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INCOME TAX ACT 1947

INCOME TAX (SINGAPORE — SPAIN)
(AVOIDANCE OF DOUBLE TAXATION AGREEMENT)
(MODIFICATIONS TO IMPLEMENT MULTILATERAL
INSTRUMENT) ORDER 2022

ARRANGEMENT OF PARAGRAPHS

Paragraph

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In exercise of the powers conferred by section 49(7) of the Income Tax Act 1947, the Minister for Finance makes the following Order:

Citation and commencement

1. This Order is the Income Tax (Singapore — Spain) (Avoidance of Double Taxation Agreement) (Modifications to Implement Multilateral Instrument) Order 2022 and comes into operation on 1 July 2022.

Purpose

2.—(1) This Order amends the arrangements made between the Republic of Singapore and the Kingdom of Spain as specified in the Schedule to the Income Tax (Singapore — Spain) (Avoidance of Double Taxation Agreement) Order 2011 (G.N. No. S 603/2011) (called in this Order the Agreement).

(2) The purpose of this Order is to amend the Agreement to give effect to Singapore's obligations under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and

Profit Shifting done at Paris on 24 November 2016 (as amended from time to time).

Amendment of Agreement

3. The provisions of the Agreement are amended in the manner set out in the Schedule.

Entry into effect

4.—(1) Paragraph 2 of the Schedule has effect with respect to any tax paid, deemed paid or liable to be paid, before, on or after 1 July 2022.

(2) All other paragraphs of the Schedule have effect —

(a) with respect to taxes withheld at source — in respect of amounts paid, deemed paid or liable to be paid (whichever is the earliest), on or after 1 January 2023; and

(b) with respect to taxes other than those withheld at source — where the income is derived or received in a basis period beginning on or after 1 January 2023.

THE SCHEDULE

Paragraphs 3 and 4

Replacement of Preamble

1. Replace the Preamble of the Agreement with —

“The Republic of Singapore and the Kingdom of Spain,

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

Intending to eliminate double taxation with respect to the taxes covered by this Agreement 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 Agreement for the indirect benefit of residents of third jurisdictions),

Have agreed as follows:”.

THE SCHEDULE — *continued*

New Articles 23A to 23H

2. After Article 23 (Mutual Agreement Procedure) of the Agreement, insert —

“ARTICLE 23A

MANDATORY BINDING ARBITRATION

1. Where:

- (a) under Article 23 (Mutual Agreement Procedure), a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of the Agreement; and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to Article 23 (Mutual Agreement Procedure) within a period of two years beginning on the start date referred to in paragraph 8 or 9, as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting States have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Article and Articles 23B to 23H, according to any rules or procedures agreed upon by the competent authorities of the Contracting States pursuant to the provisions of paragraph 10.

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in sub-paragraph (b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in sub-paragraph (b) of paragraph 1 will stop running until the suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority

THE SCHEDULE — *continued*

after the start of the period provided in sub-paragraph (b) of paragraph 1, the period provided in sub-paragraph (b) of paragraph 1 shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4. (a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1. The arbitration decision shall be final.

(b) The arbitration decision shall be binding on both Contracting States except in the following cases:

- (i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.
- (ii) if a final decision of the courts of one of the Contracting States holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 23C (Confidentiality of Arbitration Proceedings) and 23G (Costs of Arbitration Proceedings)). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.

THE SCHEDULE — *continued*

- (iii) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.

5. The competent authority that received the initial request for a mutual agreement procedure as described in sub-paragraph (a) of paragraph 1 shall, within two calendar months of receiving the request:

- (a) send a notification to the person who presented the case that it has received the request; and
- (b) send a notification of that request, along with a copy of the request, to the competent authority of the other Contracting State.

6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting State) it shall either:

- (a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or
- (b) request additional information from that person for that purpose.

