

## PROTOCOL

### TO AMEND THE CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT OF UKRAINE FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL

The Government of the Republic of Austria and the Government of Ukraine (hereinafter referred to as “the Contracting States”),

Desiring to conclude a Protocol to amend the Convention between the Government of the Republic of Austria and the Government of Ukraine for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, signed at Kiev on 16 October 1997 (hereinafter referred to as "the Convention"), have agreed as follows:

#### ARTICLE 1

The Preamble of the Convention shall be replaced by:

“The Government of the Republic of Austria and the Government of Ukraine,

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

Intending to eliminate double taxation with respect to taxes covered by this Convention without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States),

Have agreed as follows:”

#### ARTICLE 2

Clause (ii) of subparagraph (a) of paragraph 3 of Article 2 (Taxes covered) of the Convention shall be replaced by the following:

“(ii) the personal income tax”.

#### ARTICLE 3

Paragraph 1 of Article 4 (Resident) of the Convention shall be replaced by the following:

“1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of registration or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

#### **ARTICLE 4**

Paragraph 2 of Article 10 (Dividends) of the Convention shall be replaced by the following:

“2. However, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;

(b) 15 per cent of the gross amount of the dividends in all other cases.”

#### **ARTICLE 5**

1. Paragraph 2 of Article 11 (Interest) of the Convention shall be replaced by the following:

“2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.”

2. Paragraph 7 of Article 11 (Interest) of the Convention shall be replaced by the following:

“7. Notwithstanding the provisions of paragraph 2, interest referred to in paragraph 1 shall be taxable only in the Contracting State of which the recipient is a resident if the beneficial owner of the interest is a resident of that State, and:

(a) is that State, a political subdivision or local authority thereof or the central bank;

(b) if the interest is paid by the State in which the interest arises or by a political subdivision or a local authority thereof;

(c) if the interest is paid in respect of a loan, debt-claim or credit that is owed to, or made, provided, guaranteed or insured by, that State or a political subdivision, local authority or export financing agency thereof.”

3. Paragraph 8 of Article 11 (Interest) of the Convention shall be deleted.

## ARTICLE 6

1. Paragraphs 1, 2 and 3 of Article 12 (Royalties) of the Convention shall be replaced by the following Paragraphs:

“1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However royalties arising in a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the payments referred to in paragraph 4, subparagraph a) of this Article.

3. Notwithstanding paragraph 2 of this Article, royalties arising in a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent of the gross amount of the payments referred to in paragraph 4, subparagraph b) of this Article.”

## ARTICLE 7

The following Article shall be inserted after Article 23 (Elimination of Double Taxation) of the Convention:

### “Article 23A

#### Entitlement to benefits

1. Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

2. Where a benefit under this Convention is denied to a person under paragraph 1, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in paragraph 1. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other Contracting State before rejecting a request made under this paragraph by a resident of that other State.”

## ARTICLE 8

1. Article 26 (Exchange of information) of the Convention shall be 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 Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

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, 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.”

2. The following paragraph shall be added to the Protocol signed at Kiev on 16 October 1997 and the existing paragraph of the Protocol (Interpretation of the Convention) shall be numbered as paragraph 1:

“2. With reference to Article 26:

The competent authority of the applicant State shall provide the following information to the competent authority of the requested State when making a request for information under the Convention to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant State wishes to receive the information from the requested State;

(c) the tax purpose for which the information is sought;

(d) grounds for believing that the information requested is held in the requested State or is in the possession or control of a person within the jurisdiction of the requested State;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the applicant State has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.”

## ARTICLE 9

1. Each of the Contracting States shall notify to the other in writing, through diplomatic channels, the completion of the procedures required by its domestic law for the bringing into force of this Protocol.

2. This Protocol shall form an integral part of the Convention and shall enter into force on the thirtieth day after the date of the latter of the notifications referred to in paragraph 1 of this Article. This Protocol shall have effect:

(a) in respect of taxes withheld at source, on amounts paid or credited to non-residents either on or after the first day of January of the year next following the entry into force of this Protocol.

(b) in respect of other taxes for fiscal years beginning on or after the first day of January of the year next following the entry into force of this Protocol.

3. Irrespective of paragraph 2 the provisions of Article 6 of the Protocol shall enter into force one year after the entry into force of the Protocol and shall have effect for fiscal years beginning on or after the first day of January of the year next following the entry into force of Article 6 of the Protocol.

In witness whereof the undersigned, duly authorized thereto, have signed this Protocol.

Done in duplicate at ..... this ..... day of ..... in the German, Ukrainian and English languages, all texts being equally authentic. In case there is any divergence of interpretation of this Protocol the English text shall prevail.

For the Government of the Republic of Austria:

For the Government of Ukraine: