

LB&I International Practice Service Transaction Unit

Shelf		Cross-Over		
Volume	16	Treaties	UIL Code	9450
Part	16.1	Limitation on Benefits Issues	Level 2 UIL	9450.01
Chapter	16.1.1	Publicly Traded Test	Level 3 UIL	N/A
Sub-Chapter	N/A	N/A		

Unit Name	Qualification for Treaty Benefits under the Publicly Traded Test
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Document Control Number (DCN)	TRE/9450.01_01(2014)
Date of Last Update	08/28/14

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Issue and Transaction Overview

Qualification for Treaty Benefits under the Publicly Traded Test

The United States has entered into more than 60 bilateral income tax treaties that reduce or eliminate U.S. taxes imposed on residents of the treaty countries. Treaties provide benefits to both passive investors and persons that conduct an active business in the United States. For example, a treaty might reduce or eliminate the 30-percent gross basis withholding tax that otherwise would be due on U.S.-source dividends paid by a U.S. subsidiary (“USS”) to its foreign parent (“FP”), U.S.-source interest paid by a U.S. borrower to a foreign bank, or royalties paid for the use, in the United States, of a trademark developed by a foreign affiliate. This type of income is generally referred to as fixed or determinable annual or periodical gains, profits, and income (“FDAP income”). Treaties also prevent the taxation of profits of a business if not attributable to a permanent establishment in the United States, and some treaties provide a waiver of the excise tax on premiums paid to foreign insurance companies (often referred to as “FET”).

Almost all U.S. tax treaties include a limitation on benefits (“LOB”) article, which prevents residents of a treaty country that do not have a strong connection to the treaty country from inappropriately claiming treaty benefits. In treaties with an LOB article, a person must be a resident of the treaty country *and* satisfy the LOB article to receive treaty benefits.

An LOB article generally provides a series of tests. Certain tests—such as the publicly traded test, the ownership-base erosion test, and the derivative benefits test—may allow the treaty resident to claim all treaty benefits, and such residents are often referred to as “qualified residents.” Others, such as the active trade or business test, permit treaty residents to claim only specific benefits. A treaty resident need only meet *one* of the tests applicable to the benefits claimed. If a treaty resident meets *none* of the tests applicable to the benefits claimed, most LOB articles also allow the treaty resident to request in advance of a payment of U.S.-source income a determination from the U.S. Competent Authority that the treaty resident is entitled to specific benefits. In treaties with an LOB article, a treaty resident cannot qualify for treaty benefits, such as a reduced rate of withholding or protection under the treaty’s business profits article, unless one of the tests included in the LOB article is met or a discretionary determination is obtained.

This Unit examines one of these tests—the publicly traded test—and will allow the International Examiner or Revenue Agent to determine whether a treaty resident qualifies for treaty benefits on the basis of meeting the publicly traded test in LOB article of the Luxembourg treaty. That test provides that a U.S.- or Luxembourg-resident company is a qualified resident if the company’s principal class of shares is substantially and regularly traded on one or more recognized stock exchanges.

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Issue and Transaction Overview (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

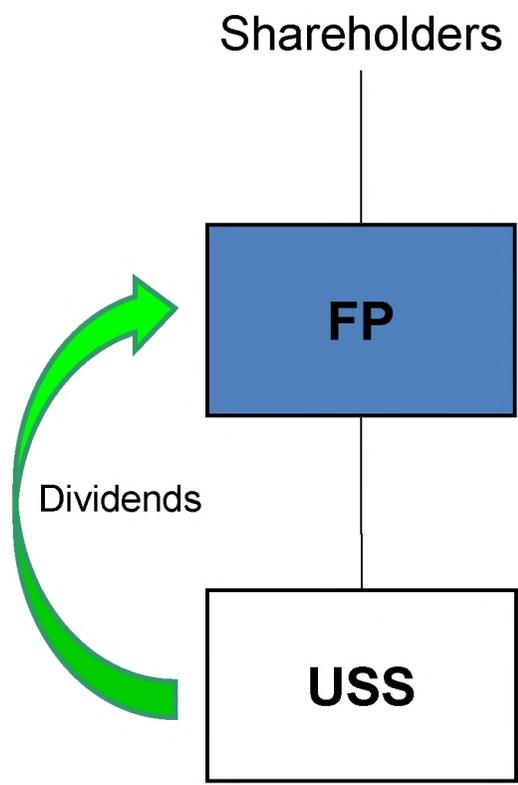
Remember, however, that every tax treaty is different. Although this Unit addresses the version of the publicly traded test found in the Luxembourg treaty, the test in the treaty you are applying might differ. Therefore, in every case involving a tax treaty, you should carefully review the LOB article and any other applicable articles in the treaty, and any contemporaneous or subsequent protocol(s), memoranda of understanding, or exchange(s) of notes between the treaty countries, to determine if treaty benefits should be granted. In addition, more interpretive guidance may be found in the Treasury Department's Technical Explanation ("TE") of the treaty/protocol, as well as the Joint Committee on Taxation Report, the Senate Foreign Relations Committee Report, authoritative case law, and guidance issued by the Internal Revenue Service ("IRS").

