Double Tax Agreements (Switzerland) Order 2020

Patsy Reddy, Governor-General

Order in Council

At Wellington this 24th day of February 2020

Present:
Her Excellency the Governor-General in Council

This order is made under section BH 1 of the Income Tax Act 2007 on the advice and with the consent of the Executive Council.

Contents

Order

1 Title

This order is the Double Tax Agreements (Switzerland) Order 2020.

2 Commencement

This order comes into force on the 28th day after the date of its notification in the *Gazette*.

3 Commencement of convention and protocols

(1) The convention and protocol set out in Schedule 1 are in force.

(2) The protocol set out in Schedule 2—

(a) comes into force in accordance with Article IX of the protocol; and

(b) amends the convention and protocol set out in Schedule 1.

4 Purposes

The arrangements specified in the convention and the protocols set out in Schedules 1 and 2 have been negotiated with the Swiss Confederation for 1 or more of the purposes set out in section BH 1(2) of the Income Tax Act 2007.

5 Arrangements to have effect

The arrangements specified in the convention and the protocols set out in Schedules 1 and 2 have effect according to the convention and the protocols.

6 Revocation

The Double Taxation Relief (Switzerland) Order 1981 (SR 1981/285) is revoked on the date that this order comes into force in accordance with clause 2.

Schedule 1
Convention between New Zealand and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income

cl 3(1)

The Government of New Zealand and the Swiss Federal Council

Desiring to conclude a Convention for the avoidance of double taxation with respect to taxes on income

Have agreed as follows:

Article 1
Personal scope

This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2
Taxes covered

1. The existing taxes to which this Convention shall apply are:

   (a) in the case of New Zealand:

   the income tax and the excess retention tax, (hereinafter referred to as "New Zealand tax");

   (b) in the case of Switzerland:

   the federal, cantonal and communal taxes on income (total income, earned income, income from capital, industrial and commercial profits, capital gains and other items of income), (hereinafter referred to as "Swiss tax").

2. The Convention shall apply also to any identical or substantially similar taxes which are imposed in either Contracting State after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws relating to the taxes to which the Convention applies.

Article 3
General definitions

1. For the purposes of this Convention, unless the context otherwise requires:

   (a) (i) the term "New Zealand", when used in a geographical sense, means the metropolitan territory of New Zealand (including the

outlying islands) but does not include the Cook Islands, Niue or Tokelau. It also includes areas adjacent to the territorial sea of the metropolitan territory of New Zealand (including the outlying islands) which by New Zealand legislation and in accordance with international law have been, or may hereafter be, designated as areas over which New Zealand has sovereign rights for the purposes of exploring them or of exploring, exploiting, conserving and managing the natural resources of the sea, or of the sea-bed and subsoil;

(ii) the term "Switzerland" means the Swiss Confederation;

(b) the terms "a Contracting State" and "the other Contracting State" mean New Zealand or Switzerland as the context requires;

(c) the term "person" includes an individual, a company and any other body of persons;

(d) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(e) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(f) the term "national" means any individual possessing the citizenship of a Contracting State and any legal person, partnership or association deriving its status as such from the law in force in a Contracting State;

(g) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

(h) the term "competent authority" means:

(i) in the case of New Zealand, the Commissioner of Inland Revenue or his authorised representative;

(ii) in the case of Switzerland, the Director of the Federal Tax Administration or his authorised representative.

2. As regards the application of the Convention by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.

Article 4
Resident

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the law of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

   (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

   (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

   (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

   (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

Article 5
Permanent establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

   (a) a place of management;

   (b) a branch;

   (c) an office;

   (d) a factory;

   (e) a workshop, and

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if:

(a) it carries on supervisory activities in that other State for more than twelve months in connection with a construction, installation or assembly project which is being undertaken in that other State; or

(b) substantial equipment or machinery is for more than twelve months in that other State being used by, for or under contract with the enterprise in exploration for, or the exploitation of, natural resources, or in activities connected with such exploration or exploitation.

6. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 7 applies—is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph.

7. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State 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.

