

SECOND PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF MALAYSIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AS AMENDED BY THE FIRST PROTOCOL OF 2 AUGUST 1999

The Government of Australia and the Government of Malaysia,

Desiring to amend the Agreement between the Government of Australia and the Government of Malaysia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income done at Canberra on 20 August 1980 (as amended by the first Protocol to that Agreement, done at Sydney on 2 August 1999), (in this Protocol referred to as "the Agreement, as amended"),

Have agreed as follows:

ARTICLE 1

Article 9 of the Agreement, as amended, is amended by adding after paragraph 2 the following paragraph:

"3. Where profits on which an enterprise of one of the Contracting States has been charged to tax in that State are also included, by virtue of the provisions of paragraph 1 or 2, in the profits of an enterprise of the other Contracting State and charged to tax in that other State, and the profits so included are profits which might reasonably have been expected to have accrued to that enterprise of the other State if the conditions operative between the enterprises had been those which might reasonably have been expected to have operated between independent enterprises dealing wholly independently with one another, then the firstmentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the firstmentioned State. In determining such an adjustment, due regard shall be had to the other provisions of this Agreement and for this purpose the competent authorities of the Contracting States shall if necessary consult each other."

ARTICLE 2

Article 10 of the Agreement, as amended, is deleted and substituted with the following:

"ARTICLE 10

Dividends

1. Dividends paid by a company which is a resident of one of the Contracting States for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. However, those 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:

(a) in Australia:

(i) no tax shall be charged on dividends to the extent to which those dividends have been "franked" in accordance with Australia's law relating to tax, if the person beneficially entitled to those dividends is a company (other than a

partnership) which holds directly at least 10 per cent of the voting power in the company paying the dividends; and

- (ii) tax charged shall not exceed 15 per cent of the gross amount of the dividends to the extent to which those dividends are not within subparagraph (a)(i); and

- (b) in Malaysia:

no tax shall be charged on dividends paid by a company which is resident in Malaysia for the purposes of Malaysian tax being dividends to which a resident of Australia is beneficially entitled, in addition to the tax chargeable in respect of the income or profits of the company paying the dividends.

3. For the purposes of paragraph 2, if the relevant law in either Contracting State at the date of signature of this Protocol is varied otherwise than in minor respects so as not to affect its general character, the Contracting States shall consult each other with a view to agreeing to any amendment of that paragraph that may be appropriate.

4. The term "dividends" as used in this Article means income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State of which the company making the distribution is a resident for the purposes of its tax.

5. The provisions of paragraphs 1 and 2 shall not apply if the person beneficially entitled to the dividends, being a resident of one of the Contracting States, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated in that other State, and the holding in respect of which the dividends are paid is effectively connected with that permanent establishment. In that case the provisions of Article 7 shall apply.

6. Where a company which is a resident of one of the Contracting States derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company—being dividends to which a person who is not a resident of the other Contracting State is beneficially entitled—except insofar as the holding in respect of which, such dividends are paid is effectively connected with a permanent establishment situated in that other State, even if the dividends paid consist wholly or partly of profits or income arising in such other State. This paragraph shall not apply in relation to dividends paid by any company which is a resident of Australia for the purposes of Australian tax and

which is also a resident of Malaysia for the purposes of Malaysian tax.

7. Dividends paid by a company which is a resident of Malaysia shall include dividends paid by a company which is a resident of Singapore which for the purpose of those dividends

has declared itself to be a resident of Malaysia, but shall not include dividends paid by a company which is a resident of Malaysia which for the purpose of those dividends has declared itself to be a resident of Singapore."

ARTICLE 3

Article 12 of the Agreement, as amended, is amended by:

- (a) deleting paragraphs 3, 8 and 9 and renumbering the paragraphs 1 to 6;
- (b) deleting "paragraphs 1, 2 and 3" and substituting "paragraphs 1 and 2" in renumbered paragraph 3; and
- (c) deleting "or" at the end of subparagraph (c) of renumbered paragraph 6, renumbering existing subparagraph "(d)" as "(f)" and inserting the following subparagraphs:
 - "(d) the use in connection with television, radio or other broadcasting, or the right to use in connection with such broadcasting, visual images or sounds, or both, transmitted by:
 - (i) satellite; or
 - (ii) cable, optic fibre or similar technology;
- (e) the use of, or the right to use, some or all of the part of the radiofrequency spectrum specified in a relevant licence; or".