Of course, if a treaty resident does not meet the requirements of the publicly traded test, the treaty resident might qualify for treaty benefits under an alternative test in the LOB article. These alternative tests are not addressed in this Unit. In the event your audit concludes that a treaty resident doesn't qualify for treaty benefits, then apply the rules of Internal Revenue Code to the transaction. The treaty resident may still request a discretionary determination by directly seeking assistance from the Treaty Assistance and Interpretation Team ("TAIT") under the Deputy Commissioner (International). It might also appeal your conclusion via normal administrative and judicial processes, as well as under the Mutual Agreement Procedure ("MAP") article of the applicable treaty. This Unit does not address the process for providing notification of the treaty resident's right to request Competent Authority assistance under MAP.

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Transaction and Fact Pattern

Qualification for Treaty Benefits under the Publicly Traded Test

Diagram of Transaction	Facts
 <p>The diagram illustrates the flow of dividends. At the top, 'Shareholders' are connected to a blue box labeled 'FP'. Below 'FP' is a white box labeled 'USS'. A vertical line connects 'FP' to 'USS'. A large green curved arrow points from 'USS' to 'FP', with the word 'Dividends' written next to it.</p>	<ul style="list-style-type: none"> ▪ FP is an entity organized, managed, and controlled in Luxembourg ▪ FP pays corporate income taxes in Luxembourg ▪ FP is not engaged in business in the United States ▪ FP believes that it is a qualified resident of Luxembourg because it meets the publicly traded test in the Luxembourg treaty ▪ FP provides a Form W-8BEN, in which FP claims it is entitled to the reduced rate of withholding provided by the Luxembourg treaty and certifies that it meets Article 24(2)(d) (LOB) of the Luxembourg treaty, to USS ▪ USS pays dividends to FP, withholding at the reduced treaty rate

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Summary of Potential Issues

Qualification for Treaty Benefits under the Publicly Traded Test	
<u>Issue 1</u>	Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?
<u>Issue 2</u>	What was FP's principal class of shares at the time of USS's dividend?
<u>Issue 3</u>	Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?
<u>Issue 4</u>	Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

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All Issues, Step 1: Initial Factual Development

Qualification for Treaty Benefits under the Publicly Traded Test

Almost all U.S. tax treaties have an LOB article. In treaties with an LOB article, a treaty resident will not qualify for any treaty benefits unless it is a resident of that country and meets one of the tests included the LOB article (or is granted discretionary relief by the U.S. Competent Authority). One test is the publicly traded test. A company meets the publicly traded test in the Luxembourg treaty if it is a resident of the United States or Luxembourg and its principal class of shares is substantially and regularly traded on one or more recognized stock exchanges.

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> Confirm there is a taxable dividend (actual, deemed, or constructive) to FP from USS 	<ul style="list-style-type: none"> Form 1042-S, Lines 12a, 13a, 21 Form 1120-F, Section I, Line 2 Adjustment on examination (for example, under IRC § 482) resulting in a deemed payment of FDAP income from USS to FP 	
<ul style="list-style-type: none"> Determine that USS withholds based on the reduced treaty rate (or, less commonly in a related party situation, FP files a claim for refund based on the reduced treaty rate) 	<ul style="list-style-type: none"> W-8 BEN provided to USS Form 1042-S, Line 6 Form 1120-F, Line W, Section I, and Schedule W Form 8833 (Treaty Based Return Position) (exemptions from filing might apply) 	

