



Treaty Series No. 10 (2017)

Exchange of Notes

to amend the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, signed at London on 8 September 1978, as amended by the Protocol signed at Ottawa on 15 April 1980, by the Protocol signed at London on 16 October 1985, by the Protocol signed at London on 7 May 2003 and by the Protocol signed at London on 21 July 2014

London, 27 July 2015 and 11 August 2015

[The Exchange of Notes entered into force on 21 December 2016]

*Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
February 2017*



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EXCHANGE OF NOTES TO AMEND THE CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF CANADA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS, SIGNED AT LONDON ON 8 SEPTEMBER 1978, AS AMENDED BY THE PROTOCOL SIGNED AT OTTAWA ON 15 APRIL 1980, BY THE PROTOCOL SIGNED AT LONDON ON 16 OCTOBER 1985, BY THE PROTOCOL SIGNED AT LONDON ON 7 MAY 2003 AND BY THE PROTOCOL SIGNED AT LONDON ON 21 JULY 2014

No. 1

High Commissioner for Canada, to the Financial Secretary to the Treasury

27 July 2015

I have the honour to refer to the Convention between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, signed at London on 8 September 1978, as amended by the protocol signed at Ottawa on 15 April 1980, by the protocol signed at London on 16 October 1985, by the protocol signed at London on 7 May 2003 and by the protocol signed at London on 21 July 2014, and to propose on behalf of the Government of Canada the following:

In respect of any case where the competent authorities have endeavored but are unable to reach a complete agreement under Article 23 (Mutual Agreement Procedure) of the Convention any unresolved issues arising from the case shall be submitted to arbitration, in accordance with paragraphs 6 and 7 of Article 23 (Mutual Agreement Procedure) of the Convention unless the competent authorities agree that the particular case is not suitable for determination by arbitration. If an arbitration proceeding under paragraph 6 of Article 23 (Mutual Agreement Procedure) commences, the following shall apply:

- (1) The arbitration proceeding shall be conducted in the manner prescribed by, and subject to the requirements of, paragraphs 6 and 7 of Article 23 (Mutual Agreement Procedure) of the Convention and the rules and procedures of this Note.
- (2) The competent authorities of the Contracting States shall agree in writing, before the date that the first arbitration proceeding begins, on procedures, including arbitration board operating guidelines, that are consistent with paragraphs 6 and 7 of Article 23 (Mutual Agreement Procedure) of the Convention and the rules and procedure set out in this Note.

(3) In this Note, the term “concerned person” means the presenter of a case to a competent authority for consideration under paragraph 1 of Article 23 (Mutual Agreement Procedure) of the Convention as well as any person whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration.

(4) The “commencement date” for a case is the date on which the information necessary to undertake substantive consideration for a mutual agreement is received by the competent authorities of both Contracting States.

(5) The competent authority of each Contracting State shall confirm in writing to the other competent authority and to the presenter of the case the date on which all of the information necessary to undertake substantive consideration for a mutual agreement is received. However, this information will not be considered received until both competent authorities receive all materials submitted to the competent authority of either Contracting State by the concerned person(s) in connection with the mutual agreement procedure.

(6) Notwithstanding paragraph 6 of Article 23 (Mutual Agreement Procedure) of the Convention a case may not be submitted to arbitration if:

- (a) any tax return of any concerned person is not duly filed with at least one of the Contracting States with respect to a taxation year at issue in the case;
- (b) a concerned person does not consent to the requirement in paragraph (8);
- (c) the case has been appealed in a Contracting State and the appeal is not held in abeyance pending a resolution under Article 23 (Mutual Agreement Procedure) of the Convention; or
- (d) the case involves primarily the application of domestic anti-abuse provisions.

(7) Arbitration proceedings in a case begin on the later of:

- (a) three years after the commencement date of that case, or other date as agreed by the competent authorities of both Contracting States in accordance with paragraph 6 of Article 23 (Mutual Agreement Procedure) of the Convention; and
- (b) the date upon which the statement required by paragraph (8) has been received by the competent authorities of both Contracting States.

(8) Each concerned person and their authorized representatives or agents must consent, within 60 days of the date mentioned in paragraph (7)(a) of this Note, not to disclose to any other person (except to other concerned persons) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of the arbitration board and must sign a written non-disclosure statement. A concerned person that has the legal authority to bind any other concerned person(s) on this matter may do so in a comprehensive written statement.

