



BERMUDA

U.S.A. - BERMUDA TAX CONVENTION ACT 1986

1986 : 39

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WHEREAS it is expedient to make provision authorizing the enforcement of certain obligations of Bermuda under the Convention on taxation matters signed on 11th July, 1986 at Washington D.C. in the United States of America between the Government of the United Kingdom (on behalf of the Government of Bermuda) and the Government of the United States of America, and to make other connected or incidental provision:

[words of enactment omitted]

Short title

1 This Act may be cited as the U.S.A. - Bermuda Tax Convention Act 1986.

Interpretation

2 (1) In this Act, unless the context otherwise requires-

“the Agreement” means the arrangements between Bermuda and the United States established by the Convention and the Notes;

“arrangement” with respect to the exchange of information—

(a) means any arrangement made between the Government of Bermuda and the Government of the United States of America to seek to improve tax compliance; and

(b) without prejudice to the generality of paragraph (a) includes—

(i) the agreement reached between the Government of Bermuda and the Government of the United States of America to seek to improve international tax compliance and to implement FATCA, signed on 19 December 2013; and

(ii) any other arrangement for the automatic exchange of information;

“Article” means Article of the Convention;

“business” includes profession or trade;

“control” in relation to the use of the term with respect to “information in his possession, custody or control”, means control of information whether the information is located in Bermuda or outside of Bermuda;

“the Convention” means the Convention entered into on 11th July, 1986 at Washington D.C. in the United States of America by the U.K. Government (on behalf of the Government of Bermuda) and the U.S. Government relating to the taxation of insurance enterprises and mutual assistance in tax matters, the text of which Convention is set forth in the First Schedule and in relation to which the Protocol of 1988 sets forth certain reservations of the United States;

“document” includes any book, paper, statement, account, writing or record, and any device by means of which material is recorded or stored;

“FATCA” means the provisions of the Foreign Account Tax Compliance Act in the enactment of the United States of America called the Hiring Incentives to

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Restore Employment Act which are commonly referred to as FATCA, and includes any provisions amending or replacing those provisions;

“information” includes documents;

“judge” means judge of the Supreme Court;

“the Minister” has the meaning given by subsection (2);

“the Notes” means the notes exchanged on 11th July, 1986 between the U.K. Government and the U.S. Government concerning the Convention, the text of which notes, apart from formal matters, is set forth in the Second Schedule;

“premises” includes any place whatsoever and any means of transport;

“the Protocol of 1988” means the Protocol of Exchange of Instruments of Ratification executed at Washington aforesaid on 2nd December 1988 and set forth in the Third Schedule;

“regulation” means regulation made under section 13;

“request” means an application made, pursuant to Article 5 and the Notes, for assistance;

“the U.K. Government” means the Government of the United Kingdom;

“the United States” has the meaning assigned by Article 1 ;

“the U.S. Government” means the Government of the United States.

(2) In this Act, a reference to the Minister, in relation to any function to be performed by the Minister under this Act, is a reference to the Minister of Finance or such person, being an officer or servant, or an agency, of the Government of Bermuda, as the Minister of Finance may designate to perform the function (with or without a duty to refer back to the Minister of Finance) in his stead as his delegate.

(3) A reference in this Act to the performance of a function includes reference to the performance of a duty or the exercise of a power or right.

[Section 2 subsection (1) definition "control" inserted by 2012 : 27 s. 7 effective 13 July 2012; subsection (1) definitions "arrangement" and "FACTA" inserted by 2015 : 30 s. 2 effective 4 July 2015]

Legal effect of this Act

3 (1) This Act has effect for the purpose of enforcing the giving of assistance by persons in Bermuda in connection with the performance of the obligations assumed by Bermuda under the Agreement.

(2) The Minister, in performing his functions under this Act, is not restricted by any law or any rule of law relating to confidentiality except as expressly provided in the Agreement.

Duties of the Minister

3A (1) The Minister as the competent authority for Bermuda under the Agreement may provide assistance in accordance with the terms of this Act.

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(2) For the purposes of this section, no person who—

- (a) receives a request; or
- (b) obtains information directly or indirectly for the purposes of paragraph (a),

shall disclose the request or the information to another person except in accordance with this Act.

(3) Pursuant to section 26A of the Public Access to Information Act 2010, and notwithstanding any other provision of that Act, this section shall have effect.

[Section 3A inserted by 2017 : 2 s. 2 effective 23 February 2017]

Procedure in respect of a request

4 (1) A request must be in writing.

(2) A request must be signed by a senior official designated by the U.S. Government.

(3) A request shall contain particulars indicating-

- (a) that by the request the U.S. Government seeks information identified in the request; and
- (b) that the information is in Bermuda or that a person in Bermuda has or may have the information in his possession, custody or control; and
- (c) that the information relates to the carrying out of the laws of the United States mentioned in Article 5; and
- (d) that the information relates to the affairs of a person in respect of whom the request has been made under the Agreement (“the taxpayer”); and
- (e) where the request has been made pursuant to the first sentence of Article 5, that the information sought by the U.S. Government is relevant to the determination of the liability of the taxpayer; and
- (f) whether or not the taxpayer is a resident of Bermuda or of the United States; and
- (g) that the request relates to an examination of the taxpayer in relation to a taxable period of the taxpayer, being a period specified in the request, but so that, where a request, in seeking information relating to a taxable period so specified, also seeks information relating to a time outside that period, the request must establish the connection between that period and that time.

(4) Subject to subsections (1), (2) and (3), a request shall be in such form as regulations may prescribe.

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(5) Where the Minister receives a request that does not fully state the particulars in subsection (3), he may nevertheless accept the request where he has determined that it is in the interest of Bermuda to do so.