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Issue 1, Step 2: Review Potential Issues

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>A person must be a resident of the United States or Luxembourg and, absent a discretionary determination by the U.S. Competent Authority, meet one of the tests in the LOB article to qualify for benefits under the dividend article of the Luxembourg treaty.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 10 ▪ TE to Luxembourg Treaty 	
<p>Subject to certain exceptions, a person is a resident of Luxembourg if, under the laws of Luxembourg, it is liable to tax in Luxembourg by reason of domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 4(1) ▪ TE to Luxembourg Treaty 	
<p>The publicly traded test applies to a “company” resident in Luxembourg whose principal class of shares meets certain trading requirements. Therefore, FP cannot meet the requirements of the test if it is not a company.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty 	
<p>FP is a company if it is a body corporate or any entity that is treated as a body corporate for tax purposes. Although the definition of company under the treaty does not identify whose law is relevant for this purpose, it is Luxembourg law.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 3(1)(b) ▪ Cf. U.S. Model Treaty (2006), Art. 3(1)(b); TE to U.S. Model Treaty (2006) 	

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Issue 1, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>Luxembourg recognizes several types of commercial entities, including the <i>société anonyme</i> ("SA"), the <i>société à responsabilité limitée</i> ("SARL"), general and limited partnerships, and partnerships limited by shares.</p> <p>An SA always is treated as a corporation for both Luxembourg and U.S. tax purposes. Although the other types of Luxembourg entities might be treated as corporations for Luxembourg tax purposes, limitations of Luxembourg corporate law make it very unlikely that interests in such entities would be traded on a recognized stock exchange.</p> <p> CAUTION: Although this Unit primarily addresses the version of the publicly traded test found in the Luxembourg treaty, the test in the treaty you are applying might differ. Be sure to read carefully the text of treaty you are applying and refer to this Unit only as general guidance.</p>	<ul style="list-style-type: none"> ▪ <i>Luxembourg – Corporate Taxation</i>, IBFD Country Analyses (IBFD) ▪ <i>Business Operations in Luxembourg</i>, Tax Mgmt. Portfolio 971-3d (Westlaw) ▪ Treas. Reg. § 301.7701-2(b)(8) 	

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Issue 1, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>For example, many treaties include a “subsidiary of a publicly traded company test.” In treaties with this test, a resident company might qualify for treaty benefits under the publicly traded test if it is publicly traded itself or if a sufficient percentage of it is owned by publicly traded companies.</p> <p>Under treaties like the Netherlands treaty, a company resident in one of the contracting states might qualify for treaty benefits if a sufficient percentage of it is owned, directly or indirectly, by five or fewer companies that themselves meet the publicly traded test, and each intermediate owner—including any disregarded entity—is a resident of one of the contracting states. By contrast, under the version of this test in the Luxembourg treaty, a resident company may be controlled, directly or indirectly, by an unlimited number of companies that themselves meet the treaty’s publicly traded test, but it also must meet a requirement that limits the amount of its deductible payments to persons who are not qualified residents or U.S. citizens (a “base erosion” test).</p> <p>Thus, if you are applying a subsidiary of a publicly traded company test, you will have to determine whether the treaty resident <i>and its owners</i> are companies resident in the treaty country. Variations of this test will be addressed in a separate unit.</p>	<ul style="list-style-type: none"> ▪ Netherlands Treaty, Art. 26(2)(c) (also requiring substantial presence in country of residence) ▪ TE to Netherlands Treaty ▪ U.S. Model Treaty (2006), Art. 22(2)(c) ▪ TE to U.S. Model Treaty (2006) ▪ Luxembourg Treaty, Art. 24(2)(e) ▪ TE to Luxembourg Treaty 	

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Issue 1, Step 3: Additional Factual Development

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> Confirm that FP is a treaty resident of Luxembourg 	<p>In addition to the items requested during initial development, request:</p> <ul style="list-style-type: none"> An explanation of whether FP is liable to tax in Luxembourg as a resident Evidence, such as a corporate tax return, that FP is liable to tax in Luxembourg as a resident A statement whether FP is considered to be liable to tax in any other country as a resident (that is, FP is a dual resident company) 	