(9) For the purposes of an arbitration proceeding under paragraph 6 of Article 23 (Mutual Agreement Procedure) of the Convention the members of the arbitration board and their staff are considered “persons or authorities” to whom information may be disclosed under Article 24 (Exchange of Information) of the Convention.

(10) If at any time before the arbitration board delivers a determination to the competent authorities of the Contracting States;

- (a) the competent authorities of the Contracting States reach a mutual agreement to resolve the case pursuant to Article 23 (Mutual Agreement Procedure) of the Convention;
- (b) the presenter of the case withdraws the application for the competent authorities to engage in the mutual agreement procedure under Article 23 (Mutual Agreement Procedure) of the Convention;
- (c) a decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting States during the arbitration proceeding; or
- (d) any concerned person or their authorized representatives or agents wilfully violates the written non-disclosure statement required by paragraph (8) of this Note, and the competent authorities of both Contracting States agree that the violation should result in the termination of the arbitration proceeding;

the mutual agreement procedure, including the arbitration proceeding, with respect to the case is terminated. In addition, in the situation described in subparagraph (b), the case will not be eligible for any further consideration by the competent authorities under Article 23 (Mutual Agreement Procedure) of the Convention.

(11) Regarding the selection of the members of the arbitration board:

- (a) the competent authority of each Contracting State has 60 days from the date on which the arbitration proceeding begins in accordance with paragraph (7) of this Note to send a written communication to the competent authority of the other Contracting State appointing one member of the arbitration board;
- (b) if the competent authority of a Contracting State fails to appoint a member within the time period prescribed by this paragraph, the competent authority of the other Contracting State shall select a second member of the arbitration board;
- (c) within 60 days from the date on which the communication appointing the second member of the arbitration board is sent, the two members appointed by the competent authorities of the Contracting States shall appoint a third member, who will serve as chair of the board;

- (d) if the members appointed by the Contracting States fail to agree upon the third member in the manner prescribed by this paragraph, the competent authority of a Contracting State shall ask the highest ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development (OECD) who is not a citizen of either Contracting State, to appoint the remaining member(s) who is not a citizen of either Contracting State by written notice to the competent authorities of both Contracting States within 60 days from the date of that failure;
- (e) the competent authorities shall develop a list of individuals who are familiar with international tax matters who may serve as the chair of the board;
- (f) the members appointed will not have any prior involvement with the specific matters at issue in the arbitration proceeding for which they are being considered as members of the arbitration board.

(12) All communications between the Contracting States and the arbitration board shall be in writing between the designated competent authorities and the chair of the arbitration board (except for logistical matters) and, in particular:

- (a) the competent authority of each Contracting State may submit for consideration by the arbitration board, within 60 days from the appointment of the chair of the arbitration board, a proposed resolution describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case and, if applicable, the relevant threshold question as described in paragraph (13) of this Note, and a supporting position paper;
- (b) the proposed resolution and supporting position paper submitted to the arbitration board by the competent authority of a Contracting State shall be provided to the competent authority of the other Contracting State according to the procedure established by the competent authorities of the Contracting States;
- (c) in the event that only one of the Contracting States submits a proposed resolution within the allotted time, then that proposed resolution is deemed to be the determination of the board in that case and the arbitration proceeding is complete;
- (d) the competent authority of each Contracting State may submit a reply submission to the board within 60 days from the date the last proposed resolution referred to in subparagraph (a) was submitted to the arbitration board, to address any points raised by the proposed resolution or position paper submitted by the competent authority of the other Contracting State.

(13) In the case of an arbitration proceeding concerning the taxation of the business profits of an enterprise with respect to which the competent authorities of the Contracting States have been made unable to reach an agreement on whether a permanent establishment exists; the proposed resolutions separately address the question of whether a permanent establishment exists, and the amount of profit attributable to that permanent establishment.

(14) The arbitration board shall adopt as its determination one of the proposed resolutions submitted by the competent authorities of the Contracting States for each adjustment or similar issue and any threshold questions, and such determination will not include a rationale or any other explanation of the determination. If the determination is in respect of a case described in paragraph (13), the arbitration board first determines whether a permanent establishment exists, and, if it does, then shall adopt one of the proposed resolutions with respect to the profit attributable to the permanent establishment.

(15) In making its determination, the arbitration board shall apply, as necessary: (1) the provisions of the Convention, as amended; (2) the applicable law of the Contracting States; and (3) any OECD Commentary, Guidelines or Reports regarding relevant analogous provisions of the OECD Model Tax Convention.

