

108TH CONGRESS
2d Session

SENATE

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108-26

SECOND PROTOCOL AMENDING TAX CONVENTION
WITH BARBADOS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

SECOND PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND BARBADOS FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME SIGNED ON DECEMBER 31, 1984, SIGNED AT WASHINGTON ON JULY 14, 2004; INCLUDING AN EXCHANGE OF NOTES WITH ATTACHED UNDERSTANDINGS



SEPTEMBER 13, 2004.—The Protocol was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *September 13, 2004.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit the Second Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, signed at Washington on July 14, 2004. Also enclosed for the Senate's information is an exchange of notes with attached Understandings, which provide clarification with respect to the application of the Convention, as amended, in specified cases. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Protocol.

The Protocol updates the existing Convention to bring it into close conformity with current U.S. tax treaty policy and to ensure that the Convention cannot be used inappropriately to secure tax reductions in circumstances where there is no risk of double taxation. The Protocol would modernize the Convention's anti-treaty-shopping provision. The Protocol also updates the Convention to take account of a 1996 change in the Internal Revenue Code relating to the tax treatment of certain former long-term residents of the United States. The exchange of notes with attached Understanding provides guidance to taxpayers and each government regarding the intended interpretation of certain provisions of the Convention, as amended.

I recommend that the Senate give early and favorable consideration to this Protocol and give its advice and consent to ratification.

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
August 26, 2004.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, the Second Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, signed at Washington on July 14, 2004 (the "Protocol"). Also enclosed for the information of the Senate is an exchange of notes with attached Understandings, which provides clarification with respect to the application of the Convention, as amended, in specified cases.

The proposed Protocol was negotiated to ensure that the Convention, concluded in 1984, cannot be used inappropriately to secure tax reductions in circumstances where there is no risk of double taxation. The proposed Protocol also updates the Convention to reflect changes in U.S. tax law and to bring the Convention into closer conformity with current U.S. tax treaty policy.

Article 2 of the proposed Protocol includes a revised "Limitation on Benefits" provision, which is designed to deny "treaty-shoppers" the benefits of the Convention. The new provision corresponds more closely to those in recent U.S. treaties than did the provision in the existing Convention. The new provision also includes enhanced protections against new forms of potential treaty shopping.

The existing Convention preserves the U.S. right to tax former citizens whose loss of citizenship had, as one of its principal purposes, the avoidance of tax. In order to reflect 1996 amendments to the applicable provision of the Internal Revenue Code, Article 1 of the proposed Protocol expands this right to include taxation of former long-term residents whose loss of such status had, as one of its principal purposes, the avoidance of tax. Article 3 of the proposed Protocol includes a clarification to the operation of the Convention's information exchange provision.

The exchange of notes with attached Understanding accompanying the proposed Protocol provides additional explanations and guidance regarding the agreed interpretation of the Convention, as amended.

The proposed Protocol will enter into force upon the exchange of instruments of ratification. It will have effect, with respect to taxes withheld at source, on the first day of the second month next following the date of entry into force. With respect to other types of

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taxes it will have effect for taxable years beginning on or after January 1 of the year following the date of entry into force.

The Department of the Treasury and the Department of State co-operated in the negotiation of the proposed Protocol. It has the full approval of both Departments.

Respectfully submitted,

COLIN L. POWELL.

SECOND PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED
STATES OF AMERICA AND BARBADOS FOR THE AVOIDANCE OF DOUBLE
TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO
TAXES ON INCOME SIGNED ON DECEMBER 31, 1984

The United States of America and Barbados,

Desiring to amend the Convention between the United States of America and Barbados for the
Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on
Income signed at Bridgetown on the 31st day of December 1984, as amended by a Protocol
signed at Washington, D.C. on the 18th day of December 1991 (in this Protocol referred to as
the "Convention"),

Have agreed as follows:

ARTICLE I

Article 1 of the Convention is amended by omitting the last sentence of paragraph (3) and substituting "For this purpose, the term 'citizen' shall include a former citizen or former long-term resident whose loss of such status has as one of its principal purposes the avoidance of tax (as defined under the laws of the Contracting State of which the person was a citizen or long-term resident), but only for a period of 10 years following such loss.".