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Issue 1, Step 3: Additional Factual Development (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> Confirm that FP is organized as an entity that is a body corporate or an entity that is a body corporate for tax purposes in Luxembourg 	<ul style="list-style-type: none"> FP's organizational document (e.g., articles of incorporation) and any amendments An explanation of whether FP is a body corporate or treated as a body corporate under Luxembourg law If a Form 8833 was not filed, a description of FP's treaty position, including why the dividends article (or other operative article) applies and how FP meets the LOB article Any opinion or memorandum prepared by FP's tax advisors discussing FP's qualification for treaty benefits with respect to the payment made by USS 	

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Issue 1, Step 4: Develop Arguments

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Explanation of Approach	Resources	6103 Protected Resources
<p>Consider whether, under the laws of Luxembourg, FP is liable to tax in Luxembourg by reason of domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature.</p> <p> CONSULTATION: Consult with the Treaties International Practice Network (“IPN”) if there is evidence that FP is liable to tax as a resident in Luxembourg and a third country, under each country’s domestic law (that is, FP is a dual resident company).</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 4(1) ▪ TE to Luxembourg Treaty ▪ Rev. Rul. 2004-76, 2004-2 C.B. 111 	

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Issue 1, Step 4: Develop Arguments (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 1

Was FP a company that was a resident of Luxembourg for treaty purposes at the time of USS's dividend?

Explanation of Approach	Resources	6103 Protected Resources
<p>Consider whether FP is a body corporate or an entity treated as a body corporate for tax purposes.</p> <p>From a practical standpoint, even if FP is a body corporate or an entity treated as a body corporate for tax purposes, it is unlikely to meet the other requirements of the publicly traded test if it is not organized as an SA.</p> <p> DECISION POINT: Determine whether to proceed to Issue 2 based on FP's residency and its classification as a body corporate or an entity treated as a body corporate for tax purposes in Luxembourg. If you decide not to proceed because you have determined that FP was not a company that was a resident of Luxembourg for treaty purposes, consider whether FP might qualify for treaty benefits under a different test in the LOB article.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ Luxembourg Treaty, Art. 3(1)(b) ▪ TE to Luxembourg Treaty ▪ Luxembourg Treaty, Art. 24(2)-(4) ▪ IPS units on alternative LOB tests (forthcoming) 	

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Issue 2, Step 2: Review Potential Issues

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 2

What was FP's principal class of shares at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>To meet the publicly traded test, FP's "principal class of shares" must meet certain trading requirements. Therefore, you need to determine which shares you will apply those requirements to.</p> <p>Generally, the principal class of shares is the class that represents a majority of the voting power and value of the company. Usually, a company's common or ordinary shares will be its principal class of shares.</p> <p>If no single class of shares represents the majority of the company's voting power and value, the principal class of shares includes those classes that together possess more than 50 percent of voting power and value of the company.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty 	

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Issue 2, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 2

What was FP's principal class of shares at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p> CAUTION: Although this Unit primarily addresses the version of the publicly traded test found in the Luxembourg treaty, the test in the treaty you are applying might differ. Be sure to read carefully the text of treaty you are applying and refer to this Unit only as general guidance.</p> <p>For example, the publicly traded test in some treaties, like the Netherlands treaty, requires that any disproportionate class of shares of the company also be regularly traded on a recognized stock exchange. In the case of a company that is a resident of the foreign treaty partner, a class of shares is a disproportionate class of shares if it entitles the shareholder to a disproportionate amount of the earnings generated in the United States by particular assets or activities of the company. (The Luxembourg treaty has a variation of this rule in Article 24(6) (see CAUTION in Issue 4, Step 4).)</p>	<ul style="list-style-type: none"> ▪ Netherlands Treaty, Art. 26(2)(c) & 26(8)(c) ▪ TE to Netherlands Treaty 	

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Issue 2, Step 3: Additional Factual Development

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 2

What was FP's principal class of shares at the time of USS's dividend?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine FP's authorized classes of shares ▪ Determine the voting power of each class of shares ▪ Determine the value of each class of shares 	<p>In addition to the items already requested, request copies of:</p> <ul style="list-style-type: none"> ▪ A description of each class of shares and the number of outstanding shares of each class ▪ Any document in addition to FP's organizational document that gives voting power to any class of shares ▪ FP's audited annual report or other document(s) showing FP's value and the number of each class of shares outstanding 	

