

PROTOCOL AMENDING TAX CONVENTION ON
INHERITANCES WITH FRANCE

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE FRENCH REPUBLIC FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON ESTATES, INHERITANCES, AND GIFTS SIGNED AT WASHINGTON ON NOVEMBER 24, 1978



NOVEMBER 4, 2005.—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, *November 4, 2005.*

To the Senate of the United States:

I transmit herewith for the advice and consent of the Senate to ratification a Protocol Amending the Convention Between the United States of America and the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, signed at Washington on November 24, 1978 (the “Convention”), signed at Washington on December 8, 2004 (the “Protocol”). Also transmitted for the information of the Senate is the report of the Department of State with respect to the Protocol.

The Protocol provides a pro rata unified credit to the estate of a French domiciliary for purposes of computing U.S. estate tax. It allows a limited U.S. “marital deduction” for certain estates if the surviving spouse is not a U.S. citizen. In addition, the Protocol expands the United States jurisdiction to tax its citizens and certain former citizens and long-term residents and makes other changes to the treaty to reflect more closely current U.S. tax-treaty policy.

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

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington.

The PRESIDENT,
The White House.

DEAR MR. PRESIDENT: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, a Protocol Amending the Convention Between the United States of America and the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, signed at Washington on November 24, 1978 (the "Convention"), signed at Washington on December 8, 2004 (the "Protocol").

The Protocol modifies the tax treatment of certain transfers of property by gift or upon death. The Protocol provides a pro rata unified tax credit to the estate of a French domiciliary for purposes of computing the U.S. estate tax. It allows a limited U.S. "marital deduction" for certain estates, if the surviving spouse is not a U.S. citizen. In addition, the Protocol makes other changes to the Convention to reflect more closely current U.S. tax-treaty policy.

The Protocol was concluded in recognition of the importance of the United States' economic relations with France. The Department of the Treasury and the Department of State cooperated in the negotiation of the proposed Protocol. It has the full approval of both Departments.

Respectfully submitted.

CONDOLEEZZA RICE.

Enclosure: Key Provisions of the U.S.-France Estate Tax Protocol.

KEY PROVISIONS OF THE U.S.-FRANCE ESTATE TAX PROTOCOL

The proposed Protocol amends the Estate and Gift Tax Convention (the “Convention”) between the United States and France, which was signed in 1978 and entered into force in 1980. It makes a number of changes to take account of changes to U.S. domestic law that were enacted in 1988, in a manner similar to recent agreements with Canada and Germany. It also includes a number of minor technical changes and updates to reflect changes in the law and policy of both countries since the Convention entered into force.

The Protocol introduces a marital exclusion with respect to certain property. Under the provision, transfers of non-community property from a French domiciliary to a spouse who is not a United States citizen that may be taxed by the United States solely on the basis of situs under the treaty can be included in the tax base only to the extent that the value of the property, after applicable deductions, exceeds 50 percent of the value of all property that may be taxed by the United States. This exclusion is not available, however, to certain transferors who are former U.S. citizens or long-term residents who lost such citizenship or residency for tax-avoidance reasons.

The Protocol also introduces a U.S. estate tax marital deduction up to the Internal Revenue Code’s “applicable exclusion amount” (\$1,500,000 in 2005) when the surviving spouse is not a U.S. citizen. Certain 1988 changes in U.S. law deny a marital deduction when the surviving spouse is not a U.S. citizen. This provision is intended to provide relief from these changes in the case of estates of limited value.

The Protocol also modernizes the provisions dealing with the elimination of double taxation and provides a pro rata unified credit to the estate of a French domiciliary for purposes of computing the U.S. estate tax. Under this provision, a French domiciliary is allowed a credit against U.S. estate tax ranging from the amount ordinarily allowed to the estate of a nonresident under the Internal Revenue Code (\$13,000) to the amount of credit allowed to the estate of a U.S. citizen under the Internal Revenue Code (\$555,800 in 2005), based on the extent to which the assets of the estate are situated in the United States.

