NCN: [2021] UKFTT 0222 (TC)

TC08171

CORPORATION TAX – interest paid by US subsidiary to UK parent company – interest subject to deduction of US withholding tax - no entitlement to benefit of relief under US/UK tax treaty - is unilateral credit for US withholding tax available – s793A(3) ICTA 1988

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/06360

BETWEEN

AOZORA GMAC INVESTMENT LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALEKSANDER

The hearing took place on 1 October 2020. With the consent of the parties, the form of the hearing was V (video) using the Tribunals TVP video platform. In addition to counsel for the parties, the hearing was attended by Giles Salmond, Edward Grffiths, Tammy Arendse, Richard Cherrett, Kunal Nathwani, Mickey Vandre, Rie Matsuura, Mr. Hartland, William Richardson, Paul Metcalfe, Ethna Duffy, Chris Mahood, Mr Eams, and Harry Williams. A face to face hearing was not held because it was impractical to hold a face-to-face hearing in the light of the COVID-19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

David Ewart QC, counsel, instructed by Eversheds Sutherland (International) LLP, for the Appellant.

James Rivett QC and Barbara Belgrano, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. This is an appeal by the Appellant, Aozora GMAC Investment Limited ("Aozora") against a review decision relating to a number of closure notices issued by HMRC dated 20 May 2016 following enquiries into the Appellant's corporation tax returns for the accounting periods ending 31 March 2007, 31 March 2008, and 31 March 2009. The total amount of UK corporation tax in dispute is nearly £4.5 million.

2. The effect of each closure notice was to deny Aozora credit under section 790, Income and Corporation Taxes Act 1988 ("ICTA" – and references in this decision to "sections" are references to sections of ICTA) in respect of withholding tax imposed by the United States of America on interest paid to Aozora on loans it made to its US subsidiary.

3. The only issue in these proceedings is whether s793A(3) denies Aozora entitlement to unilateral relief in the UK under s790 in respect of the US withholding tax imposed by the United States of America on the interest it received.

4. Aozora was represented by Mr Ewart and HMRC were represented by Mr Rivett and Ms Belgrano.

5. The evidence before me was included in a joint electronic bundle comprising 583 pages, including a statement of agreed facts and issues. The facts in this appeal are not in dispute, and there was no witness evidence.

BACKGROUND FACTS

6. On the basis of the statement of agreed facts and the other evidence before me, I find that the background facts are as follows:

7. Aozora was incorporated in England and Wales as a company limited by shares on 6 November 2006. Aozora is resident for tax purposes in the United Kingdom.

8. At all material times, Aozora is and was a wholly owned subsidiary of Aozora Bank Limited ("Aozora Japan").

9. Aozora has two subsidiaries in the US, including Aozora Investments, Inc, ("Aozora US", formerly named Aozora GMAC Investment, Inc). Aozora US has at all material times been resident for tax purposes in the US.

10. By an agreement dated 28 November 2006, Aozora US borrowed $217,770,000 from Aozora. The loan to Aozora US had a maturity of 30 November 2016. Interest was receivable at a fixed rate of 12% per annum.

11. During the accounting periods ended 31 March 2007, 31 March 2008 and 31 March 2009, interest income of $8,710,800, $26,132,400, and $8,289,310 respectively accrued to Aozora on the loan to Aozora US. Aozora US withheld US tax from each payment, amounting to $2,613,240, $7,839,720, and $2,486,793 in US tax for the accounting periods ending 31 March 2007, 31 March 2008, and 31 March 2009 respectively.

12. By an application dated 27 March 2008 (but filed on 18 April 2008) Aozora applied to the US revenue authorities ("IRS") for access to benefits of the Double Tax Convention concluded between the USA and the UK dated 24 July 2001 ("the Tax Treaty" – and references in this decision to "Articles" are to articles of the Tax Treaty).

13. In a letter dated 26 October 2010 (received by Aozora on 7 March 2011), the IRS notified Aozora that it was unable to accept Aozora's request for access to the benefits of the Tax Treaty. The refusal was on the grounds that Aozora was not a "qualified person" within Article 23.

14. Aozora applied to the US competent authority for discretionary treatment under Article 23(6). This was refused. Although Mr Ewart submits that neither Aozora nor HMRC (based on their original Statement of Case) consider that Aozora sought to use the Tax Treaty inappropriately, the US competent authority refused to determine that the establishment, acquisition, or maintenance of Aozora and the conduct of its operations did not have "as one of its principal purposes the obtaining of benefits under this Convention". Indeed, from Aozora's case in related judicial review proceedings, it appears that taxation was "critical" to Aozora's decision to structure the loans as it did (see *R (oao Aozora GMAC Investment Limited) v HMRC* [2017] EWHC 2881 (Admin) at [99]). Mr Ewart's submission in relation to HMRC's consideration is based upon their statement of case (3 February 2017) which questioned whether Aozora had done enough to challenge the refusal of the US competent authority to exercise its discretion in Aozora's favour – but this part of the Statement of Case was withdrawn by a letter dated 13 September 2018.

15. Aozora was advised that there was no prospect of a successful challenge to this decision in the US. This has been accepted by HMRC. For obvious reasons, the decision of the US competent authority cannot be challenged in the UK.

16. Aozora submitted its UK corporation tax returns for the accounting periods ending 31 March 2007, 31 March 2008 and 31 March 2009 including claims for unilateral relief by way of credit under s790 against the UK tax due on the interest. Taking into account these unilateral credit relief claims, the corporation tax liability of the company for each of periods was self-assessed as £nil.

17. Closure notices were issued by HMRC on 20 May 2016 (received by Aozora on 31 May 2016) on the basis that in Aozora's circumstances the effect of s793A(3) was to prevent Aozora from obtaining unilateral relief under s790 and Chapter II Part XVIII ICTA. The associated amendments to Aozora's corporation tax returns gave rise to assessments to corporation tax of £900,497.40, £2,640,377.40, and £922,622.40 for the accounting periods ended 31 March 2007, 31 March 2008, and 31 March 2009 respectively. The amount of tax was calculated on the basis that Aozora were entitled relief under s811, and suffered UK corporation tax on the net amount received (after deduction of the US withholding tax).

18. On 16 June 2016 Aozora appealed to HMRC on the basis that HMRC's conclusions were wrong as a matter of fact and law. Aozora requested a statutory review of the Respondents' decision on 15 July 2016.

19. HMRC issued its review decision on 21 October 2016, which upheld the closure notices.

20. On 17 November 2016, Aozora submitted a Notice of Appeal to the First-Tier Tribunal challenging the HMRC's amendments to its corporation tax returns.

THE PROVISIONS OF THE TAX TREATY

21. Article 11(1) of the of the Tax Treaty deals with interest:

> **Article 11: Interest**
>
> 1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

22. In this case, the interest arose in the US and was beneficially owned by a resident of the UK (Aozora). Therefore, the effect of Article 11(1) is that such interest could only be taxed in the UK, and either no US tax is withheld from interest payments, or any tax that has been withheld will be refunded.

