Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Number: **200149031**
Release Date: 12/7/2001
Index Number: UILC # 9114.03-19

Person to Contact:

Telephone Number:

Refer Reply To:
CC:INTL:BR1-PLR-129169-01
Date:
September 10, 2001

In Re:

TY:

A =

B =

Dear :

This responds to your letter dated April 20, 2001, in which you requested a ruling and closing agreement under Rev. Proc. 92-39, 1992-1 C.B. 860, that premiums received by A on policies of insurance or reinsurance of United States risks are exempt from the insurance excise tax imposed by section 4371 of the Internal Revenue Code pursuant to the Income Tax Treaty Between Ireland and the United States.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by penalty of perjury statements executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

A is an Irish reinsurance company. All of A's outstanding shares are held by a Canadian company, B. A reinsures the mortality risk with respect to certain individual life insurance policies held by United States insurers.

Rev. Proc. 92-39, 1992-1 C.B. 860 (Miscellaneous excise taxes collected by return), establishes procedures for entering into a closing agreement to establish an exemption from the section 4371 excise tax when the foreign insurer is claiming such an exemption under a United States income tax treaty. Where a foreign insurer is a person qualified for benefits under the applicable treaty, it may enter into a closing agreement in a format specified within sec. 3.11 of Rev. Proc. 92-39.

Section 4371 provides as follows:

> There is hereby imposed on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:
>
> (1) Casualty insurance and indemnity bonds. 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond if issued to or for, or in the name of, an insured as defined in section 4372(d);
> (2) Life insurance, sickness and accident policies, and annuity contracts. 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of life, sickness, or accident insurance, or annuity contract; and
> (3) Reinsurance. 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of reinsurance covering any of the contracts taxable under paragraph (1) or (2).

Section 4372(d) defines "insured" as:

> (1) a domestic corporation or partnership, or an individual resident of the United States, against, or with respect to , hazards, risks, losses, or liability wholly or partly within the United States, or
> (2) a foreign corporation, foreign partnership, or nonresident individual, engaged in a trade or business within the United States, against, or with respect to, hazards, risks, losses, or liability within the United States.

Treas. Reg. §46.4374-1(a) states that the "tax shall be remitted by the person who makes the payment of the premium to a foreign insurer or reinsurer". In this case, A intends to receive reinsurance premiums from United States insurers, who would otherwise be liable for payment of the excise tax because they are paying premiums to A, a foreign reinsurer, to reinsure their United States mortality risk.

By requesting to enter into a closing agreement concerning section 4371 excise tax, A is seeking the benefits of Article 7(1)(Business Profits) of the United States - Ireland Income Tax Treaty, which states in relevant part as follows:

> The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on a business in the other Contracting State through a permanent establishment situated therein... .

Article 2(1)(a) (Taxes Covered), of the United States - Ireland Income Tax Treaty, includes section 4371 excise tax within the scope of the convention, as follows:

> The Convention shall, however, apply to the Federal excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other convention which provides exemption from these taxes...

Paragraph 2 of the Protocol Amending the 1997 Tax Convention with Ireland ("Protocol"), requires an Irish resident to be subject to Irish income taxes where the Irish resident is receiving income or profits that would otherwise be subject to United States insurance excise tax, as follows:

> For the purposes of paragraph 1, it is understood that this Convention shall not apply to the Federal Excise Taxes imposed on insurance premiums paid to foreign insurers where such premiums are not subject to the generally applicable tax imposed on insurance corporations in the contracting State in which such insurers are resident.

Residence in Ireland / Liable to tax in Ireland

Article 4 (Residence) of the United States - Ireland Income Tax Treaty states in relevant part that:

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means:
> a) any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature... .

A states that it is incorporated under the laws of Ireland and that its principal place of business is in Ireland. A has also submitted certification from the Office of the Revenue Commissioners Dublin Corporation Tax District that it is a resident of Ireland for tax purposes.