The Protocol makes other changes to the Convention to reflect more closely current U.S. tax treaty policy. For example, the Protocol adds a “saving” clause, pursuant to which the United States reserves the right to tax U.S. citizens and domiciliaries as if the treaty had not come into effect. It also preserves U.S. taxing rights with respect to certain former citizens and certain former long-term residents. The Protocol defines the term “real property” in a manner consistent with the definition provided in U.S. domestic law

and U.S. income tax treaties, and adds a rule that allows source state taxation of stock in real property holding companies.

Article 9 of the Protocol addresses the entry into force of the Protocol. The United States and France will notify each other when their respective constitutional and legislative requirements for entry into force have been satisfied. The Protocol will enter into force on the date of receipt of the later of such notifications. Although the Protocol generally will be effective with respect to gifts made and deaths occurring after entry into force, the relief provided with respect to surviving non-citizen spouses and the pro rata unified credit will be effective with respect to gifts made and deaths occurring after November 10, 1988. Claims for refunds asserting the benefits of the Protocol that otherwise would be barred by the statute of limitations must be made within one year after the first day of the second month of entry into force of the Protocol, however; and all claims for retroactive relief are subject to the rules regarding the United States' ability to tax former citizens and long-term residents.

PROTOCOL
AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA
AND THE FRENCH REPUBLIC FOR THE AVOIDANCE OF DOUBLE TAXATION AND
THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON ESTATES,
INHERITANCES, AND GIFTS,
SIGNED AT WASHINGTON ON NOVEMBER 24, 1978

The Government of the United States of America and the Government of the
French Republic, desiring to amend the Convention Between the United States of America and
the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal
Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, signed at Washington on
November 24, 1978, have agreed as follows:

ARTICLE I

A new paragraph (4) shall be added to Article 1 (Estates and Gifts Covered) of the Convention as follows:

“(4)(a) Notwithstanding any other provision of the Convention, the provisions of this Convention shall not preclude the United States from taxing in accordance with its law the estate of a decedent or the gift of a donor who, at his death or at the making of the gift, was

- (i) a citizen of the United States,
- (ii) domiciled (within the meaning of Article 4 (Fiscal Domicile)) in the United States, or
- (iii) a former citizen or long-term resident whose loss of such status had as one of its principal purposes the avoidance of tax (as defined under the laws of the United States), but only for a period of ten years following such loss;

(b) Subparagraph (a) of this paragraph (4) shall not, however, affect the obligation undertaken by the United States under:

- (i) Article 10 (Charitable Exemptions and Deductions); paragraph (2) of Article 11 (Community Property and Marital Deduction); paragraphs (2) or (8) of Article 12 (Exemptions and Credits); Article 13 (Time Limitations on Claims for Credit or Refund) or Article 14 (Mutual Agreement Procedure);
- (ii) paragraph (3) of Article 11 (Community Property and Marital Deduction) as applied to the estates of persons other than former citizens or long-term residents referred to in subparagraph (a) of this paragraph (4); or
- (iii) the benefits conferred by the United States under Article 17 (Diplomatic and Consular Officials), as applied to transfers by individuals who are neither citizens of, nor have immigrant status in, the United States.”

ARTICLE II

Paragraph (2) of Article 3 (General Definitions) of the Convention shall be deleted and replaced with the following:

"(2) As regards the application of the Convention at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires, or the competent authorities agree to a common meaning pursuant to the provisions of Article 14 (Mutual Agreement Procedure), have the meaning which it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

ARTICLE III

Article 5 (Immovable (Real) Property) of the Convention shall be deleted and replaced with the following:

"ARTICLE 5 - REAL PROPERTY

- (1) Real property may be taxed by a Contracting State if such property is situated in that State.
- (2) The term "real property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated, being understood, however, that mortgages or other debt-claims secured by real property shall not be regarded as real property. The term shall in any case include property accessory to real property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of real property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as real property.
- (3) The term "real property" shall also include shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, at least 50 percent of real property situated in one of the Contracting States or of rights pertaining to such property. These shares, participations and other rights shall be deemed to be situated in the Contracting State in which the real property is situated.

(4) The provisions of paragraph (1) shall also apply to real property of an enterprise and to real property used for the performance of independent personal services."

ARTICLE IV

The last sentence of Article 6 (2) (Business Property of a Permanent Establishment and Assets Pertaining to a Fixed Base Used for the Performance of Professional Services) of the Convention shall be deleted and replaced with the following:

"If an individual is a member of a partnership or other similar pass-through entity which is engaged in industrial or commercial activity through a fixed place of business, he shall be deemed to have been so engaged to the extent of his interest therein."

ARTICLE V

Paragraph (2) (b) of Article 10 (Charitable Exemptions and Deductions) of the Convention shall be deleted and replaced with the following:

"(b) Is organized and operated exclusively for religious, charitable, scientific, literary, educational, or cultural purposes; and".

ARTICLE VI

1. Paragraph (2) of Article 11 (Community Property and Marital Deduction) of the Convention shall be deleted and replaced with the following:

"(2) Property (other than community property) which passes to a spouse who is not a citizen of the United States from a decedent or donor who was domiciled in France, and which may be taxed by the United States solely in accordance with Article 5 (Real Property), 6 (Business Property of a Permanent Establishment and Assets Pertaining to a Fixed Base Used for the Performance of Professional Services), or 7 (Tangible Movable Property), shall, for the purpose of determining United States tax, be included in the taxable base only to the extent its value (after taking into account any applicable deductions) exceeds 50 per cent of the value of all property included in the taxable base which may be taxed by the United States. The provisions of this paragraph shall not

apply to a citizen of the United States domiciled in France or a former citizen or long-term resident of the United States referred to in subparagraph (4) (a) (iii) of Article 1 (Estates and Gifts Covered) of the Convention.”

2. Paragraph (3) of Article 11 (Community Property and Marital Deduction) of the Convention shall be renumbered as paragraph (4).

3. A new paragraph (3) shall be added to Article 11 (Community Property and Marital Deduction) of the Convention as follows:

“(3) In determining the estate tax imposed by the United States on a decedent's estate with respect to property that (within the meaning of the law of the United States) passes to the decedent's surviving spouse and that would qualify for the estate tax marital deduction under the law of the United States if the surviving spouse were a citizen of the United States and all applicable elections were properly made (the “qualifying property”), the decedent's estate shall be entitled to a marital deduction provided that:

(a) At the time of the decedent's death (i) the decedent was domiciled in either France or the United States or was a citizen of the United States; (ii) the decedent's surviving spouse was domiciled in either the United States or France; and (iii) if both the decedent and the decedent's surviving spouse were domiciled in the United States at the time of the decedent's death, one or both was a citizen of France; and

(b) The executor of the decedent's estate elects the benefits of this paragraph and irrevocably waives the benefits of any other estate tax marital deduction that would be allowed under the law of the United States on a United States federal estate tax return for the decedent's estate by the date on which a qualified domestic trust election could be made under the law of the United States.

The marital deduction allowed under this paragraph (3) shall be equal to the lesser of the value of the qualifying property or the applicable exclusion amount (within the meaning of the law of the United States of America as of the date of death of the decedent) determined without regard to any gift previously made by the decedent.”

ARTICLE VII

Article 12 (Exemptions and Credits) of the Convention shall be deleted and replaced with the following:

"ARTICLE 12 - EXEMPTIONS AND CREDITS

(1) Except as otherwise provided in this Convention, each Contracting State shall impose its tax, and shall allow exemptions, deductions, credits, and other allowances, in accordance with its laws.

(2) Double taxation shall be avoided in the following manner:

(a) In determining the French tax, where the decedent or the donor was domiciled in France at the time of the transfer:

(i) France shall tax the entire property comprising the estate or the gift, including any property which may be taxed by the United States in accordance with the provisions of this Convention, and shall allow as a deduction from that tax an amount equal to the United States tax paid upon the transfer of any property, which, in relation to the same event, may be taxed in the United States.

(ii) The deduction referred to in subparagraph (i) shall not, however, exceed that part of the French tax, as computed before any deduction is made, which is attributable to the property in respect of which the deduction is to be allowed. For purposes of this subparagraph (ii), "that part of the French tax" means:

(A) Where the tax on the property concerned is computed by applying a proportional rate, the amount of the taxable net value of such property multiplied by the rate which actually applies to that property; and

(B) Where the tax on the property concerned is computed by applying a progressive scale, the amount of the taxable net value of such property multiplied by the rate resulting from the ratio of the French tax actually payable on the total property taxable in

accordance with French law to the net value of that total property.

(iii) For purposes of subparagraph (i), the United States tax

(A) shall include any United States tax referred to in Article 2 (Taxes Covered) but shall not include any tax that is permitted to be imposed by the United States under this Convention solely by reason of paragraph (4) of Article 1 (Estates and Gifts Covered), and

(B) shall be considered, in the case of property which may be taxed by the United States pursuant to Article 5 (Real Property), 6 (Business Property of a Permanent Establishment and Assets Pertaining to a Fixed Base Used for the Performance of Professional Services), or 7 (Tangible Movable Property), to be equal to that part of the French tax, as defined in subparagraph (ii), which is attributable to such property, but only if the decedent at his death or the donor at the time of the gift was a citizen of the United States and if it is established that the United States tax obligations with respect to the death or gift have been complied with.

(b) In determining the United States tax:

(i) Where both Contracting States impose tax with respect to property which is taxable by France in accordance with Article 5 (Real Property), 6 (Business Property of a Permanent Establishment and Assets Pertaining to a Fixed Base Used for the Performance of Professional Services), or 7 (Tangible Movable Property), the United States shall allow a credit equal to the amount of the tax imposed by France with respect to such property.

- (ii) If the decedent or donor was a citizen of the United States at the time of death or the making of a gift and would be considered under Article 4 (Fiscal Domicile) as having been domiciled in France at such time, the United States shall allow a credit equal to the amount of the tax imposed by France (after allowing for the deduction from tax, if any, allowed under paragraph (2) (a) of this Article).

If the decedent was a former citizen or long-term resident of the United States described in subparagraph (4) (a) (iii) of Article 1 (Estates and Gifts Covered), the United States shall allow a credit equal to the amount of the tax imposed by France in respect of all property which is included in the United States gross estate solely by reason of such status.

- (iii) Notwithstanding the provisions of subparagraphs (i) and (ii), the total amount of all credits allowed by the United States pursuant to this Article or pursuant to its laws or other conventions with respect to all property in respect of which a credit is allowable under subparagraphs (i) and (ii) shall not exceed that part of the tax of the United States which is attributable to such property.

(3) In determining the estate tax imposed by the United States, the estate of a decedent (other than a citizen of the United States) who was domiciled in France at the time of his death shall be allowed a unified credit equal to the greater of:

- (a) The amount that bears the same ratio to the credit allowed under the law of the United States to the estate of a citizen of the United States as the value of the part of the decedent's gross estate that at the time of the decedent's death is situated in the United States bears to the value of the decedent's entire gross estate wherever situated; or
- (b) The unified credit allowed under the law of the United States to the estate of a nonresident not a citizen of the United States.

The amount of any unified credit otherwise allowable under this paragraph shall be reduced by the amount of any credit previously allowed with respect to any gift made by the decedent. For purposes of subparagraph (a), the part of the decedent's gross estate that is situated in the United States shall not exceed the part of the decedent's gross estate that may be taxed by the United States in accordance with this Convention.

A credit otherwise allowable under subparagraph (a) shall be allowed only if all information necessary for the verification and computation of the credit is provided.

(4) In determining the gift or inheritance tax imposed by France with respect to transfers by reason of death or by gift by an individual, who at the time of the death or the making of the gift was a citizen of the United States or was domiciled in the United States, there shall be allowed the same deductions and credits as if the individual were domiciled in France. In determining the gift or inheritance tax imposed by France with respect to transfers by reason of death or by gift by an individual, who at the time of death or the making of the gift was domiciled in France, to an individual who is a citizen of the United States or is domiciled in the United States, there shall be allowed the same deductions and credits as if the recipient were domiciled in France.

(5) Any credits or deductions for tax imposed by a Contracting State allowable under this Article are in lieu of, and not in addition to, any such credits or deductions allowed by the laws of the other Contracting State and shall be computed in accordance with the provisions and subject to the limitations of the law of the other Contracting State, as it may be amended from time to time without changing the general principle thereof.

(6) If under this Convention any property would be taxable only in one Contracting State and tax, though chargeable, is not paid (otherwise than as a result of a specific exemption, deduction, exclusion, credit, or allowance) in that State, tax may be imposed on that property in the other Contracting State notwithstanding any other provision to the contrary.

(7) Where in accordance with the provisions of the Convention property may not be taxed in a Contracting State, that Contracting State may nevertheless, in calculating the amount of tax on property that may be taxed in that Contracting State under the

provisions of the Convention, take into account the exempted property that is taxable under the internal law of that Contracting State.

(8) The provisions of this Convention shall not result in an increase in the amount of the tax imposed by either Contracting State under its domestic laws. A reduction in the credit or deduction allowed against a Contracting State's tax for the tax paid to the other Contracting State which results from the application of this Convention shall not be construed as an increase in tax."

ARTICLE VIII

The last sentence of paragraph (2) of Article 15 (Filing of Returns and Exchange of Information) shall be deleted and replaced with the following:

"Any information furnished shall be treated as secret and shall not be disclosed to any persons other than those (including a court or administrative body) involved in the assessment, collection, enforcement, or prosecution in respect of the taxes which are the subject of this Convention."

ARTICLE IX

1. The Contracting States shall notify each other when their respective constitutional and statutory requirements for the entry into force of this Protocol have been satisfied.
2. This Protocol shall enter into force on the date of receipt of the later of such notifications and shall have effect with respect to gifts made and deaths occurring after that date.
3. Notwithstanding paragraph (2) of this Article, paragraph (3) of Article 11 (Community Property and Marital Deduction) of the Convention and paragraph (3) of Article 12 (Exemptions and Credits) of the Convention, in each case as amended by this Protocol shall, notwithstanding any limitation imposed under the law of a Contracting State on the assessment or refund with respect to a person's or estate's return, have effect with respect to gifts made or deaths occurring after November 10, 1988, provided that (i) any claim for refund by reason of this Article IX is filed before the date that is one year after the first day of the second month following the date on which this Protocol enters into force or within the otherwise applicable period for filing such claims under domestic law, and (ii) the provisions of paragraph (4) of

Article 1 (Estates and Gifts Covered) shall apply with respect to such claim for refund. In the case of an estate that, prior to the date on which this Protocol enters into force, was allowed a marital deduction by reason of a transfer to a qualified domestic trust, such estate may, within the time limit for filing a claim for refund referred to in the preceding sentence, elect to treat the qualified domestic trust as if it had not been established in order to claim the benefits of paragraph (3) of Article 11 (Community Property and Marital Deduction) or paragraph (3) of Article 12 (Exemptions and Credits) of the Convention. If such an election is made, the property shall be treated as having been transferred to the surviving spouse at the time of the decedent's death for all purposes of this Convention.

IN WITNESS WHEREOF, the representatives of the governments, being duly authorized thereto, have signed this Protocol.

Done at Washington, this eighth day of December, 2004, in duplicate, in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA



FOR THE GOVERNMENT OF
THE FRENCH REPUBLIC