23. The Tax Treaty also makes provision for credit for any US tax suffered against UK tax on that income. These provisions are contained in Article 24(4):

Article 24: Relief from double taxation

4. Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof):

(a) United States tax payable under the laws of the United States and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within the United States (excluding in the case of dividends, United States tax in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the United States tax is computed;

(b) in the case of a dividend paid by a company which is a resident of the United States to a company which is a resident of the United Kingdom and which controls directly or indirectly at least 10 per cent. of the voting power in the company paying the dividend, the credit shall take into account (in addition to any United States tax for which credit may be allowed under the provisions of sub-paragraph a) of this paragraph) the United States tax payable by the company in respect of the profits out of which such dividend is paid;

(c) United States tax shall not be taken into account under sub-paragraph (b) of this paragraph for the purpose of allowing credit against United Kingdom tax in the case of a dividend paid by a company which is a resident of the United States if and to the extent that

(i) the United Kingdom treats the dividend as beneficially owned by a resident of the United Kingdom; and

(ii) the United States treats the dividend as beneficially owned by a resident of the United States; and

(iii) the United States has allowed a deduction to a resident of the United States in respect of an amount determined by reference to that dividend;

(d) the provisions of paragraph 2 of Article 1 (General Scope) of this Convention shall not apply to sub-paragraph (c) of this paragraph.

24. However the benefits of the exemption from US tax under Article 11 and the availability of treaty tax credits under Article 24 are subject to the limitation on benefits provisions in Article 23. The complete text of Article 23 is set out in the Annex to this decision, but paragraph 1 of Article 23 is as follows:

Article 23: Limitation on benefits

1. Except as otherwise provided in this Article, a resident of a Contracting State that derives income, profits or gains from the other Contracting State shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 of this Article and satisfies any other specified conditions for the obtaining of such benefits.

25. Article 23(2) sets out the requirements to be a qualified person, and it is not disputed that Aozora is not a qualified person.

26. Articles 23(3) and 23(4) apply to persons who are not qualified persons and provide for them to be entitled to the benefits of the Tax Treaty if they satisfy specified conditions. Aozora does not satisfy any of those conditions.

27. Article 23(5) provides in specified circumstances for companies to have limited benefit from the Tax Treaty. These circumstances do not apply to Aozora.

28. Article 23(6) gives the competent authority of the US discretion to allow Aozora the benefits of the Tax Treaty:

> **Article 23: Limitation on benefits**
>
> 6. A resident of a Contracting State that is neither a qualified person nor entitled to benefits with respect to an item of income, profit or gain under paragraph 3 or 4 of this Article shall, nevertheless, be granted benefits of this Convention with respect to such item if the competent authority of the other Contracting State determines that the establishment, acquisition or maintenance of such resident and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention.
>
> The competent authority of the other Contracting State shall consult with the competent authority of the first-mentioned State before refusing to grant benefits of this Convention under this paragraph.

29. Aozora applied to the US competent authority for discretionary treatment under Article 23(6). The competent authority refused to determine that the establishment, acquisition, or maintenance of Aozora and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under the Tax Treaty, and the application was refused.

30. As Aozora was denied the benefits of the Tax Treaty by Article 23, Aozora US had to withhold US tax from payments of interest, and Aozora was not entitled to a refund of the tax withheld from the IRS. Further, Aozora was not entitled to claim a credit under Article 24 against its UK tax liability for the US tax that it suffered on the interest payments.

31. The US Treasury has issued a Technical Explanation of the Tax Treaty. The limitation on benefits provisions are explained as follows:

> The benefits otherwise accorded to residents under the Convention include all limitations on source-based taxation under Articles 6 through 22, the treaty-based relief from double taxation provided by Article 24 (Relief from Double Taxation), and the protection afforded to residents of a Contracting State under Article 25 (Non-discrimination). Some provisions do not require that a person be a resident in order to enjoy the benefits of those provisions. For example, Article 19 (Government Service) may apply to an employee of a Contracting State who is resident in neither State. Article 26 (Mutual Agreement Procedure) is not limited to residents of the Contracting States, and Article 28 (Diplomatic Agents and Consular Officers) applies to diplomatic agents or consular officials regardless of residence. Article 23 accordingly does not limit the availability of treaty benefits under these provisions.

32. Article 1(2) of the Tax Treaty provides:

> 2. This Convention shall not restrict in any manner any benefit now or hereafter accorded:
>
> (a) by the laws of either Contracting State; or
>
> (b) by any other agreement between the Contracting States.

UK UNILATERAL RELIEF

33. UK legislation provides for a unilateral double tax credit in circumstances where a treaty credit is not available – including circumstances where there is no treaty in place.

34. At the material time, the UK provided unilateral relief under s790:

> (1) To the extent appearing from the following provisions of this section, relief from income tax and corporation tax in respect of income and chargeable gains shall be given in respect of tax payable under the law of any territory outside the United Kingdom by allowing tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief.
>
> (2) Relief under sub-section (1) above is referred to in this Part as "unilateral relief".
>
> (3) Unilateral relief shall be such relief as would fall to be given under Chapter II of this Part if arrangements in relation to the territory in question containing the provisions specified in sub-sections (4) to (10C) below were in force by virtue of section 788, but subject to any provision made with respect to unilateral relief in that Chapter; and any expression in that Chapter which imports a reference to relief under arrangements for the time being having effect by virtue of that section shall be deemed to import also a reference to unilateral relief.
>
> (4) Credit for tax paid under the law of the territory outside the United Kingdom and computed by reference to income arising or any chargeable gain accruing in that territory shall be allowed against any United Kingdom income tax or corporation tax computed by reference to that income or gain […]

35. Section 793A was added to ICTA by Schedule 30, Finance Act 2000. Sub-sections (1) and (2) apply to claims for credit made on or after 21 March 2000, and sub-section (3) applies to double tax arrangements made on or after 21 March 2000. As the Tax Treaty was made on 24 July 2001, it is within the scope of sub-section (3). The section provides as follows:

> **793A.— No double relief etc.**
>
> (1) Where relief in respect of an amount of tax that would otherwise be payable under the law of a territory outside the United Kingdom may be allowed—
>
> (a) under arrangements made in relation to that territory, or
>
> (b) under the law of that territory in consequence of any such arrangements,
>
> credit may not be allowed in respect of that tax, whether the relief has been used or not.
>
> (2) Where, under arrangements having effect by virtue of section 788, credit may be allowed in respect of an amount of tax, credit by way of unilateral relief may not be allowed in respect of that tax.
>
> (3) Where arrangements made in relation to a territory outside the United Kingdom contain express provision to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances.

36. In relation to this appeal, the relevant "arrangements" to which s793A(3) refers are the provisions of the Tax Treaty.