7. Where pursuant to sub-paragraph (b) of paragraph 6, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

- (a) that it has received the requested information; or
- (b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to sub-paragraph (b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

- (a) the date on which both competent authorities have notified the person who presented the case pursuant to sub-paragraph (a) of paragraph 6; and

THE SCHEDULE — *continued*

- (b) the date that is three calendar months after the notification to the competent authority of the other Contracting State pursuant to sub-paragraph (b) of paragraph 5.

9. Where additional information has been requested pursuant to sub-paragraph (b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

- (a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to sub-paragraph (a) of paragraph 7; and
- (b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in sub-paragraph (b) of paragraph 7, such notification shall be treated as a request for additional information under sub-paragraph (b) of paragraph 6.

10. The competent authorities of the Contracting States shall by mutual agreement (pursuant to Article 23 (Mutual Agreement Procedure)) settle the mode of application of the provisions contained in this Article and Articles 23B to 23H, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. Notwithstanding the preceding paragraphs of this Article:

- (a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by this Agreement shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting State;
- (b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting States, the arbitration process shall terminate.

THE SCHEDULE — *continued*

12. The provisions of this Article and Articles 23B to 23H shall not apply —

- (a) to any case involving the application of Singapore's general anti-avoidance rules contained in section 33 of the Act, case law or juridical doctrines, and any subsequent provisions (as notified by Singapore to the Depository of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting done at Paris on 24 November 2016 (as amended from time to time)) that replace, amend or update these anti-avoidance rules;
- (b) to any case involving the application of any provisions of Singapore's law (including legislative provisions, case law, judicial doctrines and penalties) that are analogous to those governing the cases in sub-paragraph (c) or (d), including any subsequent provisions which replace, amend or update those provisions. The competent authority of Singapore will consult with the competent authority of Spain in order to specify any such analogous provisions which exist under Singapore law pursuant to paragraph 10;
- (c) to any case involving the application of anti-abuse rules in the Agreement as modified by the Convention or domestic law. For this purpose, anti-abuse rules contained in domestic law shall include the cases dealt with in Articles 15 and 16 of the General Tax Law (Law 58 of 17th December 2003). Any subsequent rules replacing, amending or updating these rules would also be comprehended. The Kingdom of Spain shall notify the Depository of any such subsequent rules; or
- (d) to any case involving conduct for which a person directly affected by the case has been subject, by a final ruling resulting from judicial or administrative proceedings, to a penalty for tax fraud, wilful default or gross negligence. For these purposes, penalties for tax fraud, wilful default or gross negligence shall be understood as those regulated under Articles:
 - (i) 305 and 305 a of the Spanish Criminal Code.
 - (ii) 191, 192 and 193 of the General Tax Law (Law 58 of 17 December 2003), provided that a qualification criterion referred to in Article 184 of said General Tax Law applies;

THE SCHEDULE — *continued*

- (iii) 18.13.2° of the Corporate Income Tax Law (Law 27 of 27 November 2014), provided that a qualification criterion referred to in Article 184 of the General Tax Law (Law 58 of 17 December 2003) applies. For these purposes, any reference to “tax return” in said Article 184 of the General Tax Law shall be understood as references made to transfer pricing documentation.

Notwithstanding the provisions of sub-paragraph (iii), penalties applied for incomplete provision of transfer pricing documentation, where the quantification or determination of market value is not seriously hampered, shall not be considered as penalty for tax fraud, wilful default or gross negligence.

Any subsequent provisions replacing, amending or updating these provisions would also be comprehended. The Kingdom of Spain shall notify the Depositary of any such subsequent provisions.

- (e) to transfer pricing cases involving items of income or capital that are not taxed in a Contracting State either because they are not included in the taxable base in that Contracting State or because they are subject to an exemption or zero tax rate provided only under the domestic tax law of that Contracting State that is specific to that item of income or capital.
- (f) to cases eligible for arbitration under the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), as amended, or any subsequent regulation.
- (g) to cases which the competent authorities of both Contracting States agree are not suitable for resolution through arbitration. Such agreement shall be reached before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case.