[Section 4 subsection (3)(e) amended by 1999:37 s.2 effective 8 September 1999; subsection (3)(b) amended by 2011 : 20 s. 8 effective 28 June 2011; subsection (5) inserted by 2013 : 43 s. 2 effective 12 December 2013]

Automatic exchange of information

4A (1) Pursuant to an arrangement for the automatic exchange of information, a person is hereby required to comply with the terms and conditions of that arrangement and that person shall comply with the terms and conditions thereof.

(2) Sections 4, 5, 9A and 10 do not apply in relation to the automatic exchange of information.

[Section 4A inserted by 2015 : 30 s. 3 effective 4 July 2015]

Production orders

5 (1) Subject to this section, where the Minister has received a request in respect of which the requirements of section 4 are fulfilled or where the Minister has made a determination in terms of section 4(5), an officer of the Ministry of Finance shall apply to the Supreme Court for a production order to be served upon the person referred to in section 4(3)(b) directing him to deliver to the Minister the information referred to in that provision.

(1A) The Supreme Court may, if on such an application it is satisfied that the conditions in section 4 are fulfilled or where the court is satisfied with the Minister's justification for accepting a request under section 4(5), make a production order requiring the person referred to in section 4(3)(b) to whom the requests relates—

- (a) to deliver to the Minister the information referred to in the request; or
- (b) to give the Minister access to such information,

within 21 days of the making of the production order.

(2) For the purposes of subsections (3) and (4) of this section, a subsection (2) matter is a matter—

- (a) with respect to which information is sought in a request; and
- (b) which relates to a person who is not a resident either of Bermuda or of the United States, whether or not the requirements of section 4 are fulfilled in relation to the request.

(3) Where the Minister receives a request which seeks information with respect to a subsection (2) matter, he shall not apply to the court for a production order unless the Minister is satisfied that the information is necessary for the proper administration and enforcement of the fiscal laws of the United States.

(4) Where the Minister receives a request which seeks information with respect to a matter which either—

- (a) is a subsection (2) matter; or
- (b) does not constitute a United States criminal or tax fraud investigation,

he shall not apply to the court for a production order unless the Minister receives certification from a senior official designated by the Secretary of the Treasury of the United States that the information sought by the request is relevant to and necessary for the determination of the tax liability of a United States taxpayer, or the criminal tax liability of a person under the laws of the United States.

(4A) With respect to an application for a production order, the Minister shall be under no duty to make inquiry in relation to any statements made or any information given in respect of a request for which a production order is sought, or to information obtained by him under a previous request.

(5) The period to be specified in a production order shall be 21 days unless it appears to the court, or an officer of the Ministry of Finance satisfies the court, that a longer or shorter period would be appropriate in the particular circumstances of the application.

(6) An application for a production order under this section may be made ex parte to a judge in Chambers and shall be heard in camera.

(7) A person served with a production order under subsection (1) who is aggrieved by the service of the order may seek review of the order within 21 days of the date of the service of the order.

(7A) A person served with a production order under subsection (1) who wishes to view the documents filed with the court on the application for the production order—

- (a) shall not be entitled as against the Minister to disclosure of such documents until the person has been granted a right of review under subsection (7B) and the court has directed disclosure of such documents as it considers appropriate for the purposes of the review; and
- (b) shall not (notwithstanding anything to the contrary contained in the Supreme Court (Records) Act 1955) be permitted to view such documents on the court file until such right of review has been granted and the court has directed as aforesaid.

(7B) Upon the application under subsection (7) having been filed with the court, the court shall decide whether to grant the person a right of review.

(7C) The costs in relation to an application under subsection (7) shall be awarded as provided in section 9B(a).

- (8) Rules of court may make provision as to—
 - (a) the discharge, variation and review of production orders; and
 - (b) proceedings in relation to such orders.

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(9) An officer of the Ministry of Finance who makes an application for a production order under this section must produce a minute signed by the Minister of Finance authorizing the officer to make the application in that particular case.

[Section 5 subsections (1), (5)-(9) repealed and substituted, subsection (1A) inserted and subsection (10) repealed by 2013 : 43 s.3 effective 12 December 2013; subsections (7A), (7B) and (7C) inserted by 2014 : 32 s. 2 effective 8 December 2014; subsection (7A) repealed and substituted and subsections (7B) and (7C) amended by 2015 : 30 s. 4 effective 4 July 2015; subsection (4A) inserted by 2017 : 2 s. 3 effective 23 February 2017]

Tipping-off

5A (1) A person is guilty of an offence if—

- (a) he knows or suspects that the Minister is acting, or is proposing to act, in connection with a request under section 5; and
- (b) he discloses to any other person information or any other matter which is likely to prejudice the implementation of that request.

(2) A person is guilty of an offence if—

- (a) he knows or suspects that a request has been made under section 5; and
- (b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following such request.

(3) Nothing in subsection (1) or (2) makes it an offence for a professional legal adviser to disclose any information or other matter to, or to a representative of, a person who has received a production order who is a client of his, in connection with the giving by the adviser of legal advice to the client, but this subsection (3) does not apply—

- (a) in relation to a person outside Bermuda who is a representative of a person who has received a production order, unless the court has under the circumstances given permission, except that permission shall not be given by the court for a copy of the request from a requesting party, or any of its contents that are not reproduced in the production order, to be provided to such person outside Bermuda; or
- (b) in relation to any information or other matter which is disclosed with a view to furthering the contravention of the provisions of this Act.

(4) In proceedings against a person for an offence under subsection (1) or (2), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial as provided.

(5) No officer of the Ministry of Finance or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in accordance with the enforcement, or intended enforcement, of any provision of this Act.

