

Double Taxation Treaty between Ireland and USA

The Competent Authorities of the United States and Ireland enter into the following agreement ("Agreement") concerning the treatment of Common Contractual Funds under the Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, signed at Dublin on July 28, 1997 (the "Treaty") and the Protocol, also signed at Dublin on July 28, 1997 (the "Protocol"). The Agreement is entered into under paragraph 3 of Article 26 (Mutual Agreement Procedure).

It has come to the attention of the Competent Authorities that difficulties have arisen as to the application of the Treaty to income received by Irish unit holders in a Common Contractual Fund ("CCF"). This results from the provisions of Subparagraph 1(d) of Article 4 of the Treaty and Article 1 of the Protocol

The CCF was introduced into law in Ireland after the Treaty entered into force. Legislation for the establishment in Ireland of a UCITS CCF was enacted under the UCITS (Undertakings for Collective Investment in Transferable Securities) Regulations (S.I. 211 of 2003 as amended). More recently, legislation allowing for the formation of a non-UCITS CCF in Ireland was passed in June 2005, entitled the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (the "2005 Act").

Taxation provisions governing the UCITS CCF were introduced in Ireland in the Finance Act 2003. Anticipating of the passing into law of the 2005 Act, those provisions were amended by Section 44 of the Finance Act 2005 to cover both UCITS and non-UCITS CCFs. Section 44 provides, inter alia, for a new Section 739I in the Taxes Consolidation Act 1997 (TCA). Under section 739I of the TCA the income and gains of a CCF are treated as arising or, as the case may be, accruing, to each unit holder of the CCF in proportion to the value of the units beneficially owned by the unit holder, as if the relevant income and relevant gains had arisen or, as the case may be, accrued, to the unit holders in the CCF without passing through the hands of the CCF.

The first sentence of Article 1 of the Protocol provides that for the purposes of the Treaty where a resident of a Contracting State is entitled to income or gains in respect of an interest in a person that derives income or gains from the other Contracting State, any income or gains so derived by such person shall be considered to be income or gains of such resident to the extent it is treated as such under the taxation laws of the first-mentioned State. Thus, under the first sentence, it would appear that income received by a unit holder that is a resident of Ireland in respect of an interest in a CCF should be considered to be income of the unit holder for purposes of the Treaty. However, under the second sentence of Article 1 of the Protocol, the income will not be treated as the income of the unit holder for purposes of the Treaty if the CCF is a resident of Ireland within the meaning of subparagraph 1(d) of Article 4 (Residence) of the Treaty. Subparagraph 1(d) of Article 4 provides that, in the case of Ireland, a "resident" includes a Collective Investment Undertaking ("CIU"). The term "Collective Investment Undertaking" is not however defined

in the Treaty. Under Irish law, a CCF is treated as a CIU. Therefore, a question has arisen as to whether Irish unit holders in a CCF are entitled to benefits under the Treaty.

Paragraph 2 of Article 3 (General Definitions) of the Treaty provides that any term not defined in the Treaty shall, unless the context otherwise requires, or the competent authorities agree to a common meaning pursuant to the provisions of Article 26 (Mutual Agreement Procedure), be defined by reference to the law of the Contracting States in effect at the time the Treaty is being applied. The technical explanation of the Treaty prepared by the Department of the Treasury of the United States explains that the reference to the "context otherwise requiring" a definition different from the internal law definition of the Contracting State whose tax is being imposed refers to a circumstance where the result intended by the negotiators or by the Contracting States is different from the result that would obtain under the statutory definition.

Competent Authority Agreement

The Competent Authorities agree that in order to reach the result intended by the Contracting States, a CCF will not be treated as a resident of Ireland pursuant to paragraph 1(d) of Article 4. Accordingly, under the first sentence of Article 1 of the Protocol, a unit holder in a CCF will be entitled to benefits under the Treaty, provided the unit holder is a resident of Ireland that satisfies the requirements of Article 23 (Limitation on Benefits). In addition, a CCF will not be entitled to benefits in its own right because it will not be a resident of Ireland.

Frank Y. Ng
Acting United States Competent Authority
Date: 23 January 2006

P. F. Mullen
Irish Competent Authority
Date: 9 February 2006