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

Article 6
Income from real property

1. Income derived by a resident of a Contracting State from real property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other 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. 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, boats and aircraft shall not be regarded as real property.

3. The provision of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of real property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from real property of an enterprise and to income from real property used for the performance of independent personal services.

Article 7
Business profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to

make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary. The method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8
Shipping and air transport

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident.

3. The provisions of paragraph 1 shall also apply to profits derived from the participation in a pool, a joint business or an international operating agency.

Article 9
Associated enterprises

Where—

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 10
Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the law of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 15 percent of the gross amount of the dividends. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

   This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares and other income assimilated to income from shares by the taxation law of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any

tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11
Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the law of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 percent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. However, this term does not include income dealt with in Article 10. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the inter-

est, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12
Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the law of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 10 percent of the gross amount of the royalties. The competent authorities of the Contracting State shall by mutual agreement settle the mode of application of this limitation.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13
Alienation of property

1. Income or gains derived by a resident of a Contracting State from the alienation of real property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Income or gains from the alienation of personal property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of personal property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such income or gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Income or gains from the alienation of ships or aircraft operated in international traffic or personal property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
4. Income or gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14
Independent personal services

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless he has a fixed base regularly available to him in the other State for the purpose of performing his activities. If he has such a fixed base, then the income may be taxed in the other State but only so much of it as is attributable to that fixed base.
2. The term “professional services” includes, especially, independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15
Dependent personal services

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
   (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned, and
   (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
   (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

Article 16
Directors' fees

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17
Artistes and athletes

1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.
2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

Article 18
Pensions and annuities

1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment and any annuity paid to such resident shall be taxable only in that State.

2. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 19
Government service

1. (a) Remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

   (b) However, such remuneration shall be taxable only in the State of which the individual is a resident if the services are rendered in that State and the individual

      (i) is a national of that State; or

      (ii) did not become a resident of that State solely for the purpose of rendering the services.

2. (a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

   (b) However, such pension shall be taxable only in the State of which the individual is a resident if he is a national of that State.

3. The provisions of Articles 15, 16 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

Article 20
Students

Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

Article 21
Other income

Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in that State except that, if such income is derived from sources within the other Contracting State, it may also be taxed in that other State.

Article 22
Elimination of double taxation

1. Subject to any provisions of the law of New Zealand which may from time to time be in force and which relate to the allowance of a credit against New Zealand tax of tax paid in a country outside New Zealand (which shall not affect the general principle hereof), Swiss tax paid under the law of Switzerland and consistently with this Convention, whether directly or by deduction, in respect of income derived by a New Zealand resident from sources in Switzerland (excluding, in the case of a dividend, tax paid in respect of the profits out of which the dividend is paid) shall be allowed as a credit against New Zealand tax payable in respect of that income.

2. For the purposes of this Article, profits, income or gains of a resident of New Zealand which may be taxed in Switzerland in accordance with the Convention shall be deemed to arise from sources in Switzerland.

3. Where a resident of Switzerland derives income dealt with in the Convention and which, in accordance with the provisions of the Convention, may be taxed in New Zealand, Switzerland shall, subject to the provisions of paragraph 4, exempt such income from Swiss tax but may, in calculating tax on the remaining income of that person, apply the rate of tax which would have been applicable if the exempted income had not been so exempted.

4. Where a resident of Switzerland derives dividends, interest or royalties which, in accordance with the provisions of Articles 10, 11 and 12, may be taxed in New Zealand, Switzerland shall allow, upon request, relief to that person. The relief may consist of:

   (a) a deduction from the Swiss tax on the income of that person of an amount equal to the tax levied in New Zealand in accordance with the provisions of Articles 10, 11 and 12; such deduction shall not, however, exceed that part of the Swiss tax, as computed before the deduction is given, which is attributable to the income which may be taxed in New Zealand, or

   (b) a lump sum reduction of the Swiss tax determined by standardised formulae which have regard to the general principles of the relief referred to in subparagraph (a), or

(c) a partial exemption of such dividends, interest or royalties from Swiss tax, in any case consisting at least of the deduction of the tax levied in New Zealand from the gross amount of the dividends, interest or royalties.