[Section 5A inserted by 2013 : 43 s. 4 effective 12 December 2013; subsection (3) repealed and substituted by 2014 : 32 s. 3 effective 8 December 2014]

Power to enter premises to obtain information

6 (1) An officer of the Ministry of Finance may make an application to a judge under and in accordance with the provisions of this section for the issue of a warrant authorizing entry upon premises.

(2) An officer of that Ministry who makes such an application must produce a minute signed by the Minister of Finance himself authorizing the officer to make the application in that particular case.

(3) If on information given on oath by such an officer a judge is satisfied that there is reasonable ground for suspecting that an offence against this Act has been, or is being, or is about to be, committed on any premises, being an offence by reason of which the delivery to the Minister of information sought by a request is endangered, then the judge may issue a warrant in writing authorizing an officer of the Ministry to enter the premises, if necessary by force, at any time within 14 days commencing on the day of the issue of the warrant, and search them.

(4) In issuing a warrant under this section, the judge may impose such restrictions upon the execution of the warrant as he may deem proper in the circumstances.

(5) An officer entering premises by virtue of a warrant under this section may take such other persons and equipment with him as he thinks necessary; and, on leaving premises entered by virtue of a warrant under this section, shall, if they are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them.

(6) On entering premises by virtue of a warrant under this section, the officer may seize and remove any things whatsoever found there which he has reasonable cause to believe may contain information relevant to a request, and shall deliver any things so seized and removed to the Minister.

(7) Where entry to premises has been made by virtue of a warrant under this section and the officer making the entry has seized any things under the authority of the warrant, he shall prepare a list of them and, if so requested by a person showing himself either—

- (a) to be the occupier of the premises; or
- (b) to have had possession or custody of those things immediately before the seizure,

provide that person with a copy of that list.

(8) Where things are seized under the authority of a warrant and it is shown that access to those things is required for the continued conduct of the business or affairs of any person, the Minister shall afford to that person reasonable access to those things.

Forwarding information to requesting party

7 Where the Minister obtains any information pursuant to a production order made under section 5, obtains any information under section 6 or obtains any information under the provisions in an arrangement for the automatic exchange of information—

- (a) he shall keep it confidential;
- (b) he may—
 - (i) in the case of information obtained under a production order, provide it to the requesting party; or
 - (ii) in the case of the automatic exchange of information, provide it to the automatic exchange of information party; and
- (c) he may make and keep copies of it, if in his opinion the material contains information sought by a request.

[Section 7 repealed and substituted by 2013 : 43 s. 5 effective 12 December 2013; amended by 2015 : 30 s. 5 effective 4 July 2015]

Service of documents

8 (1) A document to be served under this Act by one person (“the server”) on another person (“the subject”) is to be treated as properly served on the subject if dealt with as provided for in this section.

(2) The document may be delivered or sent by post to the subject, or addressed to him by name and left at his proper address.

(3) For the purposes of subsection (2), a document sent by post to, or left at, the address last known to the server as a person’s address shall be treated as sent by post to, or left at, his proper address.

(4) References in this section to the serving of a document on a person include the giving of the document to him.

Offences

9 (1) Where a person—

- (a) is required by a production order under section 5 to produce any information, document or other material to the Minister or give the Minister or an official of the Ministry of Finance access to any information, document or material and the person contravenes the order without reasonable excuse;
- (aa) fails, without reasonable excuse, to comply with section 4A(1);
- (b) makes a disclosure of information to prejudice the implementation of a request or investigations being conducted following a request, contrary to section 5A; or
- (c) wilfully obstructs an officer executing a warrant under section 6 or a person lawfully accompanying him pursuant to subsection (5) of that section,

the person is guilty of an offence under this section.

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(2) If any person, in or in connection with delivering information pursuant to an arrangement, pursuant to a production order or required under section 6, wilfully tampers with it or alters it so that the information is false when received by the Minister, he is guilty of an offence.

(3) If any person without a reasonable excuse destroys or damages any information which he knows should be delivered pursuant to section 4A(1) or to the Minister pursuant to a production order or required under section 6, he is guilty of an offence.

(4) A person guilty of an offence may be proceeded against summarily, and is liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding six months, or to both such imprisonment and such a fine.

[Section 9 repealed and substituted by 2013 : 43 s. 6 effective 12 December 2013; subsections (1), (2) and (3) amended by 2015 : 30 s. 6 effective 4 July 2015]

Exceptionally large volume of information requests

9A (1) Where a request for information under section 5(1) is made with respect to an exceptionally large volume of information, the Minister shall consult with the requesting party on the possibility of that party bearing the costs of providing such information in the place of the person required to provide the information, but such consultation shall not be accepted as reason for the person from whom the information is requested to delay providing, or to fail to provide, the information requested.

(2) Where the requesting party declines to bear the costs of providing the exceptionally large volume of information requested, the costs shall be borne by the person from whom the information is requested.

(3) In this section “exceptionally large volume of information” means a volume that exceeds 10,000 pages of information.

[Section 9A inserted by 2014 : 32 s. 4 effective 8 December 2014]

Costs arising from a person’s compliance with this Act

9B (1) For the avoidance of doubt, the Minister shall not bear the costs arising—

- (a) in the case of an application which is made under section 5(7), except where the court—
 - (i) decides to hear the application for review of the production order; and
 - (ii) the outcome of the review of the production order is not in the Minister’s favour;
- (b) from proceedings resulting in the court determining whether to give permission under section 5A(3)(a); or
- (c) from a person’s general compliance with the provisions of this Act.

(2) Notwithstanding the generality of subsection (1), the Minister shall not bear the costs arising in the case of an application which is made under section 5(7) where the court—

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- (a) decides not to hear the application for review; or
- (b) decides to hear the application for review, but the production order is not set aside.