Qualification for Benefits Under United States- Ireland Income Tax Treaty

A asserts that it is a qualified person under Article 23(5)a)(Limitation on Benefits) of the United States - Ireland income tax treaty ("Ireland treaty"). Article 23(5)a) states the following:

> A company that is a resident of a Contracting State shall also be entitled to all of the benefits of the convention if:
> (i) at least 95% of the aggregate vote and value of all its shares is owned directly or indirectly by seven or fewer qualified persons or persons that are residents of member states of the European Union or of parties to the North American Free Trade Agreement (NAFTA) or any combination thereof; and
> (ii) such company meets the base reduction test described in subparagraph c)ii) of paragraph 2, provided that a resident of a member state of the European Union or a party to NAFTA shall be treated as a qualified person for the purposes of that test.

The term "resident of a party to NAFTA" is defined in Article 23(8)(f) as:

> [A] person that would be entitled to the benefits of a comprehensive income tax convention in force between any party to NAFTA and the Contracting State from which the benefits of the Convention are claimed, provided that if such convention does not contain a comprehensive Limitation on Benefits Article (including provisions similar to those of subparagraphs c) and e) of paragraph 2), the person would be entitled to the benefits of this Convention under the principles of paragraph 2 if such person were a resident of one of the Contracting States under Article 4 (Residence).

A is owned 100% by B. Therefore, we must look to the income tax treaty between the United States and Canada ("Canada treaty") to determine whether B is entitled to benefits thereunder. Article XXIXA of the Canada treaty is a comprehensive Limitation on Benefits Article.

B is a resident of Canada as defined under Article IV(1) (Residence) of the Canada treaty because it is incorporated under the laws of Canada and is liable to tax in Canada by reason of its incorporation and place of management in Canada. Further, B is a person qualifying for the benefits under Article XXIXA(2)(c) (Limitation on Benefits) of the Canada treaty. Article XXIXA(2)(c) states that a qualifying person under the Canada treaty is "a company or trust in whose principal class of shares or units there is substantial and regular trading on a recognized stock exchange". A states that the principal class of shares in B is traded on the Toronto Stock Exchange, which is a prescribed stock exchange under the Income Tax Act of Canada, and therefore, a recognized stock exchange under Article XXIXA(5)(a)(ii) of the Canada treaty.

"Substantially and regularly traded" is not defined in the Canada treaty itself. Under Article III(2) of the Canada treaty, "any term not defined [within the treaty] shall,

unless the context otherwise requires and subject to the provisions of Article XXVI (Mutual Agreement Procedure), have the meaning which it has under the law of that State concerning the taxes to which the Convention applies".

A concept similar to "substantial and regular trading" is found in section 884(e)(4)(B), which provides a rule for determining whether a publicly traded corporation is a resident of a treaty country. Under Section 884(e)(4)(B), a publicly traded corporation may be a resident of treaty country if-

> (i) the stock of such corporation is primarily and regularly traded on an established securities market in such country...

In applying this section, Treas. Reg. § 1.884-5(d)(4)(i), defines "regularly traded" as follows:

> For purposes of this section, stock of a corporation is "regularly traded" on one or more established securities markets in the foreign corporation's country of residence... for the taxable year if-
>
> (A) One or more classes of stock of the corporation that, in the aggregate, represent 80 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote and the total value of the stock of such corporation are listed on such market or markets during the taxable year;
>
> (B) With respect to each class relied on to meet the 80 percent requirement [noted above]-
> (1) Trades in each such class are effected, other than in *de minimis* quantities, on such market or markets on at least 60 days during the taxable year ... ; and
> (2) The aggregate number of shares in each such class that is traded on such market or markets during the taxable year is at least 10 percent of the average number of shares outstanding in that class during the taxable year... .

According to the facts presented, both the common and preferred classes of shares of B are listed on the Toronto Stock Exchange. B's common class of shares is worth 100% of its vote and more than 97% of its value. B shares were traded above *de minimis* levels on each day the Toronto Stock Exchange was open for trading in calendar year 2000, which equaled 250 days, and the total number of common shares traded during 2000 equaled 66% or more of the average number of common shares outstanding during the year. Therefore, B's principal class of shares was "substantially and regularly traded" on a recognized stock exchange under the Canada treaty.