Switzerland shall determine the applicable relief and regulate the procedure in accordance with the Swiss provisions relating to the carrying out of international conventions of the Swiss Confederation for the avoidance of double taxation.

5. A company which is a resident of Switzerland and which derives dividends from a company which is a resident of New Zealand shall be entitled, for the purposes of Swiss tax with respect to such dividends, to the same relief which would be granted to the company if the company paying the dividends were a resident of Switzerland.

Article 23
Mutual agreement procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident. This case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of the Convention.

Article 24
Exchange of information

1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying

out the provisions of this Convention in relation to the taxes which are the subject of the Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those concerned with the assessment and collection of the taxes which are the subject of the Convention. No information as aforesaid shall be exchanged which would disclose any trade, business, industrial or professional secret or trade process.

2. In no case shall the provisions of this Article be construed as imposing upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

Article 25
Diplomatic agents and consular officers

1. Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

2. Notwithstanding the provisions of Article 4, an individual who is a member of a diplomatic mission, consular post or permanent mission of a Contracting State which is situated in the other Contracting State or in a third State shall be deemed for the purposes of the Convention to be a resident of the sending State if:

   (a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State, and

   (b) he is liable in the sending State to the same obligations in relation to tax on his total income as are residents of that State.

3. The Convention shall not apply to international organisations, to organs or officials thereof and to persons who are members of a diplomatic mission, consular post or permanent mission of a third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income.

Article 26
Territorial extension

1. This Convention may be extended, either in its entirety or with any necessary modifications, to any territory for whose international relations New Zealand is responsible, which imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions (including conditions as to termination) as may be specified and agreed between the contracting States

in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedures.

2. Unless otherwise agreed by both Contracting States, the termination of the Convention by one of them under Article 28 shall also terminate, in the manner provided for in that Article, the application of the Convention to any territory to which it has been extended under this Article.

Article 27
Entry into force

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at Wellington as soon as possible.

2. The Convention shall enter into force on the fifteenth day after the date of the exchange of instruments of ratification and its provisions shall apply:

   (a) In the case of New Zealand:

   to income assessable for any income year beginning on or after 1 April 1981;

   (b) in the case of Switzerland:

   to any taxable year beginning on or after 1 January 1981.

Article 28
Termination

This Convention shall remain in force indefinitely but either of the Contracting States may on or before 30 June in any calendar year give to the other Contracting State through diplomatic channels written notice of termination and, in that event, the Convention shall cease to apply:

(a) in the case of New Zealand:

to income assessable for any income year beginning on or after 1 April immediately following the calendar year in which the notice of termination is given;

(b) in the case of Switzerland:

to any taxable year beginning on or after 1 January immediately following the calendar year in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Convention.

DONE in duplicate at Berne this 6th day of June 1980 in the English and German languages, both texts being equally authoritative.

For the Government of New Zealand
R D Muldoon

For the Swiss Federal Council
Pierre Aubert

Protocol

to the Convention between New Zealand and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income.

At the signing of the Convention concluded today between the Government of New Zealand and the Swiss Federal Council for the avoidance of double taxation with respect to taxes on income, the two States have agreed upon the following additional provisions which shall form an integral part of that Convention,

1. With reference to Article 2,
   - (a) the term "New Zealand tax" does not include the bonus issue tax;
   - (b) the term "Swiss tax" does not include the Federal anticipatory tax withheld at the source on prizes in a lottery;
   - (c) the terms "New Zealand tax" and "Swiss tax" do not include any penalty or interest imposed under the law in force in either Contracting State relating to the taxes to which the Convention applies.
2. With reference to Article 7,
   - (a) in respect of paragraphs 1 and 2, where an enterprise of a Contracting State sells goods or merchandise or carries on business in the other State through a permanent establishment situated therein, the profits of that permanent establishment shall not be determined on the basis of the total amount received by the enterprise, but shall be determined only on the basis of the remuneration which is attributable to the actual activity of the permanent establishment for such sales or business. In the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, when the enterprise has a permanent establishment the profits of such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract which is effectively carried out by the permanent establishment in the State where the permanent establishment is situated. The profits related to that part of the contract which is carried out by the head office of the enterprise shall be taxable only in the State of which the enterprise is a resident;
   - (b) nothing in this Article shall affect the operation of any law of a Contracting State relating to the computation of taxable profits from life insur-

ance, provided that if the relevant law in force in either State at the date of signature of the Convention is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