37. The sole issue in this appeal is whether s793A(3) applies to deny Aozora its claim to unilateral relief.

SUBMISSIONS OF THE PARTIES

38. Both parties noted that unilateral tax credit relief was originally introduced in the 1950s, at a time when the UK's network of double tax arrangements was relatively limited. However, says Mr Rivett, as the UK's network of double tax arrangements has grown, the need for, and utilisation of, unilateral relief has shrunk.

39. Mr Ewart notes that until relatively recently, unilateral credit relief was always available to a UK taxpayer in circumstances where credit relief was not available under a tax treaty. Not only was unilateral relief available where there was no tax treaty, but it was also available where a UK taxpayer was not entitled to the benefit of relief under an otherwise applicable treaty. Mr Ewart acknowledges that it is always open to Parliament to limit the availability of unilateral relief, as it is a purely domestic provision. However, so far as he is aware, s793A is the first provision to do so.

40. Mr Rivett notes that s793A(3) applies to limit the availability of unilateral relief not just in relation to the Tax Treaty, but to all of the UK's double tax arrangements. He gives as an example the limitation on benefits provisions in the UK-Japan double tax convention, which do not (in contrast to the Tax Treaty) deprive a UK resident from being able to claim credit relief. Article 22(1) of the Japanese convention provides:

> 1. Except as otherwise provided in this Article, a resident of a Contracting State that derives income, profits or gains described in paragraph 3 of Article 10 [exemption in respect of dividends] or paragraph 1 of Article 11 [exemption in respect of interest]; or in Articles 12 [exemption in respect of royalties], 13 [exemption in respect of certain gains]or 21 [exemption in respect of other income] of this Convention from the other Contracting State shall be entitled to the benefits granted for a taxable year or chargeable period by the provisions of those paragraphs or Articles only if such resident is a qualified person as defined in paragraph 2 of this Article and satisfies any other specified conditions in those paragraphs or Articles for the obtaining of such benefits.

The effect, submits Mr Rivett, is that that although a UK resident may not be a "qualified person", and they may not be entitled to an exemption from Japanese tax, they remain entitled to the double tax credit relief under Article 23 of that treaty. Mr Rivett contrasts this with the corresponding provision in the Tax Treaty, where Article 23 of the Tax Treaty makes express provision for the denial of relief by way of credit under Article 24.

41. Mr Rivett submits that in construing s793A(3) it is important to take account of the fact that this provision applies to all of the UK's double tax arrangements and is not merely limited to the Tax Treaty.

42. Mr Rivett submits that the obvious purpose of s793A(3) is to ensure that the reciprocal provisions agreed between the state parties in a treaty are respected in domestic law. He submits that if unilateral credit relief were allowed in circumstances where treaty credit relief was denied, this would upset the balance agreed between the state parties when they negotiated the provisions of the treaty. In this context, Mr Rivett referred to the explanatory notes to Schedule 30, Finance Act 2000, which inserted s793A into ICTA which stated:

> 10. Paragraph 5 inserts new section 793A, which puts beyond doubt that if, under the terms of a double taxation agreement, a taxpayer can claim either relief from foreign tax, or credit in respect of foreign tax paid, he cannot claim relief in respect of that tax under the United Kingdom's domestic law

> provisions at section 790. Nor will it be possible to claim unilateral credit relief under section 790 in a particular situation if the relevant double taxation agreement itself expressly precludes relief in that situation under the agreement itself. The paragraph has effect in relation to credit relief claims made on or after 21 March 2000.

43. HMRC's case is that s793A(3) applies where the terms of a double tax convention have the effect that credit relief "shall not be given" – and Article 23 does exactly that by denying a UK resident who is not a "qualified person" both exemption from US withholding tax and credit relief. Mr Rivett contrasts the Tax Treaty with Article 22 of the UK-Japan treaty, which does not remove the benefit of credit relief from a non-qualified person.

44. Mr Ewart submits that to make unilateral credit relief available in circumstances when treaty credit relief is not available will not (as HMRC submit) upset the balance agreed between state parties when they negotiated the treaty. Mr Ewart submits that it is always open to the UK to provide greater relief from double taxation than the relief available under a treaty.

45. The fact that Aozora would have claimed exemption from US withholding tax under Article 11 is, submits Mr Rivett, irrelevant, as the form of the benefit a taxpayer may obtain under a double tax arrangement cannot have an impact on the construction of s793A(3), which applies to all UK taxpayers and to all double tax arrangements. Mr Rivett also notes that some of the UK's double tax arrangements do not provide for a complete exemption from foreign taxes, even if the UK resident qualifies for benefits (e.g. the UK-India double tax convention limits Indian taxes on Indian source interest to 15% but does not exempt them altogether from Indian tax). In such cases, the UK resident would claim a credit against UK tax for the foreign tax suffered.

Article 23 is not an "express provision to the effect that relief by way of credit shall not be given"

46. Mr Ewart submits that the inclusion of the word "express" to qualify "provision" is significant. "Express provision" is not being used here in contradistinction to an implied provision, as s793A(3) only applies to "cases circumstances specified or described in the arrangements", and as the cases or circumstances have to be specified or described, they cannot be implied. Further, it is difficult to envisage a provision which could be implied into a double tax treaty, and Mr Ewart submits that there is no scope within the Vienna Convention on the Law of Treaties to allow for terms to be implied into a treaty – and it would be peculiar to imply a term into a treaty to deny tax credit relief in circumstances where the treaty itself stated that relief is to be given.

47. Rather, the significance of the word "express" is, says Mr Ewart, that the provision in question must state in terms that relief by way of credit is not to be given. He gives as an example of such a provision Article 24(4)(c) of the Tax Treaty which refers in terms to credit for US tax against UK tax. By contrast, Article 23, which deals with all the benefits of the treaty, does not expressly deny, or even refer to, credit relief.

48. Further, submits Mr Ewart, the provision must be "to the effect that" credit relief shall not be given in the "cases or circumstances specified or described" in the arrangements. The use of the language "to the effect that" means that the provision does not need to use exactly the same words as are set out in s793A(3), but the provision does need to set out in clear language that the entitlement to the credit is excluded. He again gives Article 24(4)(c) as an example of such a provision. Where the cases or circumstances described in sub-paragraphs (i) to (iii) exist then treaty credit relief is prohibited. Article 23 by contrast does not expressly set out the cases and circumstances in which the benefits of the Tax Treaty (including credit relief) are not to be given. Rather, the cases or circumstances which are set out are those in which the

benefits of the Tax Treaty are to be available (see Article 23(2)-(5)). However, even outside those cases or circumstances, the benefits of the Convention remain available at the discretion of the relevant competent authority (see Article 23(6)).

49. Mr Ewart submits that the reason why s793A(3) has been drafted in this way as it is intended to give effect to anti-avoidance transactions of the kind described in the Technical Explanation relating to repos, rather than to the broad "limitation on benefits" provisions which provide more generally as to which UK residents are within the scope of the treaty.