A satisfies the first prong of the Article 23(5)a)(Limitation on Benefits) test under the Ireland treaty because at least 95% of the aggregate vote and value of all its shares is owned directly or indirectly by seven or fewer qualified persons or persons that are residents of member states of the European Union or of parties to the North American Free Trade Agreement (NAFTA) or any combination thereof.

The second prong of Article 23(5)a) (Limitation on Benefits) of the Ireland treaty refers to the base reduction test of Article 23(2)(c)ii), which provides that a company may be a qualified person for a fiscal year only if:

> [a]mounts paid or accrued by the person during its fiscal year:
> A) to persons that are neither qualified persons nor residents or citizens of the United States, and
> B) that are deductible for income tax purposes in that fiscal year in the persons's State of residence ... do not exceed 50 percent of the gross income of the person;

Article 23(5)a)(ii) states that a resident of a member state of the European Union or a party to NAFTA shall be treated as a qualified person for the purposes of the base reduction test. As discussed above, B is a resident of a party to NAFTA. A asserts that it meets the base reduction test under the second prong of Article 23(5)a) of the Ireland treaty because payments to persons described in Article 23(2)(c)ii) will not exceed 50 percent of A's gross income.

Therefore, under the facts as presented, A is a resident of Ireland that is qualified for the benefits of the Income Tax Treaty Between Ireland and the United States under Article 23(5)(a)(Limitation on Benefits) of the treaty.

Pursuant to paragraph 8(a) of the attached agreement, taxpayer's liability for Federal excise tax, as agreed upon, including liability resulting from reinsurance of U.S. risks with persons not entitled to exemption under the Convention or another Convention, will commence on April 20, 2001, the date of taxpayer's ruling request. The letter of credit required by paragraph 5(a) of the attached agreement, in the amount of $75,000, must be in effect within 30 days of the date the agreement is finally signed on the Commissioner's behalf.

Any person otherwise required to remit the Federal excise tax on foreign insurance or reinsurance policies issued by taxpayer pursuant to section 46.4371-1(a) of the Excise Tax Regulations may rely upon a copy of this letter and/or a copy of the approved Closing Agreement as authority that they may consider premiums paid to taxpayer on and after April 20, 2001, as exempt under the Convention from the United States Federal excise tax.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. Furthermore, this

ruling does not address the issue of whether taxpayer is an insurance company or whether premiums paid to taxpayer are deductible under section 162 of the Code. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to A.

Sincerely yours,
W. EDWARD WILLIAMS
Senior Technical Reviewer, Branch 1
Office of the Associate Chief Counsel
(International)

cc:

CLOSING AGREEMENT OF FINAL DETERMINATION COVERING SPECIFIC MATTERS

Under section 7121 of the Internal Revenue Code, TIN , and the Commissioner of Internal Revenue make the following closing agreement:

WHEREAS, the business profits article (Article 7 of the United States-Ireland Income Tax Convention (the "Convention")) exempts insurance or reinsurance premiums paid to a resident of Ireland from the Federal excise tax imposed by section 4371 et seq. of the Internal Revenue Code of 1986, as amended (the "Code") only to the extent that the Irish insurer or reinsurer does not reinsure such risks with a person not entitled to exemption from such tax under the Convention or another convention (Article 2(1)(a) of the Convention) and only if the insurer or reinsurer qualifies under Article 23 of the Convention;

WHEREAS, section 3.02 of Rev. Proc. 92-39 provides that the person required to remit the tax may consider the premium exempt if, prior to filing the return for the taxable period, such person has knowledge that the Irish insurer or reinsurer has in effect a closing agreement to be liable as a United States taxpayer for Federal excise tax due under section 4371 et seq. of the Code on premiums from policies reinsured with reinsurers that are not entitled to exemption from the excise tax under the Convention or any other convention and on premiums paid or accrued when the Irish insurer or reinsurer did not qualify under the Convention for exemption from the excise tax imposed by section 4371 et seq. of the Code;

WHEREAS, the Irish insurer or reinsurer represents that it is and will continue to be eligible for benefits under the Convention; and

WHEREAS, the Irish insurer or reinsurer (hereinafter referred to as "the Taxpayer") wishes to have its policies of insurance or reinsurance considered exempt from tax under the Convention; IT IS HEREBY DETERMINED AND AGREED THAT:

(1) Taxpayer shall, for purposes of this closing agreement, be liable as a United States Taxpayer for the Federal excise tax due under section 4371 et seq. of the Code on premiums from policies reinsured with reinsurers that are not entitled to exemption from the excise tax under the Convention or any other convention and from policies issued or outstanding when Taxpayer did not qualify under the Convention for exemption from the excise tax imposed by section 4371 et seq. of the Code.

