protocol to the Agreement shall be added and the remaining paragraphs shall be renumbered accordingly and shall read as follows:

“1. With reference to Article 4

It is understood that paragraph 1 of Article 4, the term “resident of a Contracting State” includes a recognized pension fund or pension scheme in that Contracting State. It is further understood that a recognized pension fund or pension scheme of a Contracting State shall be regarded as any pension fund or pension scheme recognized and controlled according to statutory provisions of that State, which is generally exempt from income taxation in that State and which is operated principally to administer or provide pension or retirement benefits.”

Article 10

The first subparagraph of paragraph 2 of the Protocol (With reference to Article 7) shall be deleted.

Article 11

Paragraph 4 of the Protocol to the Agreement shall be deleted and replaced by the following paragraph:

“5. With reference to Articles 10, 11, 12 and 22

The provisions of Articles 10, 11, 12 and 22 shall not apply in respect to any dividend, interest, royalty, fees for technical services or other income paid under, or as part of a conduit arrangement. The term “conduit arrangement” means a transaction or series of transactions which is structured in such a way that a resident of a Contracting State entitled to the benefits of the Agreement receives an item of income arising in the other Contracting State but that resident pays, directly or indirectly, all or substantially all of that income (at any time or in any form) to another person who is not a resident of either Contracting State and who, if it received that item of income directly from the other Contracting State, would not be entitled under a Convention or Agreement for the avoidance of double taxation between the State in which that other person is resident and the Contracting State in which the income arises, or otherwise, to benefits with respect to that item of income which are equivalent to, or more favorable than, those available under this Agreement to a resident of a Contracting State; and the main purpose of such structuring is obtaining benefits under this Agreement.

In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD signed after the signature of this Amending Protocol, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in this Agreement on the said items of income, the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force.

If after the date of signature this Amending Protocol, India under any Convention, Agreement or Protocol with a third State which is a member of the OECD, restricts the scope in respect of royalties or fees for technical services than the scope for these items of income provided for in Article 12 of this Agreement, then Switzerland and India shall enter into negotiations without undue delay in order to provide the same treatment to Switzerland as that provided to the third State.”

Article 12

Paragraph 7 of the Protocol to the Agreement (With reference to paragraph 4 of Article 24) shall be deleted and replaced by the following paragraph:

“8. With reference to paragraph 2 of Article 24

It is understood that the provisions of paragraph 2 of Article 24 shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which a company of the other Contracting State has in the first-mentioned State at a rate of tax which is higher than that imposed on the profits of a similar company of the first-mentioned Contracting State, nor as being in conflict with the provisions of paragraph 3 of Article 7. However the difference in tax rate shall not exceed 10 percentage points.”

Article 13

A new paragraph 10 of the Protocol to the Agreement shall be added as follows:

“10. With reference to Article 26

- a) It is understood that an exchange of information will only be requested once the requesting Contracting State has exhausted all normal procedures under its domestic laws to obtain that information.
- b) It is understood that the competent authority of the requesting State shall provide the following information to the competent authority of the requested State when making a request for information under Article 26 of the Agreement:
 - (i) the name of the person(s) under examination or investigation and, if available, other particulars facilitating that person’s identification

such as address, date of birth, marital status, tax identification number;

- (ii) the period of time for which the information is requested;
 - (iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;
 - (iv) the tax purpose for which the information is sought;
 - (v) the name and, if available, address of any person believed to be in possession of the requested information.
- c) If specifically requested by the competent authority of the requesting Contracting State, the competent authority of the requested Contracting State shall provide information in the form of authenticated copies of documents.
- d) The purpose of referring to information that may be foreseeably relevant is intended to provide for exchange of information in tax matters to the widest possible extent without allowing the Contracting States to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While clause b) of paragraph 10 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subclauses (i) through (v) nevertheless need to be interpreted in order not to frustrate effective exchange of information.
- e) It is further understood that Article 26 of the Agreement shall not commit the Contracting States to exchange information on an automatic or a spontaneous basis.
- f) It is understood that in case of an exchange of information, the administrative procedural rules regarding taxpayers’ rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State. It is further understood that this provision aims at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process.”

Article 14

1. The Governments of the Contracting States shall notify each other through diplomatic channels that all legal requirements and procedures for giving effect to this Amending Protocol have been satisfied.

2. The Amending Protocol, which shall form an integral part of the Agreement, shall enter into force on the date of the later of the notifications referred to in paragraph 1 and its provisions shall have effect :

- a) in India,
in respect of income arising in any fiscal year beginning on or after the first day of April next following the calendar year in which the Amending Protocol entered into force ; and

b) in Switzerland,

in respect of income arising in any fiscal year beginning on or after the first day of January next following the calendar year in which the Amending Protocol entered into force.

3. Notwithstanding paragraph 2 of this Article, with respect to Article 26 of the Agreement, the exchange of information provided for in this Amending Protocol will be applicable for information that relates to any fiscal year beginning on or after the first day of January of the year next following the date of signature of this Amending Protocol.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Amending Protocol.

Done in duplicate at New Delhi this 30th day of August 2010 in the German, Hindi and English languages, all texts being equally authentic. In the case of any divergence, the English text shall prevail.

For the Swiss Federal Council:

For the Government of the Republic
of India:

Micheline Calmy-Rey
Federal Councillor
Head of the Swiss Federal Department
of Foreign Affairs

Shri Pranab Mukherjee
Finance Minister