50. For these reasons, says Mr Ewart, there are no cases or circumstances in which Article 23 provides that the benefits of the Convention (and therefore relief by way of credit) "shall not be given". There are no cases or circumstances in which credit relief will never be available to a taxpayer as there is always a residual discretion available to the relevant competent authority to allow the reliefs. And Mr Ewart submits that the exercise of a discretion by a competent authority cannot be a case or circumstance "specified or described in the arrangements" (namely the Tax Treaty), as the manner in which the discretion is to be exercised is not set out in the Tax Treaty.

51. Mr Ewart notes that Article 23(1) begins with the words "Except as otherwise provided in this article […]", so the Article has to be construed as a whole – it is not as if there are "express provisions" in paragraphs (1) to (5) and paragraph (6) provides a separate entitlement to the treaty's benefits. Rather, says Mr Ewart, paragraph (6) is one of the provisions to which paragraph (1) is subject.

52. Mr Ewart submitted that HMRC's proposed construction of s793A(3), if taken logically, would mean that credit relief would never be available in respect of US taxes. This is because a UK resident is either within the scope of Article 23's limitation on benefits provisions or is not. If the UK resident is outside the scope of the limitation on benefits provisions, then he is entitled to the benefit of exemption from withholding tax under Article 11, and as there would be no US tax liability, no credit relief would be available. Conversely, if the resident was within the scope of the Article 23 limitation on benefits provisions, credit relief would be denied. It does not make sense, says Mr Ewart, that credit relief can never be available in any circumstances.

53. Mr Rivett submits that s793A(3) has to be construed in accordance with the usual principles of construction that apply to UK statutes, and not by reference to the terms of a particular treaty addressing double taxation. He says that the plain meaning of s793A(3) is that a double tax arrangement merely has to have the "effect" of denying credit relief. He submits that the section does not require the provision to "state in terms" that credit relief is denied.

54. Mr Rivett submits that Aozora's circumstances are such that Article 23 applies, and therefore credit relief under Article 24 is not available. It follows that Article 23 is an "express provision" to the effect that credit relief (under Article 24) shall not be given to Aozora, and therefore s793A(3) applies to deny Aozora unilateral credit relief under s790. Article 23(1) states that a resident of a Contracting State “shall be entitled” to the benefits of the Convention “only if” the resident is a “qualified person” for the purposes of Article 23 (and satisfies any other conditions for obtaining of such benefits). Mr Rivett submits that by using the words, relief by way of credit “shall not be given”, s793A(3) ensures that it is the *effect* of a particular treaty provision that is important. In other words, the provision must have the effect that credit relief shall not be given under the treaty, but the precise method by which credit relief is denied is not relevant.

55. Accordingly, the fact that Article 23 sets out the “only” circumstances where benefits will be available under the Tax Treaty, rather than listing circumstances in which benefits will not be available, is irrelevant. The effect of Article 23, says Mr Rivett is that the benefits of the

Tax Treaty are not available in circumstances such as those of Aozora and, accordingly, Article 23 contains "express provision to the effect that relief by way of credit shall not be given" for the purposes of s793A(3).

56. The fact that the competent authorities retain a discretion to allow treaty benefits does not, submits Mr Rivett, affect this conclusion. The fact that treaty benefits may be available through a discretionary route does not prevent there from being an "express provision" that denies the treaty benefits.

57. Mr Rivett submits that Aozora's submissions on the construction of "express provision" are inconsistent with the Article 4(5) which allows dual-residents credit relief:

> **Article 4: Residence**
>
> 5. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the mode of application of this Convention to that person. If the competent authorities do not reach such an agreement, that person shall not be entitled to claim any benefit provided by this Convention, except those provided by paragraph 4 of Article 24 (Relief from Double Taxation), Article 25 (Non-discrimination) and Article 26 (Mutual Agreement Procedure)."

58. Mr Rivett submits that if Aozora were correct in their approach to the construction of the Tax Treaty, there would have been no need for Article 4(5) to provide a carve-out in respect of credit relief under Article 24. Article 4 does not "in terms" state that credit relief is not to be given and therefore would not, if Aozora is correct, prevent unilateral credit relief from being obtained. The reason, says Mr Rivett that the terms of Article 4(5) have to expressly carve-out credit relief is that otherwise the "effect" of Article 4 could have prevented credit relief being given, whether under the Article 24 or by way of unilateral relief.

59. Mr Ewart submits that Article 4 is not a provision to which s793A(3) is intended to apply. Article 4 is a "pure" treaty provision intended to determine in which jurisdiction a person is to be treated as resident for the purposes of the treaty – but if the US and UK cannot agree as to the jurisdiction of residence, then the person cannot benefit from the treaty - apart from certain provisions which are carved-out from the exclusion. The reason for the inclusion of the reference to Articles 24 to 25 needs to be considered from the perspective of the US government when negotiating the treaty, to ensure that their national and resident entities were not denied credit relief or the other specified treaty entitlements, notwithstanding that the competent authorities were not able to agree on their "treaty" residence.

60. Mr Rivett also referred me to the last sentence of s788(5):

> **788.— Relief by agreement with other territories**
>
> (5) For the purposes of this section and, subject to section 795(3), Chapter II of this Part in its application to relief under this section, any amount of tax which would have been payable under the law of a territory outside the United Kingdom but for a relief to which this subsection applies given under the law of that territory shall be treated as having been payable; and references in this section and that Chapter to double taxation, to tax payable or chargeable, or to tax not chargeable directly or by deduction shall be construed accordingly. This subsection applies—
>
> (a) to any relief given with a view to promoting industrial, commercial, scientific, educational or other development in a territory outside the United Kingdom, being a relief with respect to which provision is made in the arrangements in question for double taxation relief;

> Relief does not fall to be given in accordance with section 801 by virtue of this subsection unless the arrangements in question make express provision for such relief (but this paragraph is without prejudice to section 790(10B)).

I note that this last sentence was added to s788 by Sch 30, Finance Act 2000 (as was s793A(3)). Mr Rivett wanted to show that s793A(3) was not the only provision that used the phrase "express provision", but he considered that its use in s788 did not necessarily take the construction any further.

61. Mr Ewart considers that the fact that the term "express provision" is also utilised in s788 is another illustration of the same point that he made in relation to its use in s793A – in other words, there has to be an "express provision" for the relief to be available under s801.

Article 1(2) prevents Article 23 removing the benefit of unilateral relief under UK domestic law

62. Mr Ewart submits that Article 1(2) prevents the Tax Treaty from counteracting UK domestic law (such as unilateral relief under section 790) – save in the circumstances where Article 1(2) is disapplied.

63. Article 1(2) is disapplied in relation to Article 24(4)(c) by Article 24(4)(d). The US Treasury's Technical Explanation on Article 24 explains the need for the exclusion in paragraph 24 as relating to abusive sale and repurchase ("repo") contracts in the securities markets:

> Subparagraph (c) eliminates the UK credit otherwise provided for in subparagraph (b) in certain circumstances. The rule is limited to certain cases where the two countries have a different view as to the ownership of dividends and, as a result, the United States has provided a tax deduction for payments that are measured by reference to the dividend. This rule is intended to apply to a particular type of financing that has been widely used by UK resident companies to finance their US operations. In this transaction, a US holding company would sell stock in another US company to a UK company. At the same time it would enter into a repurchase agreement that would allow it to buy back the stock at a pre-determined price. The parties would structure the transactions in such a way that the sale and repurchase transactions would be treated as a loan for US tax purposes. As a result, the dividends paid to the UK company are treated as payments of interest on the loan from the UK company to the US company The United Kingdom has seen a number of these transactions and was concerned about their potential impact.
>
> UK law provides no mechanism by which to treat the sale and re-purchase in accordance with its economic substance. Accordingly, the United Kingdom is required by UK domestic law to treat the UK company as the owner of the dividends for purposes of its rules, and to provide a foreign tax credit for the taxes paid by the US company paying the dividends. However, recent changes to UK foreign tax credit rules allow the United Kingdom to deny credits if a tax treaty specifically so provides. The United Kingdom asked for the exception in paragraph (c) in order to conform the UK treatment of these transactions to the US tax treatment. Because the rule applies only with respect to indirect tax credit, it will apply only with respect to transactions involving persons who own more than 10 percent of the underlying company. Moreover, the rule applies only if the US company receives an interest deduction that is based on the dividends paid in respect to the stock, while other deductible payments arising from the standard sale-repurchase agreements would be based on a completely different measure, the current cost of funds. Accordingly , the rule should not (and is not intended to) affect most repos and similar transactions that take place in the public markets.

> Subparagraph (c) would not be effective without subparagraph (d). Subparagraph (c) limits benefits that are otherwise available under domestic law and therefore would be inconsistent with the rules of paragraph 2 of Article 1 (General Scope) which provide that the tax treaty cannot limit benefits that are available under domestic law. Subparagraph (d) provides an exception from paragraph 2 of Article 1 with respect to subparagraph (c).

64. Mr Ewart submits that the reference in the Technical Explanation to "recent changes to UK foreign tax credit rules" is a reference to s793A(3). He submits also that when looking at paragraph (c) in the Tax Treaty it is apparent that it has been carefully drafted with three criteria that have to be satisfied before it bites.

65. Mr Ewart submits that the Technical Explanation provides a coherent explanation of why Article 24(4)(d) was included in the Tax Treaty. If it did not exist, Article 1(2) would prevent the UK from denying UK unilateral tax credits in respect of US tax by virtue of Article 24(4)(c) (which is brought into effect in UK domestic law by s793A ICTA). Mr Ewart referred me to the case of *NEC Semiconductors v IRC* [2007] STC 1265 at [8]-[9] in support of the proposition that a provision in a double tax treaty cannot prevent the application of a tax relief given in UK domestic law, unless that denial was itself brought into effect by a provision of domestic law – such as, for example, s793A(3).

66. Mr Ewart submits that Article 1(2) is not disapplied in relation to Article 23. In consequence, Article 1(2) prevents Article 23 (pursuant to s793A) restricting the benefit of unilateral relief under s790. Mr Ewart submits that if the UK had wanted Article 23 to limit the benefit of unilateral relief, a provision similar to that in Article 24(4)(d) would have been included in Article 23.

67. Mr Ewart describes HMRC's submission that Article 1(2) could not apply in this way (because Aozora was not a “qualified person”) as being misconceived. He submits that Article 1(2) delineates the scope of the Tax Treaty, rather than itself being a benefit provided by the treaty of the type referred to in Article 23. The effect of Article 1(2), submits Mr Ewart, is to prevent a provision in the Tax Treaty from restricting a benefit under domestic law. The application of Article 1(2) cannot be a benefit of the Tax Treaty as it is *ex hypothesi* solving a problem created by the treaty itself (the problem in this case being the potential application of Article 23 (via section 793A(3)) to Aozora. For Aozora there is no benefit provided by the Tax Treaty, as the benefit is provided by s790.

68. Mr Ewart submits that HMRC are wrong to submit that s793A(3) ensures that unilateral relief cannot be used to circumvent an anti-abuse provision included in a tax treaty. Mr Ewart acknowledges that this may be correct to the extent that s793A(3) is intended to give effect to an anti-abuse provision in a treaty, but, he says, HMRC's argument is that it has effect in Aozora's case where there is no tax avoidance, no treaty abuse, and no treaty shopping, and therefore no circumvention of the effect of the treaty.

69. Mr Ewart distinguishes between treaty abuse (in the sense of "treaty shopping") and tax avoidance. He describes the limitation on benefits provisions in Article 23 as being anti-abuse provisions designed to prevent "treaty shopping" – in other words routing, for example, capital through jurisdictions chosen because their tax treaties gave benefits to which other jurisdictions (and their treaties) did not. He distinguishes this from "anti-avoidance" provisions, such as those directed at repo contracts of the kind described in the US Treasury's Technical Explanation. Mr Ewart submits that s793A(3) is intended to bite only on anti-avoidance provisions, and not generally on limitation on benefits provisions directed at preventing treaty shopping.

70. Mr Ewart also submits that it cannot be the case that Aozora engaged in "treaty shopping". Aozora's parent is a Japanese company. To the extent that the group wanted to invest in the US, it could have invested directly into the US from Japan, and the US-Japan double tax convention would have provided for exemption from US withholding taxes. The choice of investing into the US from the UK was therefore not driven by there being a "better" treaty between the US and UK, than the treaty between the US and Japan. Mr Ewart submits that the drivers for investing from the UK were commercial, and he referred me to application made by Aozora to the US competent authority (for discretionary relief) in support of this submission. Mr Ewart also referred me to correspondence with HMRC that shows that they supported Aozora's application for discretionary relief.

71. Mr Rivett submits that Article 23 does not on its terms restrict any benefits available under UK domestic law. This is because it is s793A(3) that restricts the availability of unilateral tax credits to Aozora, and not any provision of the Tax Treaty. This shows the importance of giving a construction to s793A(3) which is independent of any particular double tax arrangement. Mr Rivett also submits that both Article 23 and Article 24 are "express provisions" for the purposes of s793A(3).

72. I asked Mr Rivett what purposes Article 24(4)(d) therefore served, if his interpretation was correct, and (in essence) it is the UK domestic provision in s793A(3) that restricts the availability of unilateral relief. He said that it served two purposes. The first was "belt and braces" to ensure that the issue was addressed both in the Tax Treaty as well as in UK domestic law. The second relates to the principle that a double tax arrangement cannot increase the tax burden faced by a taxpayer beyond their liability under domestic law. Mr Rivett submits that Article 1(2) is engaged where the application of the Tax Treaty would result in (in this case) in the tax burden in the UK being greater than if the Tax Treaty provisions had not been applied. If the domestic tax burden is increased as a result of the application of the Tax Treaty, Article 1(2) ensures that the taxpayer pays only the tax determined in accordance with UK domestic law. Mr Rivett referred me to the US Treasury Technical Explanation that addresses this point. This explains why Article 24 had to include a carve-out from Article 1(2), but Article 23 did not – as Article 24 addressed the calculation of tax payable (and therefore was a factor that had to be taken into account for the purposes of determining whether the Article 1(2) was engaged), in contrast, as Article 23 addressed the broader "limitation on benefits" issue, it did not address the calculation of tax payable, and therefore did not engage Article 1(2).

73. Mr Ewart's response to this point is that s793A(3) is a provision that has the effect of treating parts of treaties to which it applies as having effect under UK domestic law. And if it does so, it brings those provisions into domestic law "lock, stock and barrel", including (in the case of the Tax Treaty) the limitations in Article 1(2).

HMRC manual

74. At the relevant times, paragraph 151060 of HMRC's International Tax Manual stated:

> At 1 April 2003, the only provisions to which s.793A applies is Article 24(4)(c) of the new UK/US DTA.

75. In the judicial review proceedings (*R (oao Aozora GMAC) v HMRC*), the Court of Appeal held that this was a

> [...] clear and unambiguous representation that the only provision in the Treaty on which section 793A bites so as to deprive a taxpayer of unilateral relief is art. 24(4)(c) (*per* Rose LJ at para [29]).

76. Mr Ewart confirmed that Aozora were taking no point on "legitimate expectation" before the Tribunal, as that had already been litigated before the High Court. But he submits that it

seems likely that s793A(3) was promoted by HMRC as part of Finance Act 2000 in the knowledge of the terms of the Tax Treaty, which he submits must have been in the course of negotiation as it was concluded on 21 July 2001. Indeed, he says, Article 24(4)(c) of the Tax Treaty only has teeth because unilateral relief can be denied by s793A(3). Equally, it seems likely, he submits, that the Tax Treaty was negotiated with section 793A(3) in mind.

77. If, as Rose LJ held in her judgment in the Court of Appeal in *R (oao Aozora GMAC Investment Limited) v HMRC* [2019] EWCA Civ 1643 at [29], HMRC had thought that Article 23 was an "express provision" falling within section 793A(3), Mr Ewart would have expected it to be mentioned in HMRC's International Tax Manual at paragraph 151060. This is because Article 23 would be likely to lead to the disapplication of unilateral relief under section 793A(3) much more frequently than Article 24(4)(c).

78. Mr Ewart therefore infers from the fact that Article 23 was not mentioned that HMRC (and in particular its international tax policy specialists) did not consider that Article 23 was an "express provision" within section 793A(3). That, he submits, is a remarkable position if it had been what had been intended when HMRC promoted what became section 793A(3) in Parliament in 2001.

79. Mr Rivett submits that the terms of HMRC's International Tax Manual 151060 are irrelevant to the issues to be decided by this Tribunal. The exercise required of the Tribunal is the construction of a piece of primary legislation, not the terms of HMRC's published guidance.

80. Mr Rivett notes that in the judicial review proceedings mentioned previously Aozora failed to establish that the terms of HMRC's guidance gave rise to any legitimate expectation on its part as to the proper construction of s793A(3).

81. Mr Rivett also submits that it would be wrong for me to consider that s793A(3) was designed to give effect to Article 24 – not least because the Tax Treaty was made after the enactment of the Finance Act 2000 (which introduced the section). And as a matter of statutory construction it is wrong to work "backwards" chronologically - it would be an odd approach to statutory construction to say that the meaning of section 793A(3) should be circumscribed or forced to fit a particular provision of a treaty that was yet to be signed – not least in circumstance where the statutory provision was clearly of wider application than just to the Tax Treaty.

DISCUSSION

82. Having heard the submissions of the parties, I find that the key to unlocking the construction of s793A(3) is the use of the adjective "express" to qualify "provision". As the word is not defined and does not bear a technical meaning, it has to be construed in accordance with its normal English meaning. Although not cited to me, the Oxford English Dictionary includes the following definitions in relation to "express" as regards its senses relating to explicit statement or formulation:

> (3)(a) Of a meaning, purpose, stipulation, law, etc.: expressed and not merely implied; definitely formulated; definite, explicit. Of language, statements, indications: definite, unmistakable in import.
>
> (3)(e) Specifically designated or considered; special
>
> (4)(a) Specially designed or intended for a particular object; done, made, or sent 'on purpose.' Of a messenger: Specially dispatched.

83. I agree with Mr Ewart that "express" is not being used in s793A(3) in contradistinction to "implied", as terms are not implied into treaties. The meaning therefore is in the sense of definitely formulated, definite, explicit, specifically designated, or specially intended.

84. I therefore find that in order for s793A(3) to have effect in relation to the exclusion of credit relief, the terms of the relevant double tax arrangement must be explicit as to the cases and circumstances in which the credit relief is not available.

85. I find that the Tax Treaty is not explicit as to the cases and circumstances in which credit relief is not to be made available, and in particular Article 23 is not "an express provision to the effect that relief by way of credit shall not be given".

86. I disagree with Mr Rivett that the obvious purpose of s793A(3) is to ensure that the reciprocal provisions agreed between the state parties in a double tax arrangement are respected in domestic law, so that the "balance" negotiated between the parties is not upset. I reach this conclusion because, as a matter of general principle, the UK enters into double tax arrangements (in broad terms) in order to limit the exposure of its residents to the taxes of the counterparty territory. As part of the negotiations, the UK will accept restrictions on how it will levy UK taxes on the residents (or nationals) of the counterparty territory. But double tax arrangements are not executed with a view to determining how the UK will tax its own residents. And this purpose is reflected in Mr Rivett's own submissions as he acknowledges that that the Tax Treaty itself allows for the possibility that a taxpayer may have a smaller tax burden under domestic law than under the terms of the Tax Treaty – and Article 1(2) is intended to ensure that in these circumstances the taxpayer's entitlement to pay tax in accordance with domestic law is not restricted by the terms of the Tax Treaty. As the Tax Treaty itself contemplates the possibility that a taxpayer may have a lower burden of taxation under domestic law than under the Tax Treaty, I find that there cannot have ever been an intention to ensure that UK domestic law reflects the "balance" in the Tax Treaty.

87. Furthermore, if there had been an intention that domestic law reflected the "balance" negotiated in a double tax arrangement, why is s793A(3) limited to unilateral credits, and why does it not address anything else that might be included in double tax arrangements?

88. I also disagree with Mr Rivett that the drafting of Article 4(5) is inconsistent with the construction preferred by Aozora. The terms of the Tax Treaty have to be considered not only from the perspective of the UK government, but also from the perspective of the US government – and the carve-outs in Article 4(5) are there to provide protection (for example) to US incorporated entities which are also treated as UK tax resident (so dual resident), to ensure that they retain some residual treaty protections (such as double tax credits, non-discrimination and mutual agreement procedures), notwithstanding that the competent authorities have been unable reach agreement on "treaty residence".