(2)(a) Returns of Federal excise tax due under and pursuant to this closing agreement and section 4371 et seq. of the Code shall be made by Taxpayer, or by Taxpayer's authorized representative on Taxpayer's behalf, by filing Form 720, Quarterly Federal Excise Tax Return, for each return period covered by this closing agreement.

(b) If Taxpayer reinsures, in whole or in part, a policy of insurance or reinsurance with any person(s) not entitled to exemption from the excise tax under the

Convention or any other convention or if Taxpayer issues or has outstanding a policy or policies when the Taxpayer did not qualify under the Convention for exemption from the excise tax imposed by section 4371 et seq. of the Code, the tax reportable on the return, Form 720, shall be computed on the basis of the percentage of such policy reinsured or on the basis of the premium accrued or received during the time period when Taxpayer did not qualify for exemption under the Convention. For purposes of the preceding sentence, Taxpayer may consider a reinsurer to be entitled to exemption from the excise tax under the Convention or another convention if the reinsurer is a party to a closing agreement with the Internal Revenue Service under this Convention or another convention, or the reinsurer provides evidence that it is a resident of the United States or of a country with which the United States has in effect a convention that waives the excise tax without an explicit "anti-conduit" clause.

(c) Forms 720 shall be filed with the Director, Internal Revenue Service Center, Philadelphia, Pennsylvania 19255, U.S.A.

(d) Taxpayer, or Taxpayer's authorized representative, shall make the required Federal tax deposits of the Federal excise tax in such manner and at such times as are prescribed by regulations and explained in the instructions for Form 720.

(3) Taxpayer agrees that, for purposes of determining its Federal excise tax liability pursuant to this closing agreement and for purposes of verifying Taxpayer's entitlement to benefits under the Convention, Taxpayer will maintain for a period of 6 years from the end of each taxable period to which this closing agreement applies accounts and records of items of insurance and reinsurance that will be made available upon written request by the Internal Revenue Service at the place mutually agreed upon by the Service and Taxpayer. Taxpayer will also maintain for 6 years and make available for inspection records to establish eligibility for Convention benefits. Taxpayer will be allowed 60 days, or other period of time (but in no event less than 60 days) determined as reasonable by the Assistant Commissioner (International), within which to make available its accounts and records.

(4) If it is determined that there is an underpayment in respect of any excise tax determined to be due pursuant to this closing agreement and section 4371 et seq. of the Code, the Internal Revenue Service shall issue a statement of notice and demand for the tax due plus any interest and applicable penalties. Notice of any underpayment shall be sent to the Taxpayer at the name and address shown on the Form 720, if a Form 720 was filed for the period for which an underpayment is determined by the Internal Revenue Service, or otherwise to the Taxpayer's registered address in Ireland. Payment of all additional amounts due shall be made in accordance with the terms specified in the statement of notice and demand. Collection of such amounts not paid per notice and demand shall be in accordance with paragraph 5 hereof.

(5)(a) As security for payment of tax, Taxpayer shall cause an irrevocable letter of credit to be issued by a United States bank that is a member of the Federal Reserve System, or by a United States branch or agency of a foreign bank that is on the National Association of Insurance Commissioners list of banks from which letters of credit may be accepted, in favor of the Internal Revenue Service in the amount of $75,000 or such amount as may from time to

time be mutually agreed upon by Taxpayer and the Service. Such letter of credit must be in effect within 30 days of the date that the closing agreement is signed for the Commissioner of Internal Revenue.