ARTICLE 4

Article 21 of the Agreement, as amended, is deleted and substituted with the following:

"ARTICLE 21

Other Income

1. Items of income of a resident of one of the Contracting States, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from land as defined in paragraph 2 of Article 6, derived by a resident of one of the Contracting States where that income is effectively connected with a permanent establishment situated in the other Contracting State. In that case the provisions of Article 7 shall apply.
3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of one of the Contracting States not dealt with in the foregoing articles of this Agreement from sources in the other Contracting State may also be taxed in the other Contracting State."

ARTICLE 5

Article 23 of the Agreement, as amended, is amended by:

- (a) deleting paragraphs 4 to 7 and substituting the following:

"4. For the purposes of paragraph 5, the term "Malaysian tax forgone" means an amount which, under the laws of Malaysia and in accordance with this Agreement, would have been payable as Malaysian tax on income had that income not been exempted either wholly or partly from Malaysian tax in accordance with Schedules 7A and 7B of the Income Tax Act 1967 of Malaysia or sections 22, 23, 29, 29A, 29B, 29C, 29D, 29E, 29F, 29G, 29H, 31E, 35, 37 and 41B of the Promotion of Investments Act 1986 of Malaysia and section 45 of that Act to the extent that it relates to sections 21, 22, 26, or 30Q of the Investment Incentives Act 1968, so far as the sections were in force on, and have not been modified since, the date of signature of the Protocol second amending the Agreement or have been modified only in minor respects so as not to affect their general character.

5. Notwithstanding the operation of paragraph 4, Malaysian tax forgone shall not be deemed to have been paid in respect of income derived from:

- (a) banking, insurance, consulting, accounting, auditing or similar services; or
- (b) the operation of ships or aircraft, other than ships or aircraft operated principally from places in Malaysia and used solely in carrying on a business in Malaysia; or
- (c) any scheme entered into by an Australian resident with the purpose of using Malaysia as a conduit for income or as a location of property in order to evade or avoid Australian tax through the exploitation of the Australian foreign tax credit provisions or to confer a benefit on a person who is neither a resident of Australia, nor of Malaysia.

6. For the purposes of subparagraph (a) or (b) of paragraph 3, Malaysian tax forgone which answers the description in paragraph 4 and is not of a type referred to in paragraph 5 shall be deemed to be Malaysian tax paid.

7. Paragraphs 4, 5 and 6 shall not apply in relation to income derived in any year of income after the year of income that ends on 30 June 2003.";

- (b) deleting the words "5 and 6" and substituting "4 and 6" in subparagraph (b) of paragraph 8; and
- (c) deleting paragraph 9 and renumbering paragraph 10 as 9.

ARTICLE 6

Article 24 of the Agreement, as amended, is amended by adding after paragraph 4 the following paragraph:

"5. For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Agreement may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States."

ARTICLE 7

Article 27 of the Agreement, as amended, is amended by numbering the existing paragraph as 1 and adding after that paragraph, the following:

"2. Persons entitled to a particular tax treatment under:

- (a) a law of one of the Contracting States which has been identified in an Exchange of Letters between the Contracting States; or
- (b) any law substantially similar to such an identified law which is subsequently enacted by the relevant Contracting State,

shall not be entitled to any benefit of this Agreement.

3. In the event of either Contracting State becoming aware of a substantially similar law of the type referred to in subparagraph (b) of paragraph 2, the Contracting States shall consult each other with a view to identifying such law in an Exchange of Letters."

ARTICLE 8

This Protocol, which shall form an integral part of the Agreement, as amended, shall enter into force on the last of the dates on which the Contracting States exchange notes through the diplomatic channel notifying each other that the last of such things has been done as is necessary to give this Protocol the force of law in Australia and in Malaysia respectively, and thereupon this Protocol shall, have effect:

(a) in Australia:

- (i) for the purposes of paragraph (a) of Article 5 of the Protocol, in respect of tax on income of any year of income beginning on or after 1 July 1992; and
- (ii) in any other case, in relation to income of any year of income beginning on or after 1 July in the calendar year next following that in which this Protocol enters into force;

(b) in Malaysia:

- (i) for the purposes of paragraph (a) of Article 5 of the Protocol, in respect of Malaysian tax for any year of assessment beginning on or after 1 January 1993; and
- (ii) in any other case, in respect of Malaysian tax for any year of assessment beginning on or after 1 January in the calendar year next following that in which this Protocol enters into force.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Protocol.

DONE in duplicate in English and Bahasa Malaysia, both texts being equally authentic, at Genting Highlands, this twenty-eighth day of July, Two thousand and two.

For the Government of
Australia:

Mark Vaile
Minister for Trade

For the Government of
Malaysia:

Rafidah Aziz
Minister for Trade