89. I agree with Mr Ewart that the US Treasury's Technical Explanation about repos provides a coherent explanation for the inclusion of Article 24(4)(c), and the need for Article 24(4)(d) to provide for a carve-out of Article 24(4)(c) from Article 1(2).

90. I note, in the light of *NEC Semiconductor*, that the provisions of Article 24(4)(c) would not be effective as a matter of UK domestic law without s793A(3). So it makes sense that Article 24(4) could have only been included in a UK double tax arrangement after s793A(3) had been enacted into domestic law.

91. However, that does not mean that s793A(3) was enacted solely to give effect to Article 24(4), nor that its impact is limited solely to the Tax Treaty. I acknowledge that it would be wrong for me to consider that s793A(3) was designed to give effect to Article 24, and I have not done so. I find rather that s793A(3) is, in some sense, an enabling provision, which allowed the UK subsequently to reach agreement with the US to include Article 24(4)(c) in the Tax Treaty, knowing that those provisions would have effect in UK domestic law. Further, it allows the UK to include (and give effect to) similar kinds of provisions in other double tax arrangements that it may agree with other territories in the future.

92. I agree with Mr Rivett that s793A(3) is of general application to all of the UK's double tax arrangements that have been concluded since 21 March 2000. It will therefore apply to any tax convention that is concluded by the UK after this date that includes an express provision which denies a taxpayer entitlement to credit relief.

93. I also find that the explanation given in the explanatory notes to Schedule 30 is consistent with my findings – and I note in particular the reference in the explanation that unilateral relief cannot be claimed if the "relevant double tax arrangement itself *expressly* precludes relief in that situation in the agreement itself" (emphasis added).

94. I note that Article 23 is not carved out from Article 1(2) in the same way as Article 24(4)(c), and I was not persuaded by Mr Rivett's explanation for the reason why (on his proposed construction) such an exclusion was not necessary.

95. But I was not persuaded by Mr Ewart that Aozora Japan was not motivated by tax considerations in choosing to finance Aozora US through the UK, rather than directly from Japan. Although Mr Ewart referred me to correspondence between Aozora and the US competent authority in support of his submission, I place no weight on it. His submission on this issue of fact was not included within the statement of agreed facts, and there was no witness evidence to support it. Indeed, Rose LJ's judgment in *R (oao Aozora GMAC) v HMRC* at [12] makes it clear that, even though Aozora may not have engaged in "treaty shopping" in the narrow sense of mitigating withholding taxes, its decision to route funding to Aozora US though Aozora (rather than directly) was made with a view to minimising the group's overall tax liability:

> *The decision to set up Aozora UK*
>
> [12] In the later part of 2006, Aozora Japan was considering how to structure an investment into the US. It was advised on the tax implications of this project by Tohmatsu Tax Co in Japan ('Deloitte Japan'). One possibility was a direct investment by Aozora Japan. Interest payments from Aozora US directly to Aozora Japan would have qualified for exemption from US withholding tax under art 11(3)(c)(i) of the US/Japan Double Tax Treaty. However, Aozora Japan would have paid corporation tax at the rate of 41 percent on those interest payments under Japanese revenue law. Aozora Japan considered making the investment through a UK resident subsidiary. That was the route decided upon and on 6 November 2006 Aozora UK was incorporated in the UK.

And Rose LJ's finding does provide some context for the decision by the US competent authority to refuse to exercise its discretion under Article 23.

96. Nor was I persuaded by Mr Ewart that HMRC's proposed interpretation was inherently illogical as it would mean that credit relief could never be available. I find that the limitation on benefits provisions in Article 23 are of wider application than just to the exemptions from withholding taxes on interest – they apply (for example) to the business income provisions, and in the case of the business income of permanent establishments (where the US would retain taxing rights), a UK resident would claim treaty credits (subject to Article 23).

97. But I agree with Mr Ewart that s793A(3) is not a broad anti-treaty abuse provision (at least in the wider sense of the kind of tax mitigation exercise undertaken in this case by Aozora Japan).

98. For completeness, I would mention that I did not find that the reference to "express provision" in s788 was of assistance in construing its meaning. Nor did I treat the statement in HMRC's International Tax Manual at paragraph 151060 as being academic authority.

Ironically, it was Mr Rivett who submitted that the statement in the manual was incorrect, and he acknowledged that this was not the first (nor I suspect the last) occasion on which statements by HMRC in their manuals have been found wanting. Mr Rivett referred me to the "Project Blue" litigation, and (although not specifically cited to me), I would also mention *Hannover Leasing Wachstumswerte Europa Beteiligungsgesellschaft MBH & Anor v HMRC* [2019] UKFTT 262 (TC) at [192] where HMRC's SDLT manual was held to be incorrect. But in this case, I consider that the statement originally contained at paragraph 151060 was (when it was made) was correct – although I expect that in time, the effect of s793A(3) will be extended to other provisions in other double tax arrangements.

DISPOSITION

99. The appeal is allowed.

COSTS

100. This appeal has been categorised as complex, and I have the power to award costs in accordance with Rule 10(1)(c) of the Tribunal's procedure rules.

101. As it seems likely that this decision may be subject to an application for permission to appeal, I direct that the time limit in Rule 10(4) be extended so that any application for costs may be made:

> (a) if application for permission to appeal against this decision is made and granted, 28 days after this appeal has been finally determined, or
>
> (b) if no such application is made (or is made but refused), 28 days after such permission has been refused or (if earlier) the deadline for applying for permission has expired with no application for permission having been made.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 12 April 2021

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 4 May 2021 to correct typographical errors.

ANNEX

ARTICLE 23 - LIMITATION ON BENEFITS

1. Except as otherwise provided in this Article, a resident of a Contracting State that derives income, profits or gains from the other Contracting State shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 of this Article and satisfies any other specified conditions for the obtaining of such benefits.