[Section 9B inserted by 2014 : 32 s. 4 effective 8 December 2014; paragraph (a) amended by 2015 : 30 s. 7 effective 4 July 2015; subsection (2) inserted by 2017 : 2 s. 4 effective 23 February 2017]

Depositions etc.

10 (1) Where a request so stipulates and the production order makes such requirement, information sought shall be in the form of—

- (a) depositions of witnesses, disclosed on oath; or
- (b) original documents or copies of original documents, certified or authenticated by a Notary Public.

(2) Regulations shall be made, conferring such functions on such persons as the regulations may specify, so that full effect can be given to subsection (1).

[Section 10 repealed and substituted by 2013 : 43 s. 7 effective 12 December 2013]

Advisory Committee

11 (1) The Minister of Finance shall establish and maintain a committee, to be known as “the Tax Convention Advisory Committee”, for the purpose of advising him on matters of policy connected with the performance of his functions under this Act.

(2) The Tax Convention Advisory Committee (“the Committee”) shall consist of such persons (not fewer than five in number), to be appointed by the Minister of Finance, as he thinks fit, but so that not fewer than three of the Committee’s members shall be persons appearing to him to be knowledgeable about the matters dealt with in the Convention.

(3) The Minister of Finance shall appoint a person to be the Committee’s chairman.

(4) Subject to Article 6 dealing with confidentiality, the Minister of Finance may refer to the Committee any matter mentioned in subsection (1), and shall take into account any advice that the Committee may tender on that matter.

Judicial review

12 *[Repealed by 2013 : 43 s. 8.]*

[Section 12 repealed by 2013 : 43 s. 8 effective 12 December 2013]

Regulations

13 (1) The Minister of Finance may make regulations—

- (a) prescribing anything that is required or permitted by this Act to be prescribed by regulation, or that is in the opinion of the Minister necessary or convenient to be prescribed for carrying out this Act or giving effect to it; and

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(b) creating offences and prescribing penalties (including, if thought fit, imprisonment) for such offences but not exceeding the penalties fixed by section 9.

(2) Regulations are subject to the affirmative resolution procedure.

Crown bound

14 This Act binds the Crown.

Commencement

15 *[omitted]*

FIRST SCHEDULE

(Section 2)

THE CONVENTION

CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (ON BEHALF OF THE GOVERNMENT OF BERMUDA) AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA RELATING TO THE TAXATION OF INSURANCE ENTERPRISES AND MUTUAL ASSISTANCE IN TAX MATTERS

The Government of the United Kingdom of Great Britain and Northern Ireland (on behalf of the Government of Bermuda) and the Government of the United States of America, desiring to conclude a convention with respect to the taxation of insurance enterprises and mutual assistance in tax matters, have agreed as follows:

Article 1

General Definitions

1 In this Convention, unless the context otherwise requires:

- (a) (i) the term "United States" means the United States of America, but does not include Puerto Rico, the Virgin Islands, Guam, or any other United States possession or territory; and
 - (ii) the term "Bermuda" means the islands in the Atlantic Ocean known as Bermuda;
- (b) the term "person" includes an individual, an estate, a trust, a company, a partnership, and any other body of persons;
- (c) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (d) the term "enterprise of insurance" means an enterprise of which the predominant business activity during the taxable year is the issuing of insurance or annuity contracts or acting as the reinsurer of risks underwritten by insurance companies, together with the investing or reinvesting of assets held in respect of insurance re-serves, capital, and surplus incident to the carrying on of the insurance business;
- (e) the terms "enterprise of a Covered Jurisdiction" and "enterprise of the other Covered Jurisdiction" mean respectively an enterprise carried on by a resident of a Covered Jurisdiction and an enterprise carried on by a resident of the other Covered Jurisdiction;
- (f) the term "competent authority" means:
 - (i) in the case of the United States, the Secretary of the Treasury or his delegate; and
 - (ii) in the case of Bermuda, the Minister of Finance or his delegate;

- (g) the “insurance obligation” means any obligation which, in accordance with normal industry practice, an insurer undertakes under the terms of a contract of insurance, to make payments or incur expenses in connection with the insurance protection offered under the contract, including any such obligation to pay claims to or for the benefit of the insured resulting from damages connected with the covered risk, to pay interest on such claims, and to pay the costs of defending an insured against such damages, but in no event including any obligation to pay premiums or other costs of reinsuring the covered risk; and
- (h) the term “Covered Jurisdiction” means the United States or Bermuda, as the context requires.

2 As regards the application of the Convention by a Covered Jurisdiction, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning, have the meaning which it has under the laws of that Jurisdiction. For purposes of the United States, the preceding sentence shall refer to laws concerning taxes. The competent authorities may agree to a common meaning of a term for purposes of this Convention.

Article 2

Residence

For purposes of this Convention, the term “resident” of a Covered Jurisdiction means:

- (a) in the case of the United States:
 - (i) any person, other than a company, resident in the United States for the purpose of United States tax; but in the case of a partnership, estate or trust, only to the extent that the income derived by such partnership, estate or trust is subject to United States tax as the income of a resident, either in its hands or in the hands of its partners or beneficiaries; and
 - (ii) a company created under the laws of the United States or a political subdivision thereof; and
- (b) in the case of Bermuda:
 - (i) an individual who has the status of a legal resident of Bermuda; and
 - (ii) a company, partnership, trust, or association created under the laws of Bermuda.

Article 3

Permanent Establishment

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1 For the purposes of Article 4, except as otherwise specified in this Article, the term “permanent establishment” means a regular place of business through which the business of an enterprise of insurance is wholly or partly carried on.

2 The term “Permanent establishment” shall include especially a place of management, a branch, an office and premises used a sales outlet.

3 The term “permanent establishment” shall also include the furnishing of services, including consultancy, management, technical and supervisory services, within a Covered Jurisdiction by an enterprise of insurance through employees or other persons but only if:

- (a) activities of that nature continue within the Jurisdiction for a period or periods aggregating more than 90 days in a twelve-month period, provided that a permanent establishment shall not exist in any taxable year in which such services are rendered in that Jurisdiction for a period or periods aggregating less than 30 days in the taxable year; or
- (b) the services are performed within the Jurisdiction for an associated enterprise.

For purposes of this paragraph, two enterprises shall be “associated” if either participates directly or indirectly in the management, control, or capital of the other, or if the same persons participate directly or indirectly in the management, control, or capital of both.

4 Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include any one or more of the following:

- (a) the maintenance of a regular place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise of insurance; or
- (b) the maintenance of a regular place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

5 Notwithstanding the provisions of paragraphs 1, 2, and 3, a person (other than an agent of independent status to whom paragraph 6 applies) acting in a Covered Jurisdiction on behalf of an enterprise of insurance of the other Covered Jurisdiction shall be deemed to be a permanent establishment of that enterprise in the first-mentioned Jurisdiction if he has and habitually exercises in the first-mentioned Jurisdiction an authority to include contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 4 which, if exercised through a regular place of business, would not make that regular place of business a permanent establishment under the provisions of that paragraph.

6 An enterprise of insurance shall not be deemed to have a permanent establishment in a Covered Jurisdiction merely because it carries on business in that Jurisdiction through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such person are devoted substantially on behalf of that enterprise, he shall not be considered an agent of independent status within the meaning of this paragraph if the transactions between the agent and the enterprise were not made under arm's length conditions.

7 The fact that a company which is a resident of a Covered Jurisdiction controls or is controlled by a company which is a resident of the other Covered Jurisdiction, or which carries on business in that other Jurisdiction (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 4

Taxation of Insurance Enterprises

1 The business profits of an enterprise of insurance of a Covered Jurisdiction derived from carrying on the business of insurance (including insubstantial amounts of income incidental to such business) shall not be taxable in the other Covered Jurisdiction unless the enterprise carries on or has carried on business in the other Jurisdiction through a permanent establishment situated therein. If the enterprise carries on or has carried on business as aforesaid, the business profits of the enterprise may be taxed in the other Jurisdiction but only so much of them as is attributable to that permanent establishment. Nothing in this Convention shall prevent the United States from taxing its residents (as determined under Article 2(a)) and its citizens as if this Convention had not entered into force.

2 Where an enterprise of insurance of one of the Covered Jurisdictions carries on or has carried on business through a permanent establishment in the other Jurisdiction, there shall in each Covered Jurisdiction be attributed to the permanent establishment business profits which would reasonably be expected to have been derived by it, if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions. In determining the business profits of a permanent establishment in a Covered Jurisdiction through which an enterprise of insurance of the other Jurisdiction carries on or has carried on business, there shall be allowed as deductions, for purpose of tax imposed by the first-mentioned Jurisdiction other than excise taxes on premiums paid to foreign insurers, expenses which are incurred for the purposes of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expense, interest, and other expenses incurred for the enterprise of insurance as a whole (or the part thereof which includes the permanent establishment), whether incurred in the Jurisdiction in which the permanent establishment is situated or elsewhere. For the purposes of this paragraph, the business profits to be attributed to a permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary. Nothing in this Article shall affect taxation by a Covered Jurisdiction of dividends, interest, royalties, gains or

compensation for services beneficially owned by a resident of the other Covered Jurisdiction if such items of income are not attributable to a permanent establishment of the beneficial owner of such income in the first-mentioned Jurisdiction.

3 A person which is a resident of a Covered Jurisdiction and which derives income from sources within the other Covered Jurisdiction shall not be entitled, in the other Covered Jurisdiction, to relief from taxation under this Article if:

- (a) 50 percent or less of the beneficial ownership of such person is owned, directly or indirectly, by any combination of one or more individual residents of a Covered Jurisdiction or citizens of the United States; or
- (b) the income of such person is used in substantial part, directly or indirectly, to make distributions (where such distributions are made with respect to beneficial ownership interests and are substantially disproportionate to such interests) to, or to meet liabilities (including liabilities for interest, royalties, or other expenses, but not including liabilities, whether or not for interest or other expenses, which constitute insurance obligations) to, persons who are neither residents of either of the Covered Jurisdictions nor citizens of the United States.

If one of the Covered Jurisdictions proposes to deny benefits to a resident of the other Covered Jurisdiction by reason of this paragraph, the competent authorities of the Covered Jurisdictions shall, upon request of the competent authority of the other Covered Jurisdiction, consult each other.

4 The provisions of paragraph 3 shall not apply if the person deriving the income is a company which is a resident of a Covered Jurisdiction in whose principal class of shares there is substantial and regular trading on a recognized stock exchange. For purposes of the preceding sentence, the term "recognized stock exchange" means:

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

5 Nothing in this Convention shall limit any provisions of the law of either Covered Jurisdiction which permit the distribution, apportionment, or allocation of income, deductions, credits, or allowances between persons, whether or not residents of a Covered Jurisdiction, owned or controlled directly or indirectly by the same interests when necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such persons.

6 The existing taxes to which this Article shall apply in the United States are the Federal income taxes imposed by the Internal Revenue Code (but excluding the accumulated earnings tax and the personal holding company tax), and the excise taxes imposed on insurance premiums paid to foreign insurers. This Article shall, however, apply

to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which applies to these taxes. This Article shall also apply to any identical or substantially similar taxes which are imposed by the United States after the date of signature of the Convention in addition to, or in place of, the existing taxes, and shall also apply to any tax imposed by Bermuda after the date of signature of the Convention which is identical or substantially similar to the existing United States taxes to which this Article applies, to the same extent as it applies to those existing taxes. The competent authorities of the Covered Jurisdictions shall notify each other of any significant changes which have been made in their respective taxation laws and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.

7 The taxation on a permanent establishment which an enterprise of insurance of a Covered Jurisdiction has in the other Covered Jurisdiction shall not be less favorably levied in that other Jurisdiction than the taxation levied on enterprises of insurance of that other Jurisdiction carrying on the same activities. This provision shall not be construed as obliging a Covered Jurisdiction to grant to residents of the other Covered Jurisdiction any personal allowances, reliefs, and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents. The provisions of this paragraph shall not be construed to prevent the United States from imposing an additional tax on the income of a permanent establishment maintained by a resident of Bermuda in the United States. Except where the provisions of paragraph 5 apply, interest, royalties, and other disbursements paid by a resident of a Covered Jurisdiction to an enterprise of insurance of the other Covered Jurisdiction shall, for purposes of determining the taxable profit of such resident, be deductible under the same conditions as if they had been paid to an enterprise of insurance of the first-mentioned Jurisdiction. For purposes of this paragraph, the term "taxation" means taxes which are the subject of this Convention.

Article 5

Mutual Assistance in Tax Matters

The competent authorities of the Covered Jurisdictions shall provide assistance as appropriate in carrying out the laws of the respective Covered Jurisdictions relating to the prevention of tax fraud and the evasion of taxes. In addition, the competent authorities shall, through consultations, develop appropriate conditions, methods, and techniques for providing, and shall thereafter provide, assistance as appropriate in carrying out the fiscal laws of the respective Covered Jurisdictions other than those relating to tax fraud and the evasion of taxes.

Article 6

Confidentiality

Any matters subject to assistance under Article 5 shall be treated as confidential in the same manner as such matters or items would be under the domestic laws of the Covered Jurisdiction requesting the assistance and, in any event, shall be disclosed only:

- (a) in the case of the United States, to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes, and
- (b) in the case of Bermuda, to the competent authority of Bermuda.

Such persons or authorities shall use such matters or items only for purposes of the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes. Such matters or items may be disclosed in public court proceedings or public decisions, but shall not be disclosed to any country other than one of the Covered Jurisdictions for any purpose.

Article 7

Entry into Force and Termination

1 This Convention shall be subject to ratification in accordance with the applicable procedures of each party and instruments of ratification shall be exchanged as soon as possible.

2 The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:

- (a) in respect of excise taxes on insurance premiums paid to foreign insurers, for premiums paid or credited on or after January 1, 1986;
- (b) in respect of income taxes imposed on the business profits derived by an enterprise of insurance, for such profits derived in taxable years beginning on or after the first day of the calendar year in which this Convention enters into force;
- (c) in respect of mutual assistance covered by the first sentence of Article 5, for taxable years not barred by the statute of limitations of the Covered Jurisdiction requesting such assistance; provided, however, that neither Covered Jurisdiction shall be required by Article 5 to provide such assistance with respect to taxable years beginning prior to January 1, 1977; and
- (d) in respect of mutual assistance covered by the second sentence (and not also described in the first sentence) of Article 5, for taxable years not barred by the statute of limitations of the Covered Jurisdiction requesting such assistance; provided, however, that neither Covered Jurisdiction shall be required by Article 5 to provide such assistance with respect to:
 - (i) taxable years beginning prior to January 1, 1977; or
 - (ii) taxable years beginning prior to the entry into force of the Convention if the provisions of such assistance would cause or result in the breach of an obligation to maintain confidentiality of information under the

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laws of such Jurisdiction in effect on the date of signature of the Convention.

2 The Convention shall continue in force indefinitely, but either party may give notice of termination to the other party on or after June 30 of the year following the calendar year in which this Convention enters into force and in such event the Convention shall terminate on the first day of the seventh full calendar month following that in which the notice is given.

Done at Washington, in duplicate, this Eleventh day of July, 1986.

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF BRITAIN AND
NORTHERN IRELAND (ON BEHALF OF THE GOVERNMENT OF BERMUDA):
JOHN SWAN

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
JOHN C. WHITEHEAD

SECOND SCHEDULE

(Section 2)

THE TEXT OF THE NOTES

(1) The United States Government noted that in order to implement the relief from excise taxes pursuant to paragraph 1 of Article 4 of the Convention it would be necessary to establish procedures which would, inter alia, ensure that companies claiming the benefits of that paragraph are entitled to such benefits and, in the case of refunds, that the amount and recipient of such refunds are properly determined. Representatives of Bermuda assured the representatives of the United States Government of Bermuda's willingness to establish such procedures as may be mutually agreed to ensure that relief from the excise tax is obtained by appropriate persons.

(2) The United States Government noted that paragraph 3 of Article 4 of the Convention limits the availability of the exemption granted to insurance enterprises by either Covered Jurisdiction under the Convention to persons resident in the other Covered Jurisdiction which (i) are more than 50 percent owned, directly or indirectly, by individual residents of the Covered Jurisdiction or U.S. citizens; and (ii) do not use their income in substantial part, directly or indirectly, to make certain payments to persons who are neither residents of a Covered Jurisdiction nor U.S. citizens. The United States Government indicated that, for purposes of the ownership test in that provision, it would not treat any individual as owning "indirectly" through an intermediary entity any beneficial interest in an entity resident in one of the Covered Jurisdictions if the evidence of and rights to the ownership of any interest in such intermediary entity are in bearer form. For purposes of the second test, the term "Liabilities" refers to payments which reduce gross premiums or are deductible against gross income, and includes interest, royalties, and premiums paid in connection with reinsuring risks. Also, if the sum of (i) the ratio which reinsurance premium payments bears to gross premiums less return premiums and (ii) the ratio which payments of other liabilities bears to (a) gross premiums less return premiums and less reinsurance premium payments plus (b) gross income from all other activities, is no more than 50 percent, such payments will not generally be considered "substantial," provided that in appropriate circumstances a lower aggregate percentage will be considered "substantial".

(3) The United States Government expressed its concern that the obligations of a Covered Jurisdiction not be construed to establish an obligation to provide assistance with respect to matters other than those relating to the domestic laws of a Covered Jurisdiction respecting taxes. The representatives of the United States and Bermuda agreed that the intended scope of Article 5 of the Convention is limited to assistance relating to the domestic laws of the Covered Jurisdictions concerning taxes.

(4) Representatives of Bermuda expressed concerns as to the policies of the United States Government regarding assistance that might relate to persons not resident in one of the two Covered Jurisdictions and matters that do not constitute a criminal investigation. The representatives of the United States Government discussed with the representatives of Bermuda the United States' policies relating to information exchange. The representatives of the United States and Bermuda agreed that, where the United States requests assistance

with respect to a matter which (i) relates to a person not resident in one of the two Covered Jurisdictions or (ii) does not constitute a United States criminal or tax fraud investigation, a senior official designated by the Secretary of the Treasury shall certify such request as being relevant to and necessary for the determination of the tax liability of a United States taxpayer, or the criminal tax liability of a person under the laws of the United States. The representatives of the United States and Bermuda further agreed that, in connection with any assistance relating to persons not resident in one of the two Covered Jurisdictions, it shall be established to the satisfaction of the competent authority of the requested Jurisdiction that such assistance is necessary for the proper administration and enforcement of the fiscal laws of the requesting Jurisdiction. Where such necessity has been duly established, the competent authorities shall consult as to the appropriate form of such assistance.

(5) The representatives of the United States and Bermuda agreed that, subject to the limitations described in and agreement to procedures referred to in paragraph (4) above, it is intended that the mutual assistance to be provided under Article 5 of the Convention come into effect under the limitations of Article 7 as follows:

- (i) Subject to paragraph (iv), Bermuda's obligation under the Convention to provide assistance with respect to civil and criminal tax matters relating to taxable years of a taxpayer beginning after the entry into force of the Convention will not be limited by any confidentiality restrictions of Bermudian law, other than those relating to solicitor-client privilege.
- (ii) With respect to matters relating to taxable years of a taxpayer beginning before the entry into force of the Convention (but beginning on or after January 1, 1977 and not barred by the statute of limitations), paragraph 2(d)(ii) of Article 7 limits Bermuda's obligation to provide assistance with respect to civil tax matters (other than civil fraud) if the provision of such assistance would entail breach of an obligation to maintain confidentiality of information under the laws of Bermuda in effect on the date of signature of the Convention. Under this standard, confidential information would only include information protected by Bermudian statutory and common law. It is understood that under Bermudian common law confidential information would include information protected by the common law solicitor-client privilege and banker-client privilege. It was agreed that if a taxpayer claims that other categories of information are protected under Bermudian common law, and if the United States so requests, the Government of Bermuda will have such a claim determined in the courts of Bermuda.
- (iii) Bermuda's obligation under subparagraph 2(c) of Article 7 to provide assistance with respect to criminal tax matters (and tax matters involving civil fraud) relating to taxable years of a taxpayer beginning before the entry into force of the Convention (but on or after January 1, 1977 and not barred by the statute of limitations) would only be limited by the confidentiality obligations of the solicitor-client privilege.

- (iv) Bermuda's obligation under the Convention to provide assistance with respect to civil tax matters (other than civil fraud) relating to a taxpayer's taxable years beginning after the entry into force of the Convention will not require it to cause any person to breach a legal obligation to maintain confidentiality of documents or information, properly asserted by such person under the laws of Bermuda as in effect on the date of signature of the Convention, where such documents or information were created in or derived from periods prior to the date of entry into force of the Convention. However, the limitation on Bermuda's obligation described in the preceding sentence will not apply to documents or information created in or derived from a date preceding the entry into force of the Convention that are relevant to a request relating to taxable years after the entry into force of the Convention and are of a kind that have a continuing operational effect. For example, if assistance is requested with respect to a taxpayer's bank transactions occurring after the entry into force of the Convention and the signature card for the account in question was executed prior to the entry into force of the Convention, Bermuda's obligation to provide assistance with respect to such a signature card would not be affected by confidentiality restrictions. Similarly, if a taxpayer's depreciation deduction for a year after entry into force of the Convention is under examination, Bermuda's obligation to provide assistance with respect to information about the purchase price of the property in question, if such property was acquired before the entry into force of the Convention, would not be affected by any confidentiality restrictions of Bermudian law.

(6) The representatives of the United States Government expressed concerns regarding whether assistance would be provided in a form which would permit its use in judicial or administrative proceedings. The representatives of the United States and Bermuda agreed that under Article 5 of the Convention, it was intended that, if specifically requested by a competent authority of a Covered Jurisdiction, the competent authority of the other Covered Jurisdiction shall provide information in the form of depositions of witnesses and authenticated copies of original documents (including books, papers, statements, records, accounts and writings) to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other Jurisdiction.

(7) Representatives of Bermuda also expressed concerns as to the scope for use of unilateral compulsory measures by one Covered Jurisdiction to obtain documents, records, or other materials located in the territory of the other Covered Jurisdiction, and within the scope of assistance under the Convention after entry into force of the Convention. In this context the representatives of the United States Government confirmed that, with respect to documents, records, or other materials in the custody of a resident of a Covered Jurisdiction and located in the territory of that Jurisdiction, it shall be the policy of the United States, where practicable, to request assistance pursuant to the provisions of the Convention before using unilateral measures.

(8) The representatives of the United States Government inquired whether shares of a company organized under the laws of Bermuda could be issued in bearer form. The

representatives of Bermuda informed the United States representatives that the laws of Bermuda did not permit the issuance of company shares to an unnamed person.

(9) The United States representatives sought clarification that matters that were the subject of assistance under the Convention but that are made public in accordance with Article 6 of the Convention would not be further subject to Article 6. The representatives of the United States and Bermuda agreed that matters that are the subject of assistance under the Convention but that are made public in accordance with the Convention would not be further subject to Article 6.

(10) The representatives of the Government of the United States observed that, under the legal system applicable in Bermuda, the Convention is not self-executing and that legislation would be required in order to implement the provisions of the Convention. The representatives of Bermuda understood that instruments of ratification would not be exchanged until such legislation as may be required to implement the provisions of the Convention has been enacted. It was further understood that the Convention would be ratified and other necessary steps, such as the adoption of implementing legislation necessary to meet the obligations of the Convention, would be taken so as to permit the exchange of instruments of ratification at the earliest possible date.

(11) The representatives of Bermuda inquired whether, following the entry into force of the Convention, the Secretary of the Treasury of the United States would be prepared to certify that assistance under the Convention, and subject to the understandings of this Note, would be satisfactory for purposes of section 927(e)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), relating to countries qualifying as a Jurisdiction in which a Foreign Sales Corporation (FSC) may be organized. The representatives of Bermuda also inquired whether the assistance provided for in the Convention, subject to the understandings of this Note, would be satisfactory for purposes of eligibility for convention tax benefits under section 274(h)(6) of the Code.

The representatives of the United States stated that upon entry into force of the Convention, and subject to the understandings contained in this Note, the Secretary of the Treasury, or his delegate, will be prepared to certify Bermuda for purposes of section 927(e)(3) of the Code such that a company organized under the laws of Bermuda may qualify as a FSC. Such certification would be published in the Federal Register and may be terminated effective six months after the date of publication of a notice of termination in the Federal Register. The United States Government also stated that, upon entry into force of the Convention, the Secretary of the Treasury, or his delegate, will be prepared to execute on behalf of the United States Government an executive agreement satisfying the requirements of section 274(h)(6) of the Code, which would incorporate by cross-reference the provisions of Articles 5 and 6 of the Convention and this Note, and would allow persons incurring expenses for attending business conventions in Bermuda to claim deductions for such expenses as though Bermuda were included as part of the "North American area."

(12) The representatives of Bermuda emphasized the necessity of including in the Convention additional provisions intended to prevent changes in U.S. income tax treaty policy from adversely affecting the economic position of Bermuda's insurance and tourism industries relative to those of U.S. treaty partners in similar circumstances under current U.S. tax treaty policy. The United States representatives were not able to accept such

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provisions. However, the United States Government recognizes that insurance and tourism currently play a vital role in the Bermudian economy. If, in the future, the income tax treaty policies of the United States change in a manner which would have a material, adverse effect on such Bermudian business activities, compared with existing circumstances, the United States Government would be prepared to reopen the discussions in order to take account of such change in policies.

THIRD SCHEDULE

(Section 2)

THE PROTOCOL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned, John Swan, Premier of Bermuda, and George P. Shultz, Secretary of State of the United States of America, being duly authorized for the purpose by their respective Governments, have met for the purpose of exchanging instruments of ratification of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland (on behalf of the Government of Bermuda) and the Government of the United States of America relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, with a related Exchange of Notes, signed at Washington on July 11, 1986. The United States ratification is subject to the following reservations:

(1) Effective January 1, 1990, said Convention shall not operate to prevent the imposition by the United States of any excise taxes on insurance premiums paid to foreign insurers, whether or not such premiums constitute income of an enterprise of insurance of a Covered Jurisdiction; and

(2) Said Convention shall in no event operate to prevent the imposition by the United States of any excise taxes on insurance premiums paid to foreign insurers except with respect to insurance premiums that either:

- (a) constitute income of an enterprise of insurance of a Covered Jurisdiction carried on by a company in a taxable year in which the company is a controlled foreign corporation within the meaning of section 957(a) or (b) of title 26 of the United States Code as in effect for such taxable year; or
- (b) constitute income of an enterprise of insurance of a Covered Jurisdiction carried on by a company in a taxable year in which:
 - (i) the company is subject to the rules of section 953(c) of the Internal Revenue Code of 1986, and
 - (ii) the company is a controlled foreign corporation within the meaning of section 957(a) of the Internal Revenue Code of 1986 as modified by section 953(c)(1) of said Code, and

the premiums constitute related person insurance income within the meaning of section 953(c) of the Internal Revenue Code of 1986.

The respective instruments of ratification having been compared and found to be in due form, the exchange took place this day.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed the present Protocol of Exchange of Instruments of Ratification.

DONE in duplicate in the English language at Washington this second day of December, 1988.

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FOR THE GOVERNMENT OF THE UNITED KINGDOM OF BRITAIN AND
NORTHERN IRELAND (ON BEHALF OF THE GOVERNMENT OF BERMUDA):
JOHN SWAN

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
GEORGE P. SCHULTZ

[Assent Date: 29 August 1986]

[This Act was brought into operation on 2 December 1988 by BR 72/1988]

[Amended by:

1989 : 12
1999 : 37
2011 : 20
2012 : 27
2013 : 43
2014 : 32
2015 : 30
2017 : 2]