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Issue 2, Step 3: Additional Factual Development (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test		
Issue 2		
What was FP's principal class of shares at the time of USS's dividend?		
Fact Element	Resources	6103 Protected Resources
<p>In cases where the treaty requires that any disproportionate class of shares of FP be publicly traded,</p> <ul style="list-style-type: none"> Determine any class of shares that gives the shareholder disproportionately higher participation in earnings generated in the United States by particular assets or activities of the company 	<ul style="list-style-type: none"> Any document in addition to FP's organizational document that gives a special participation in the earnings of the company 	

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Issue 2, Step 4: Develop Arguments

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 2

What was FP's principal class of shares at the time of USS's dividend?

Explanation of Approach	Resources	6103 Protected Resources
Determine FP's principal class of shares by determining and comparing the voting power and value of each class of FP's shares outstanding.	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty 	

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Issue 3, Step 2: Review Potential Issues

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>If FP's principal class of shares was not traded or was traded only on an unrecognized stock exchange at the time USS paid the dividend to FP, then FP cannot qualify for treaty benefits under the publicly traded test.</p> <p>The following are recognized stock exchanges for purposes of the Luxembourg treaty: (1) any stock exchange registered with the U.S. Securities and Exchange Commission ("SEC") as a national securities exchange; (2) the Luxembourg stock exchange; (3) NASDAQ; and (4) the principal stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, London, Madrid, Milan, Paris, Sydney, Tokyo, and Toronto.</p> <p>If FP is a "closely held company," however, the Luxembourg stock exchange and NASDAQ are <i>not</i> recognized stock exchanges. The closely held company exception is an additional rule intended to prevent persons that do not have a strong connection with a treaty country from inappropriately claiming treaty benefits. This exception is found only in the Luxembourg treaty.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty ▪ Luxembourg Treaty, Art. 24(8)(a) ▪ TE to Luxembourg Treaty ▪ Exchange of Notes* to Luxembourg Treaty, Para. III.A ▪ SEC, Division of Trading and Markets, Exchanges (listing national securities exchanges) <p>*Note: The Exchange of Notes is labeled as an MOU in some legal research databases.</p>	

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Issue 3, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p>FP is a closely held company if:</p> <ul style="list-style-type: none"> ▪ 50 percent or more of its principal class of shares is owned by persons who do not satisfy one of the LOB tests in the United States' tax treaties with Luxembourg, Canada, Mexico, or the member states of the European Union ("EU"), and ▪ Every one of those persons own, directly or indirectly, alone or together with related persons, more than 5 percent of such shares for more than 30 days during a taxable year. <p>If FP is owned in a tiered structure, you need to look through to the top of the structure to determine whether FP is closely held.</p> <p>If FP's principal class of shares is traded on the Luxembourg stock exchange or NASDAQ, and none of FP's shareholders own, directly or indirectly, and alone or together with related persons, more than 5 percent of FP's principal class of shares for the specified period, FP is <i>not</i> a closely held company.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(8)(b) ▪ Luxembourg Treaty, Art. 24(4)(d) ▪ TE to Luxembourg Treaty 	

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Issue 3, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Explanation of Issue	Resources	6103 Protected Resources
<p> CAUTION: Although this Unit primarily addresses the version of the publicly traded test found in the Luxembourg treaty, the test in the treaty you are applying might differ. Be sure to read carefully the text of treaty you are applying and refer to this Unit only as general guidance.</p> <p>For example, different treaties might define “recognized stock exchanges” differently. Moreover, some treaties require that any disproportionate class of shares also be traded on a recognized stock exchange. Other treaties also require that the relevant classes of shares be traded on a recognized stock exchange located in the country where the company is a resident.</p> <p>In addition, if the applicable treaty allows a resident company to qualify for treaty benefits if it is a subsidiary of companies that themselves meet the publicly traded test, one might have to analyze this issue at the parent level.</p>	<ul style="list-style-type: none"> ▪ Netherlands Treaty, Art. 26(2)(c)(i) ▪ TE to Netherlands Treaty ▪ U.S. Model Treaty (2006), Art. 22(2)(c)(i) ▪ TE to U.S. Model Treaty (2006) ▪ Canada Treaty, Art. XXIXA(5)(f) ▪ Netherlands Treaty, Art. 26(8)(a) 	