3. With reference to Articles 10, 11 and 12,

   (a) if in any future double taxation convention with any other State, being a member of the Organisation for Economic Cooperation and Development, New Zealand should limit its taxation at source of dividends, interest or royalties to a rate lower than the one provided for in any of those articles, the Government of New Zealand shall without undue delay inform the Swiss Federal Council and shall enter into negotiations with the Swiss Federal Council with a view to providing the same treatment;

   (b) in determining for the purposes of those Articles, whether dividends, interest or royalties are beneficially owned by a resident of New Zealand, dividends, interest or royalties in respect of which a trustee is subject to tax in New Zealand shall be treated as being beneficially owned by that trustee.

4. If, in a Convention for the avoidance of double taxation that is made between New Zealand and a third State after the date of signature of the Convention, New Zealand shall include an Article on non-discrimination, the Government of New Zealand shall without undue delay inform the Swiss Federal Council and shall enter into negotiations with the Swiss Federal Council with a view to including such an Article in the Convention concluded today.

DONE in duplicate at Berne this 6th day of June 1980 in the English and German languages, both texts being equally authoritative.

For the Government of New Zealand
R D Muldoon

For the Swiss Federal Council
Pierre Aubert

Schedule 2
Protocol amending the Convention between New Zealand and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income

cl 3(2)

The Government of New Zealand and the Swiss Federal Council;

Desiring to amend the Convention between the Swiss Confederation and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Berne on 6 June 1980 (hereinafter "the Convention");

Have agreed as follows:

Article I

The following new preamble shall replace the existing preamble:

"The Swiss Federal Council and the Government of New Zealand;

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States);

Have agreed as follows:"

Article II

1. The existing paragraph 7 of Article 7 (Business profits) of the Convention shall be renumbered as paragraph 8.

2. The following new paragraph 7 shall be added to Article 7 (Business profits) of the Convention:

"7. A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after 5 years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default."

Article III

1. The existing paragraph of Article 9 (Associated enterprises) of the Convention shall be numbered as paragraph 1.

2. The following new paragraph 2 shall be added to Article 9 (Associated enterprises) of the Convention:

"2. Where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting

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

3. The following new paragraph 3 shall be added to Article 9 (Associated enterprises) of the Convention:

"3. A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after 5 years from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default."

Article IV

The following new paragraph 6 shall be added to Article 22 (Elimination of double taxation) of the Convention:

"6. The provisions of paragraph 3 shall not apply to income derived by a resident of Switzerland where New Zealand applies the provisions of this Convention to exempt such income from tax or applies the provisions of paragraph 2 of Article 10, paragraph 2 of Article 11 or paragraph 2 of Article 12 to such income."

Article V

The first sentence of paragraph 1 of Article 23 (Mutual agreement procedure) of the Convention shall be deleted and replaced by the following sentence:

"Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with the provisions of this Convention, that person may, irrespective of the remedies provided by the domestic law of those States, present the case to the competent authority of either Contracting State."

Article VI

The following new paragraphs 5 and 6 shall be added to Article 23 (Mutual agreement procedure) of the Convention:

"5. Where,

(a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or

both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

(b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

6. The Contracting States may release to the arbitration board, established under the provisions of paragraph 5, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations of disclosure described in paragraph 1 of Article 24 with respect to the information so released."