ARTICLE II

Article 22 (Limitation on Benefits) is omitted and the following Article is substituted:

"Article 22**Limitation on Benefits**

1. A person that is a resident of a Contracting State and derives income from the other Contracting State shall be entitled, in that other Contracting State, to all the benefits of this Convention only if such person is:

- (a) an individual;
- (b) a Contracting State or a political subdivision or local authority thereof;
- (c) a company, if:
 - i) its principal class of shares is:
 - (a) listed on a recognized stock exchange located in the Contracting State of which the company is a resident;
 - (b) primarily traded on a recognized stock exchange located in the Contracting State of which the company is a resident or, in the case of a company that is resident in Barbados, primarily traded on one of the recognized exchanges identified in paragraph 4(b) of Article 22; and
 - (c) regularly traded on one or more recognized stock exchanges; or

- ii) (a) at least 50 percent of each such class of shares in the company is owned directly or indirectly by companies entitled to benefits under clause i), provided that in the case of indirect ownership, each intermediate owner is a person entitled to benefits of the Convention under this clause ii); and
 - (b) the company satisfies the requirements of clause ii) of paragraph 1(d) of this Article;

(d) a resident of a Contracting State other than an individual if:

- i) on at least half the days of the taxable year, more than 50 percent of the beneficial interest in that person (or in the case of a company, more than 50 percent of the number of shares of each class of whose shares) is owned, directly or indirectly, by residents of that State that are entitled to the benefits of this Convention under subparagraphs (a), (b), (c)i), (e) or (f) (other than a person described in paragraph 6 of this Article), provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State; and
- ii) less than 50 percent of the person's gross income for that taxable year is paid or accrued, directly or indirectly, to persons who are not residents of that Contracting State entitled to the benefits of this Convention under subparagraphs (a), (b), (c)i), (e) or (f) (other than a person described in paragraph 6 of this Article) in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the State of which the person is a resident (but not including arm's length payments in the ordinary course of business for services or tangible property);

(e) an entity that is organized and operated exclusively for religious, charitable, scientific, literary or educational purposes and that, by virtue of that status, is generally exempt from income taxation in its Contracting State of residence; or

(f) a plan, scheme, fund, trust, company or other arrangement established in a Contracting State that is operated exclusively to administer or provide employee benefits and that, by reason of its nature as such, is generally exempt from income taxation in that State, provided

that more than half of the beneficiaries, members or participants, if any, in such organization are persons that are entitled, under this Article, to the benefits of this Convention.

2. (a) A resident of one of the Contracting States will be entitled to the benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is entitled to benefits under paragraph 1, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments, unless these activities are banking or insurance activities carried on by a bank or insurance company), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business and that resident satisfies any other conditions for obtaining such benefits.

(b) If the resident or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, sub-paragraph (a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned State is substantial in relation to the trade or business activity in the other State. Whether a trade or business activity is substantial for purposes of this paragraph will be determined based on all the facts and circumstances. In any case, however, a trade or business will be deemed substantial if, for the preceding taxable year, or for the average of the three preceding taxable years, the asset value, the gross income, and the payroll expense that are related to the trade or business in the first-mentioned State equal at least 7.5 percent of the resident's (and any related parties') proportionate share of the asset value, gross income and payroll expense, respectively, that are related to the activity that generated the income in the other State, and the average of the three ratios exceeds 10 percent.

(c) In determining whether a person is "engaged in the active conduct of a trade or business" in a Contracting State under sub-paragraph (a) of this paragraph, activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, at least 50

percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

(d) For purposes of this paragraph,

i) a resident of a Contracting State will be treated as a bank only if:

(a) it is licensed to accept deposits from residents of the Contracting State of which it is a resident and to conduct, in that State, lending or other banking activities;

(b) it regularly accepts deposits from customers who are residents of the Contracting State of which it is a resident in the ordinary course of its business and the amount of deposits shown on the company's balance sheet is substantial; and

(c) it must regularly make loans to customers in the ordinary course of its trade or business;

ii) a resident of a Contracting State will be treated as an insurance company only if:

(a) it is licensed to insure risks of residents of the Contracting State of which it is a resident; and

(b) it regularly insures (not including reinsurance) risks of customers who are residents of the Contracting State of which it is a resident; and

iii) whether the activities of a resident of a Contracting State constitute an active trade or business must be determined under all the facts and circumstances. In general, a trade or business comprises activities that constitute (or could constitute) an independent economic enterprise carried on for profit. To constitute a trade or business, the activities conducted by the resident ordinarily must include every operation which forms a part of, or a step in, a process by which an enterprise may earn income or profit. A resident of a Contracting State actively conducts a trade or business if it regularly performs active and substantial management and operational functions through its own officers or

staff of employees. In this regard, one or more of such activities may be carried out by independent contractors under the direct control of the resident.

However, in determining whether the corporation actively conducts a trade or business, the activities of independent contractors shall be disregarded.