13. This Article and Articles 23B to 23H —

- (a) shall have effect with respect to cases presented to the competent authority of a Contracting State under Article 23 on or after 1 July 2022; and

THE SCHEDULE — *continued*

- (b) shall apply to a case presented to the competent authority of a Contracting State under Article 23 prior to 1 July 2022 only to the extent that the competent authorities of both Contracting States agree that it will apply to that specific case.

ARTICLE 23B

APPOINTMENT OF ARBITRATORS

1. Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, paragraphs 2 through 4 shall apply for the purposes of Articles 23A to 23H.

2. The following rules shall govern the appointment of the members of an arbitration panel:

- (a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.
- (b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1 of Article 23A (Mandatory Binding Arbitration). The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting State.
- (c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

THE SCHEDULE — *continued*

3. In the event that the competent authority of a Contracting State fails to appoint a member of the arbitration panel in the manner and within the time periods specified in paragraph 2 or agreed to by the competent authorities of the Contracting States, a member shall be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting State.

4. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 2 or agreed to by the competent authorities of the Contracting States, the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting State.

ARTICLE 23C

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

1. Solely for the purposes of the application of Articles 23A to 23H and 24 and of the provisions of the domestic laws of the Contracting States related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under Article 24 (Exchange of Information).

2. The competent authorities of the Contracting States shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in Article 24 (Exchange of Information) and under the applicable laws of the Contracting States.

THE SCHEDULE — *continued*

ARTICLE 23D

RESOLUTION OF A CASE PRIOR TO THE
CONCLUSION OF THE ARBITRATION

For the purposes of Articles 23 and 23A to 23H, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States:

- (a) the competent authorities of the Contracting States reach a mutual agreement to resolve the case; or
- (b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

ARTICLE 23E

TYPE OF ARBITRATION PROCESS

1. Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to Articles 23A to 23H:

- (a) After a case is submitted to arbitration, the competent authority of each Contracting State shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the Contracting States). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to the Agreement, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting States have been unable to reach agreement on an issue regarding the conditions for application of a provision of the Agreement (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

THE SCHEDULE — *continued*

- (b) The competent authority of each Contracting State may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.
- (c) The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the Contracting States. The arbitration decision shall have no precedential value.

2. Prior to the beginning of arbitration proceedings, the competent authorities of the Contracting States shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under Article 23, as well as the arbitration proceeding under Articles 23A to 23H, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting States, a person that presented the case or one of that person's advisors materially breaches that agreement.

THE SCHEDULE — *continued*

ARTICLE 23F

AGREEMENT ON A DIFFERENT RESOLUTION

Notwithstanding paragraph 4 of Article 23A (Mandatory Binding Arbitration), an arbitration decision pursuant to Articles 23A to 23H shall not be binding on the Contracting States and shall not be implemented if the competent authorities of the Contracting States agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered to them.

ARTICLE 23G

COSTS OF ARBITRATION PROCEEDINGS

In an arbitration proceeding under Articles 23A to 23H, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the Contracting States, shall be borne by the Contracting States in a manner to be settled by mutual agreement between the competent authorities of the Contracting States. In the absence of such agreement, each Contracting State shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the Contracting States in equal shares.

ARTICLE 23H

COMPATIBILITY

1. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Article and Articles 23A to 23G shall not be submitted to arbitration if the issue falls within the scope of a case with respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

2. Nothing in this Article and Articles 23A to 23G shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the Contracting States are or will become parties.”

THE SCHEDULE — *continued*

Amendment of Protocol

3. In paragraph 1 of the Protocol, replace sub-paragraph (d) with —

“(d) Notwithstanding any provisions of this Agreement, a benefit under this Agreement 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 Agreement.”.

Made on 14 June 2022.

LAI WEI LIN
*Second Permanent Secretary,
Ministry of Finance,
Singapore.*

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