2. A resident of a Contracting State is a qualified person for a taxable or chargeable period only if such resident is-either:

a) an individual;

b) a qualified governmental entity;

c) a company, if

(i) the principal class of its shares is listed or admitted to dealings on a recognised stock exchange specified in clauses (i) or (ii) of sub-paragraph a) of paragraph 7 of this Article and is regularly traded on one or more recognized stock exchanges, or

(ii) shares representing at least 50 per cent. of the aggregate voting power and value of the company are owned directly or indirectly by five or fewer companies entitled to benefits under clause (i) of this sub-paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

d) a person other than an individual or a company, if:

(i) the principal class of units in that person is listed or admitted to dealings on a recognized stock exchange specified in clauses (i) or (ii) of subparagraph a) of paragraph 7 of this Article and is regularly traded on one or more recognized stock exchanges, or

(ii) the direct or indirect owners of at least 50 per cent. of the beneficial interests in that person are qualified persons by reason of clause (i) of subparagraph c) or clause (i) of this sub-paragraph;

e) a person described in sub-paragraph a), b) or c) of paragraph 3 of Article 4 (Residence) of this Convention, provided that, in the case of a person described in subparagraph a) orb) of that paragraph, more than 50 per cent. of the person's beneficiaries, members or participants are individuals who are residents of either Contracting State;

f) a person other than an individual, if:

(i) on at least half the days of the taxable or chargeable period persons that are qualified persons by reason of sub-paragraphs a), b), clause (i) of

subparagraph c), clause (i) of sub-paragraph d), or sub-paragraph e) of this paragraph own, directly or indirectly, shares or other beneficial interests representing at least 50 per cent. of the aggregate voting power and value of the person, and

(ii) less than 50 per cent. of the person's gross income for that taxable or chargeable period is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the State of which the person is a resident (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a resident of a Contracting State such payment is attributable to a permanent establishment of that bank located in one of the Contracting States); or

g) a trust or trustee of a trust in their capacity as such if at least 50 per cent. of the beneficial interest in the trust is held by persons who are either:

(i) qualified persons by reason of sub-paragraphs a), b), clause (i) of subparagraph c), clause (i) of sub-paragraph d), or sub-paragraph e) of this paragraph; or

(ii) equivalent beneficiaries, provided that less than 50 per cent. of the gross income arising to such trust or trustee in their capacity as such for the taxable or chargeable period is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the Contracting State of which that trust or trustee is a resident (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a resident of a Contracting State such payment is attributable to a permanent establishment of that bank located in one of the Contracting States).

3. Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, it shall be entitled to the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income, profit or gain if it satisfies any other specified conditions for the obtaining of such benefits and:

a) shares representing at least 95 per cent. of the aggregate voting power and value of the company are owned, directly or indirectly, by seven or fewer persons who are equivalent beneficiaries; and

b) less than 50 per cent. of the company's gross income for the taxable or chargeable period in which the item of income, profit or gain arises is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries, in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the State of which the company is a resident (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a

resident of a Contracting State such payment is attributable to a permanent establishment of that bank located in one of the Contracting States).

4.

a) Notwithstanding that a resident of a Contracting State may not be a qualified person, it shall be entitled to the benefits of this Convention with respect to an item of income, profit or gain derived from the other Contracting State, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or registered securities dealer), the income, profit or gain derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business and that resident satisfies any other specified conditions for the obtaining of such benefits.

b) If a resident of a Contracting State or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, profit or gain, sub-paragraph a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned State is substantial in relation to the trade or business activity in the other State. Whether a trade or business activity is substantial for the purposes of this paragraph shall be determined on the basis of all the facts and circumstances.

c) In determining whether a person is engaged in the active conduct of a trade or business in a Contracting State under sub-paragraph a) of this paragraph, activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 per cent. of the beneficial interest in the other (or, in the case of a company, shares representing at least 50 per cent. of the aggregate voting power and value of the company or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 per cent. of the beneficial interest (or, in the case of a company, shares representing at least 50 per cent. of the aggregate voting power and value of the company or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if; on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

5. Notwithstanding the preceding provisions of this Article, if a company that is a resident of a Contracting State, or a company that controls such a company, has outstanding a class of shares:

a) which is subject to terms or other arrangements which entitle its holders to a portion of the income, profit or gain of the company derived from the other Contracting State that is larger than the portion such holders would receive in the absence of such terms or arrangements; and

b) 50 per cent. or more of the voting power and value of which is owned by persons who are not equivalent beneficiaries,

the benefits of this Convention shall apply only to that proportion of the income which those holders would have received in the absence of those terms or arrangements.

6. A resident of a Contracting State that is neither a qualified person nor entitled to benefits with respect to an item of income, profit or gain under paragraph 3 or 4 of this Article shall, nevertheless, be granted benefits of this Convention with respect to such item if the competent authority of the other Contracting State determines that the establishment, acquisition or maintenance of such resident and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention. The competent authority of the other Contracting State shall consult with the competent authority of the first-mentioned State before refusing to grant benefits of this Convention under this paragraph.

7. For the purposes of this Article the following rules and definitions shall apply:

a) the term "recognized stock exchange" means:

(i) the NASDAQ System and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;

(ii) the London Stock Exchange and any other recognised investment exchange within the meaning of the Financial Services Act 1986 or, as the case may be, the Financial Services and Markets Act 2000;

(iii) the Irish Stock Exchange, the Swiss Stock Exchange and the stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, Johannesburg, Madrid, Milan, Paris, Stockholm, Sydney, Tokyo, Toronto and Vienna; and

(iv) any other stock exchange which the competent authorities agree to recognise for the purposes of this Article;

b)

(i) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" is that class or those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;

(ii) the term "shares" shall include depository receipts thereof or trust certificates thereof; .

c) the term "units" as used in sub-paragraph d) of paragraph 2 of this Article includes shares and any other instrument, not being a debt-claim, granting an entitlement to share in the assets or income of, or receive a distribution from, the person. The term "principal class of units" means the class of units which represents the majority of the value of the person. If no single class of units represents the majority of the value of the person, the "principal class of units" is those classes that in the aggregate represent the majority of the value of the person;

d) an equivalent beneficiary is a resident of a Member State of the European Community or of a European Economic Area state or of a party to the North American Free Trade Agreement but only if that resident:

(i) A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between any Member State of the European Community or a European Economic Area state or any party to the North American Free Trade Agreement and the Contracting State from which the benefits of this Convention are claimed, provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be a qualified person under paragraph 2 of this Article (or for the purposes of sub-paragraph g) of paragraph 2, under the provisions specified in clause (i) of that sub-paragraph) if such person were a resident of one of the Contracting States under Article 4 (Residence) of this Convention; and

B) with respect to income referred to in Article 10 (Dividends), 11 (Interest) or 12 (Royalties) of this Convention, would be entitled under such convention to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or

(ii) is a company resident in a Member State of the European Community which is entitled under the provisions of any Directive of the European Community to receive the particular class of income for which benefits are being claimed under this Convention free of withholding tax.

For the purposes of applying paragraph 3 of Article 10 (Dividends) in order to determine whether a person, owning shares, directly or indirectly, in the company claiming the benefits of this Convention, is an equivalent beneficiary, such person shall be deemed to hold the same voting power in the

e) For the purposes of paragraph 2. of this Article, the shares in a class of shares or the units in a class of units are considered to be regularly traded on one or more recognized stock exchanges in a chargeable or taxable period if the aggregate number of shares or units of that class traded on such stock exchange or exchanges during the twelve months ending on the day before the beginning of that taxable or chargeable period is at least six per cent. of the average number of shares or units outstanding in that class during that twelve-month period.

f) A body corporate or unincorporated association shall be considered to be an insurance company if its gross income consists primarily of insurance or reinsurance premiums and investment income attributable to such premiums.