3. A person that is not entitled to the benefits of this Convention pursuant to the provisions of paragraph 1 may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income in question arises so determines.

4. For the purposes of paragraph 1, the term "recognized stock exchange" means:

- (a) the NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934;
- (b) the Barbados Stock Exchange, the Jamaica Stock Exchange and the Trinidad Stock Exchange; and
- (c) any other stock exchange agreed upon by the competent authorities of the Contracting States.

5. The competent authorities will consult together with a view to developing a commonly agreed application of the provisions of this Article. The competent authorities shall, in accordance with the provisions of Article 26 (Exchange of Information), exchange such information as is necessary for carrying out the provisions of this Article and safeguarding, in cases envisioned therein, the application of their domestic law.

6. (a) Notwithstanding that a person otherwise would qualify for the benefits of the Convention under paragraphs 1 or 2 of this Article without regard to this paragraph, a person that is entitled to income tax benefits under the provisions of a special tax regime shall be entitled to receive only the benefits of this Convention (subject to all applicable conditions or limitations) other than the benefits of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties) of this Convention. For purposes of the preceding sentence, to the extent that a partnership, estate or trust is treated as a resident of a Contracting State under paragraph 1 of Article 4 (Residence) by reason of income of such partnership, estate or trust being subject to tax in the hands of one or more persons described in this paragraph, such partnership, estate or trust, to

that extent, shall be treated as a person that is entitled to income tax benefits under the provisions of a special tax regime.

(b) A special tax regime is any legislation or administrative practice that provides for an effective tax rate substantially lower than the generally applicable tax rate for companies or individuals, as appropriate.”.

ARTICLE III

Article 26 (Exchange of Information) is amended by inserting the following new paragraph and re-numbering paragraph 4 as paragraph 5:

“4. Notwithstanding paragraph 3, the competent authority of the requested State shall, in accordance with paragraph 1, obtain and provide information held by financial institutions, nominees or persons acting in an agency or fiduciary capacity (not including information that would reveal confidential communications between a client and an attorney, solicitor or other legal representative, where the client seeks legal advice), or respecting interests in a person.”.

ARTICLE IV

1. This Protocol shall be subject to ratification and instruments of ratification shall be exchanged as soon as possible.

2. This Protocol shall enter into force upon the exchange of instruments of ratification and shall have effect:

(a) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following the date on which this Protocol enters into force;

(b) in respect of other taxes, for taxable years beginning on or after the first day of January next following the date on which this Protocol enters into force.

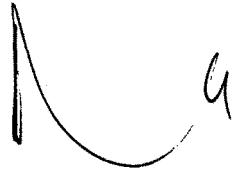
IN WITNESS WHEREOF, the undersigned, duly authorized thereto by their respective
Governments, have signed this Protocol.

DONE at Washington, in duplicate, this fourteenth day of July, 2004.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF
BARBADOS:



**DEPARTMENT OF STATE
WASHINGTON**

July 14, 2004

Excellency:

I have the honor to refer to the Second Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, which was signed today and inform you on behalf of the Government of the United States of America of the following:

During negotiations leading to the conclusion of the Protocol signed today, the negotiators developed agreed Understandings that are attached to this note. The Understandings are intended to give guidance both to

His Excellency

Michael Ian King,

Ambassador of Barbados.

DIPLOMATIC NOTE

taxpayers and tax authorities of our two countries in interpreting Article 22
(Limitation on Benefits).

If the attached Understandings are acceptable to the Government of Barbados, this note and your note in reply thereto will indicate that our two Governments share a common understanding in this matter.

Accept, Excellency, the expression of my highest consideration.

For the Secretary of State:

A handwritten signature in black ink, appearing to read "Adwoa".

Attachment:

As stated.

**UNDERSTANDINGS REGARDING THE LIMITATIONS ON BENEFITS
ARTICLE IN THE U.S.-BARBADOS PROTOCOL**

1. The Protocol, signed December 18, 1991, Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, was accompanied by Understandings Regarding the Scope of the Limitation on Benefits Article in the U.S.-Barbados Protocol. Those Understandings continue to apply for purposes of applying Article 22 (Limitation on Benefits) of the Convention, as amended by this Protocol, except to the extent the Understandings are inconsistent with the provisions of Article 22.