(16) The arbitration board shall deliver a determination in writing to the competent authorities of the Contracting States within 6 months of the appointment of the chair. The determination of the arbitration board will not have precedential value with respect to the application of the Convention in any other case.

(17) Each concerned person shall, within 45 days of receiving the determination of the board from the competent authority to which the case was first presented, notify, in writing, that competent authority whether that concerned person accepts the determination of the board. If any concerned person fails to so notify the relevant competent authority within this period, the determination of the board is not considered to have been accepted. Where the determination of the board is not accepted, the case may not subsequently be the subject of an arbitration proceeding. Notwithstanding the above, in the event that the case is pending in litigation or appeal, the determination of the arbitration board is deemed not to be accepted by the presenter of the case if any concerned person who is a party to the litigation or appeal does not advise the relevant court or administrative tribunal, within the 45-day period, of its intention to withdraw from consideration all issues resolved in the arbitration proceeding. If, in accordance with this paragraph, the determination of the arbitration board is not accepted, the case shall not be eligible for any further consideration by the competent authorities under Article 23 (Mutual Agreement Procedure) of the Convention.

(18) If the determination of the arbitration board is accepted in accordance with paragraph (17) of this Note, that determination constitutes a resolution by mutual agreement of the case under Article 23 (Mutual Agreement Procedure) of the Convention at the time it is accepted by the concerned person(s) and is binding on both Contracting States. The resolution resulting from the determination of the arbitration board shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

(19) The application of any associated interest or penalties shall be determined by the domestic law of the Contracting State(s) concerned.

(20) Information relating to the arbitration proceeding (including the board's determination) may not be disclosed by the members of the arbitration board or their staff or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, the arbitration proceeding is considered to be information exchanged between the Contracting States pursuant to Article 24 (Exchange of Information) of the Convention and is remitted to the competent authority of the Contracting State where the mutual agreement procedure was initiated in the case once a decision has been rendered. The competent authorities of the Contracting States shall ensure that all members of the arbitration board and their staff sign and send written statements to each Contracting State, prior to their acting in the arbitration proceeding, in which they consent to abide by and be subject to the confidentiality and nondisclosure provisions of Articles 23 (Mutual Agreement Procedure) and 24 (Exchange of Information) of the Convention and the applicable domestic law of the Contracting States (in the event that any of those provisions conflict with the applicable domestic law, the most restrictive condition applies). Such statement shall also include the board members' acceptance to serve on the arbitration board.

(21) The fees and expenses of members of the arbitration board are set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators, as in effect on the date on which the arbitration proceedings begin, and are borne equally by the Contracting States. Any fees for language translation are also borne equally by the Contracting States. Any other costs are borne by the Contracting State that incurs them.

If the above proposal is acceptable to your Government, I further propose that this Note, which is authentic in English and French, and your reply Note reflecting such acceptance shall constitute an agreement between our two Governments which shall enter into force and have effect on the date of the second note by which our two Governments notify each other that they have completed their internal procedure required to bring into force this Note.

The provisions of paragraphs 6 and 7 of Article 23 (Mutual Agreement Procedure) of the Convention shall have effect from the date of entry into force of this Note where those provisions are applied to cases that come under consideration by the competent authority after that date.

For cases that are under consideration at the date of entry into force of this Note, paragraphs 6 and 7 of Article 23 (Mutual Agreement Procedure) of the Convention shall have effect from the date of entry into force of this Note, but for these cases the beginning of the three year period described in paragraph 6 of Article 23 (Mutual Agreement Procedure) of the Convention shall be the later of the date of entry into force of this Note or the date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by the competent authorities of both Contracting States.

Please accept, Excellency, the assurance of my highest consideration.

No. 2

Financial Secretary to the Treasury, to the High Commissioner for Canada.

11 August 2015

I have the honour to acknowledge receipt of your Note 1014/15 dated 27 July 2015 which states in its entirety as follows:

[As in No.1]

I am pleased to inform you that the Government of the United Kingdom of Great Britain and Northern Ireland accepts the proposal set forth in your Note. The Government of the United Kingdom of Great Britain and Northern Ireland further agrees that your Note, which is authentic in English and in French, together with this reply, shall constitute an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada, which shall enter into force and have effect on the date of the second note by which our two Governments notify each other that they have completed their internal procedure required to bring into force this Note.

Accept, Excellency, the renewed assurances of my highest consideration.

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