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INCOME TAX ACT (CHAPTER 134)

INCOME TAX (SINGAPORE — NETHERLANDS) (AVOIDANCE OF DOUBLE TAXATION CONVENTION) (MODIFICATIONS TO IMPLEMENT MULTILATERAL INSTRUMENT) ORDER 2019

ARRANGEMENT OF PARAGRAPHS

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

Citation and commencement

1. This Order is the Income Tax (Singapore — Netherlands) (Avoidance of Double Taxation Convention) (Modifications to Implement Multilateral Instrument) Order 2019 and comes into operation on 1 July 2019.

Purpose

2.—(1) This Order amends the arrangements made between the Government of the Republic of Singapore and the Government of the Kingdom of the Netherlands as specified in the Schedule to the Income Tax (Singapore — Netherlands) (Avoidance of Double Taxation Convention) Order 1971 (O 20) (called in this Order the Convention), as modified —

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- (a) by the Protocol specified in the Schedule to the Income Tax (Singapore — Netherlands) (Avoidance of Double Taxation Convention) (Supplementary) Order 1994 (O 20A); and
 - (b) by the Protocol specified in the Schedule to the Income Tax (Singapore — Netherlands) (Avoidance of Double Taxation Convention) Order 2010 (G.N. No. S 135/2010).

(2) The purpose of this Order is to amend the Convention 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 Convention

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

Entry into effect

4.—(1) Paragraph 3 of the Schedule has effect for a case presented on or after 1 July 2019 without regard to the basis period to which the case relates.

(2) Sub-paragraph (1) does not apply to a case that was not eligible to be presented immediately before 1 July 2019.

(3) Paragraph 4 of the Schedule has effect with respect to any tax paid, deemed paid or liable to be paid, before, on or after 1 July 2019.

(4) 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 2020; 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 2020.

THE SCHEDULE

Paragraph 3

Deletion and replacement of Preamble

1. The Preamble of the Convention is deleted and replaced by the following Preamble:

“The Government of the Republic of Singapore and the Government of the Kingdom of the Netherlands,

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 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 jurisdictions),

Have agreed as follows:”.

Amendment of Article 9

2. Article 9 (Associated Enterprises) of the Convention is amended —

(a) by numbering the existing provision as paragraph 1; and

(b) by inserting, immediately after paragraph 1, the following paragraph:

“2. Where a Contracting State includes in the profits of an enterprise of that Contracting State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other Contracting State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.”.

Amendment of Article 26

3. Article 26 (Mutual Agreement Procedure) of the Convention is amended —

(a) by inserting, immediately after the words “of which he is a resident.” in paragraph 1, the words “The case must be presented within three years

THE SCHEDULE — *continued*

from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.”; and

- (b) by inserting, immediately after the words “not in accordance with this Convention.” in paragraph 2, the words “Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.”.

New Articles 26A to 26G

4. The Convention is amended by inserting, immediately after Article 26 (Mutual Agreement Procedure), the following Articles:

“ARTICLE 26A

MANDATORY BINDING ARBITRATION

1. Where:

- (a) under Article 26 (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 Convention; and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to Article 26 (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 26B to 26G, 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

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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 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 26C (Confidentiality of Arbitration

THE SCHEDULE — *continued*

Proceedings) and 26F (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.

- (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:

THE SCHEDULE — *continued*

- (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
- (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 26 (Mutual Agreement Procedure)) settle the mode of application of the provisions contained in this Article and Articles 26B to 26G, 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 Convention 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;

THE SCHEDULE — *continued*

- (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.

12. The provisions of this Article and Articles 26B to 26G shall not apply to any case involving the application of Singapore's general anti-avoidance rules contained in section 33 of the Act, case law or judicial doctrines, and any subsequent provisions (as notified by Singapore to the Depositary 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.

13. This Article and Articles 26B to 26G —

- (a) shall have effect with respect to cases presented to the competent authority of a Contracting State under Article 26 (Mutual Agreement Procedure) on or after 1 July 2019; and
- (b) shall apply to a case presented to the competent authority of a Contracting State under Article 26 prior to 1 July 2019 only to the extent that the competent authorities of both Contracting States agree that it will apply to that specific case.

ARTICLE 26B

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 26A to 26G.

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.

THE SCHEDULE — *continued*

- (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 26A (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.

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.

THE SCHEDULE — *continued*

ARTICLE 26C

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

1. Solely for the purposes of the application of Articles 26A to 26G and 27 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 27 (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 27 (Exchange of Information) and under the applicable laws of the Contracting States.

ARTICLE 26D

RESOLUTION OF A CASE PRIOR TO THE
CONCLUSION OF THE ARBITRATION

For the purposes of Articles 26 and 26A to 26G, 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.

THE SCHEDULE — *continued*

ARTICLE 26E

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 26A to 26G:

- (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 Convention, 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 Convention (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.
- (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.

THE SCHEDULE — *continued*

- (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 26, as well as the arbitration proceeding under Articles 26A to 26G, 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.

ARTICLE 26F

COSTS OF ARBITRATION PROCEEDINGS

In an arbitration proceeding under Articles 26A to 26G, 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.

THE SCHEDULE — *continued*

ARTICLE 26G

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 26A to 26F 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 26A to 26F 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.”.

New Article 27A

5. The Convention is amended by inserting, immediately after Article 27 (Exchange of Information), the following Article:

“ARTICLE 27A

PREVENTION OF TREATY ABUSE

1. Notwithstanding any 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 provisions of this Convention that deny all or part of the benefits that would otherwise be provided under this Convention where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, 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

THE SCHEDULE — *continued*

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. The competent authority of the Contracting State to which a request has been made under this paragraph by a resident of the other Contracting State shall consult with the competent authority of that other Contracting State before rejecting the request.”.

Made on 24 June 2019.

TAN CHING YEE
*Permanent Secretary,
Ministry of Finance,
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