2. Paragraph 3 of Article 22 provides that a person that is not entitled to the benefits of this Convention pursuant to the provisions of paragraph 1 of Article 22 may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income in question arises so determines. In making determinations under paragraph 3 of Article 22, it is understood that the Competent Authority will take into account all of the relevant facts and circumstances. In the case of an organization that fails to satisfy the requirements of paragraph 1(f) of Article 22 solely because 50 percent or less of its beneficiaries, members or participants are persons entitled to the benefits of this Convention, the U.S. Competent Authority will favorably consider the following factors:

- (a) the organization is established in Barbados;
- (b) the sponsoring employer of the organization is a resident of Barbados entitled to the benefits of the Convention (other than a person described in paragraph 6 of Article 22);
- (c) more than 30 percent of the beneficiaries, members or participants of the organization are persons entitled to the benefits of this Convention; and
- (d) more than 70 percent of the beneficiaries, members or participants of the organization are individuals resident in a member of the Caribbean Community.

3. For purposes of paragraph 6 of Article 22, a “special tax regime” shall mean:

- (a) in the case of Barbados:
 - (1) the Exempt Insurance Act, Cap. 308;

- (2) the International Financial Services Act, 2002;
- (3) the International Business Companies Act, Cap. 77;
- (4) the Societies with Restricted Liability Act, Cap. 318B; or
- (5) the Insurance (Miscellaneous Provisions) Act, 1998; or

(b) in the case of either Contracting State, any legislation or administrative practice enacted or adopted after the signing of this Protocol pursuant to which the income of a person is entitled to the same or substantially similar tax benefits to those granted under the legislation referred to in paragraph (a).



Embassy of Barbados
2144 Wyoming Avenue, N.W.
Washington, D.C. 20008

July 14, 2004

The Secretary of State
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Excellency:

I have the honour to confirm receipt of your Note of today's date which reads as follows:

"DEPARTMENT OF STATE
WASHINGTON

July 14, 2004

Excellency:

I have the honor to refer to the Second Protocol Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, which was signed today and inform you on behalf of the Government of the United States of America of the following:

During negotiations leading to the conclusion of the Protocol signed today, the negotiators developed agreed Understandings that are attached to this note. The Understandings are intended to give guidance both to taxpayers and tax authorities of our two countries in interpreting Article 22 (Limitation on Benefits).

If the attached Understandings are acceptable to the Government of Barbados, this note and your note in reply thereto will indicate that our two Governments share a common understanding in this matter.

Accept, Excellency, the expression of my highest consideration.

For the Secretary of State:

Attachment:

As stated."

I have the honour to inform you that my Government agrees to the above.

Accept, Excellency, the assurances of my highest consideration.



Michael I. King
Ambassador.

**UNDERSTANDINGS REGARDING THE LIMITATIONS ON BENEFITS
ARTICLE IN THE U.S.-BARBADOS PROTOCOL**

1. The Protocol, signed December 18, 1991, Amending the Convention Between the United States of America and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Signed on December 31, 1984, was accompanied by Understandings Regarding the Scope of the Limitation on Benefits Article in the U.S.-Barbados Protocol. Those Understandings continue to apply for purposes of applying Article 22 (Limitation on Benefits) of the Convention, as amended by this Protocol, except to the extent the Understandings are inconsistent with the provisions of Article 22.
2. Paragraph 3 of Article 22 provides that a person that is not entitled to the benefits of this Convention pursuant to the provisions of paragraph 1 of Article 22 may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income in question arises so determines. In making determinations under paragraph 3 of Article 22, it is understood that the Competent Authority will take into account all of the relevant facts and circumstances. In the case of an organization that fails to satisfy the requirements of paragraph 1(f) of Article 22 solely because 50 percent or less of its beneficiaries, members or participants are persons entitled to the benefits of this Convention, the U.S. Competent Authority will favorably consider the following factors:
 - (a) the organization is established in Barbados;
 - (b) the sponsoring employer of the organization is a resident of Barbados entitled to the benefits of the Convention (other than a person described in paragraph 6 of Article 22);
 - (c) more than 30 percent of the beneficiaries, members or participants of the organization are persons entitled to the benefits of this Convention; and
 - (d) more than 70 percent of the beneficiaries, members or participants of the organization are individuals resident in a member of the Caribbean Community.
3. For purposes of paragraph 6 of Article 22, a “special tax regime” shall mean:
 - (a) in the case of Barbados:
 - (1) the Exempt Insurance Act, Cap. 308;

- (2) the International Financial Services Act, 2002;
- (3) the International Business Companies Act, Cap. 77;
- (4) the Societies with Restricted Liability Act, Cap. 318B; or
- (5) the Insurance (Miscellaneous Provisions) Act, 1998; or

(b) in the case of either Contracting State, any legislation or administrative practice enacted or adopted after the signing of this Protocol pursuant to which the income of a person is entitled to the same or substantially similar tax benefits to those granted under the legislation referred to in paragraph (a).

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