(b) The Service may issue a statement of notice and demand with respect to:

(i) Any tax shown on a Form 720 (original, amended, or substitute for return) that is not paid with such return; or

(ii) Any proposed additional excise tax liability sustained by the Internal Revenue Service Regional Director of Appeals having jurisdiction over such matter, if the time for filing a protest of such proposed liability has expired, provided that the statement of notice and demand has been issued as provided in paragraph 4 hereof.

(c) If, after the conditions in paragraph 5(b) hereof have been met, the tax, interest, and any applicable penalties, are not paid in accordance with the terms of the statement of notice and demand, collection of such amounts will be made by resorting to such letter of credit, to the extent thereof, before any levy or proceeding in court for collection is instituted against Taxpayer.

(d) If such letter of credit is drawn upon, it must be reinstated to $ 75,000 within 60 days after the date drawn upon.

(6)(a) Solely by reason of the execution by Taxpayer and the Commissioner of this closing agreement, any person otherwise required to remit the federal excise tax on foreign insurance or reinsurance premiums pursuant to section 46.4374-1(a) of the Excise Tax Regulations may consider premiums paid to Taxpayer after the effective date of this agreement as exempt under the Convention from the Federal excise tax.

(b) Taxpayer agrees that the Commissioner, or his or her authorized delegate, may disclose Taxpayer's name as an insurer or reinsurer that qualifies for exemption from the excise tax under the Convention by publication or otherwise.

(7)(a) This closing agreement shall include, as an attachment hereto, a statement from the local tax office with which the insurer or reinsurer files its Irish tax returns certifying that Taxpayer is a resident of Ireland as defined in the Convention and a statement from Taxpayer that the Taxpayer is not disqualified from receiving benefits under the Convention by reason of Article 23 of the Convention. Taxpayer shall submit such information in its statement as will establish its entitlement to benefits under the Convention.

(b) The statement from the local tax office in Ireland shall be effective for a period of 3 calendar years beginning with the year of receipt. Taxpayer agrees to renew the certificate of residency every three years, and its own certification of eligibility for benefits under the Convention every year, on or before the expiration date of the original certificate. Taxpayer agrees to provide an original and one copy of the recertification along with a photocopy of this closing agreement to:

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224, U.S.A.
Attn: CC:INTL:1

Taxpayer also agrees to promptly notify the Competent Authority of Ireland and the Internal Revenue Service of any change that may result in its disqualification from receiving Treaty benefits.

(8)(a) This closing agreement shall be effective April 20, 2001. This agreement shall thereafter continue in effect unless terminated as provided in subparagraph (b) of this paragraph.

(b) This agreement may be terminated by either Taxpayer or the Commissioner by giving the other written notice of the notifying party's intent to terminate. The decision to terminate is solely at the discretion of the party giving such notice. This agreement shall be terminated on the last day of the return period immediately following the return period within which the written notice of termination is given.

(c) Taxpayer hereby agrees to file a return, Form 720, marked "Final Return" for the taxable period within which this agreement terminates pursuant to paragraph (8)(b) hereof and to furnish a duplicate of such "Final Return" to:

Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224, U.S.A.
Attn: CC:INTL:1

(d) Taxpayer agrees that the letter of credit issued pursuant to paragraph 5 hereof shall remain in effect for a period of not less than 60 days after the "Final Return" has been filed in accordance with subparagraph (c) hereof, or until the examination of Taxpayer's returns is completed and any additional tax due has been paid, whichever is later.

WHEREAS, the determinations set forth above are hereby agreed to by said taxpayer:

NOW THIS CLOSING AGREEMENT WITNESSETH, that the said taxpayer and said Commissioner of Internal Revenue hereby mutually agree that the determinations set forth shall be final and conclusive, subject, however, to reopening in the event of fraud, malfeasance, or misrepresentation of material fact, and provided that any change or modification of applicable statutes or tax conventions will render this agreement ineffective to the extent that it is dependent upon such statutes or tax conventions.

IN WITNESS WHEREOF, the above parties have subscribed their names to these presents, in triplicate.

Signed this ____ day of _____, 2001

By _____
Title _____

By _____
Title _____

Commissioner of Internal Revenue

By _____
Associate Chief Counsel (International)

Date:_____

By _____
Assistant Commissioner (International)

Date: _____