Article VII

The following new Article 25A (Entitlement to benefits) shall be added to the Convention immediately following Article 25:

"Article 25A
Entitlement to benefits

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

Article VIII

1. The existing paragraph 4 of the Protocol to the Convention shall be renumbered as paragraph 5.

2. The following new paragraph 4 shall be added to the Protocol to the Convention:

"4. With reference to paragraph 5 of Article 23

Notwithstanding paragraph 5 of Article 23 a case may not be submitted to arbitration if:

(a) in the case of New Zealand:

(i) the case involves the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007, including any subsequent provisions replacing, amending or updating these anti-avoidance rules. New Zealand shall notify the Swiss Confederation through diplomatic channels of any such subsequent provisions;

(ii) the case involves the application of New Zealand's permanent establishment anti-avoidance rule contained in section GB 54 of the Income Tax Act 2007, including any subsequent provisions replacing, amending or updating these anti-avoidance rules. New Zealand shall notify the Swiss Confederation through diplomatic channels of any such subsequent provisions; and

(b) in the case of Switzerland, the case involves the application of tax avoidance as defined under case law by the Swiss Federal Court.

It is further understood that the provisions of paragraph 5 of Article 23 shall not apply if:

(a) the case concerns issues where Chapter VI D.4 (hard-to-value intangibles) of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2017 or a later version of those Guidelines) is applied by a Contracting State in an adjustment according to paragraph 1 of Article 9:

(i) in a fiscal year that is not time barred but concerns profits that relate to a time barred fiscal year in that Contracting State; or

(ii) through the application of domestic legislation which provides for a more extended period for adjustments specifically for hard-to-value intangibles than what applies under the regular statute of limitation for reassessments;

(b) the case is connected with fraud, gross negligence or wilful default."

Article IX

1. Each of the Contracting States shall notify the other via diplomatic channels of the completion of the procedures required by its law for the bringing into force of this Protocol.

2. The Protocol shall enter into force on the date of the receipt of the later of these notifications and shall thereupon have effect:

(a) in the case of New Zealand:

(i) in respect of withholding tax on income, profits or gains derived by a non-resident, for amounts paid or credited on or after the first day of January following the calendar year in which the Protocol enters into force;

(ii) in respect of other taxes, for any taxation year beginning on or after 1 April next following the date on which the Protocol enters into force; and

(b) in the case of Switzerland:

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

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

3. Notwithstanding the provisions of subparagraphs (a) and (b) of paragraph 2, the amendments made by Articles II, III, V, VI and VIII of this Protocol shall have effect from the date of entry into force of this Protocol, without regard to the taxable period to which the matter relates. However, for cases that are under consideration under paragraph 2 of Article 23 of the Convention at the date of entry into force of this Protocol, the start date of the 3-year period referred to in paragraph 5 of Article 23 of the Convention shall be the later of the date of entry into force of this Protocol and the date otherwise provided for under paragraph 5 of Article 23 of the Convention.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Protocol.

Done in duplicate at Wellington this 8th day of August 2019 in the German and English languages, both being equally authentic.

For the Government of New Zealand	**For the Swiss Confederation**
Hon Stuart Nash	Dr. David Vogelsanger
Minister of Revenue	Ambassador of the Swiss Confederation

Michael Webster,
Clerk of the Executive Council.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which comes into force on the 28th day after the date of its notification in the *Gazette*, replaces the Double Taxation Relief (Switzerland) Order 1981. That order gave effect to a convention and a protocol between the Government of New Zealand and the Swiss Federal Council that was signed in 1980 (the **convention**). The convention relates to avoidance of double taxation with respect to taxes on income. It came into force in 1981 in accordance with Article 27 of the convention.

This order gives effect to a protocol, signed on 8 August 2019, that amends the convention. The protocol will come into force in accordance with Article 9 of the protocol.

The parties to the protocol will notify each other of the completion of their respective domestic procedures for the entry into force of the protocol. The date on which the protocol comes into force will be publicised on http://taxpolicy.ird.govt.nz/tax-treaties

A copy of the national interest analysis can be found at https://www.parliament.nz/resource/en-NZ/SCR_93187/a23c6c6e7d9e316ff556b47ea011ae390c02809d

Issued under the authority of the Legislation Act 2012.
Date of notification in *Gazette*: 27 February 2020.
This order is administered by the Inland Revenue Department.

Wellington, New Zealand:
Published under the authority of the New Zealand Government—2020