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Issue 3, Step 3: Additional Factual Development

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> Verify that FP's principal class of shares is traded on one or more stock exchanges 	<p>In addition to the items already requested, request, with respect to the principal class of shares, documents showing:</p> <ul style="list-style-type: none"> Letters from the applicable stock exchange(s) confirming FP's listing and trading at the time USS made the payment to FP If FP's principal class of shares is traded only on the Luxembourg stock exchange or NASDAQ, a statement that FP has no knowledge or reason to know that its stock is closely held within the meaning of Article 24(8), or an explanation why FP is not a closely held company within the meaning of Article 24(8) Other relevant documents 	

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Issue 3, Step 4: Develop Arguments

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Explanation of Approach	Resources	6103 Protected Resources
<p>Determine whether FP's principal class of shares was traded on one or more stock exchanges at the time of USS's payment and, if so, whether such shares were traded on an exchange set forth in the treaty as a recognized stock exchange.</p> <p> CONSULTATION: If FP's principal class of shares was traded only on the Luxembourg stock exchange or NASDAQ, consult with the Treaties IPN regarding whether the closely held company exception applies.</p> <p>If FP's principal class of shares was traded on what FP asserts is the principal stock exchange of Amsterdam, Brussels, Frankfurt, Hamburg, London, Madrid, Milan, Paris, Sydney, Tokyo, or Toronto, consult with the Treaties IPN.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ Luxembourg Treaty, Art. 24(8)(a) ▪ TE to Luxembourg Treaty ▪ MOU to Luxembourg Treaty, Para. III.A ▪ Luxembourg Treaty, Art. 24(8)(b) ▪ Luxembourg Treaty, Art. 24 (4)(d) 	

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Issue 3, Step 4: Develop Arguments (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 3

Was FP's principal class of shares traded on one or more recognized stock exchanges at the time of USS's dividend?

Explanation of Approach	Resources	6103 Protected Resources
 <p>DECISION POINT: Determine whether to proceed to Issue 4 based on whether FP's principal class of stock was traded on a recognized exchange at the time of USS's payment. If you decide not to proceed because you have determined that FP does not meet the publicly traded test based on Issue 3, consider whether FP might qualify for treaty benefits under a different test in the LOB article.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)-(4) ▪ IPS units on alternative LOB tests (forthcoming) 	

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Issue 4, Step 2: Review Potential Issues

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 4

Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

Explanation of Issue	Resources	6103 Protected Resources
<p>FP's principal class of shares must have been substantially and regularly traded on one or more recognized stock exchanges in order for FP to qualify for treaty benefits under the publicly traded test with respect to the dividend payment by USS.</p> <p>Shares in FP's principal class of shares are substantially and regularly traded on one or more recognized stock exchanges in a taxable year if, <i>during the previous taxable year</i>, the total number of shares traded on a recognized stock exchange was at least 6 percent of the average number of shares outstanding in the class.</p> <p>If a single class of shares does not by itself constitute FP's principal class of shares, and instead FP's principal class of shares is made up of those classes of its shares that together possess a majority of the voting power and value of FP, the 6-percent test must be met by each component class of shares standing alone.</p> <p> CONSULTATION: Consult with the Treaties IPN if FP's principal class of shares was first listed and traded in the year for which treaty benefits are claimed.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty 	

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Issue 4, Step 2: Review Potential Issues (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 4

Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

Explanation of Issue	Resources	6103 Protected Resources
<p> CAUTION: Although this Unit primarily addresses the version of the publicly traded test found in the Luxembourg treaty, the test in the treaty you are applying might differ. Be sure to read carefully the text of treaty you are applying and refer to this Unit only as general guidance.</p> <p>For example, some treaties require that any disproportionate class of shares also be substantially and regularly traded on one or more recognized stock exchanges.</p> <p>A different treaty also might define “substantially and regularly traded” differently. The Denmark treaty adds that in order for a class of shares to be regularly traded in a taxable year, such shares must be traded in other than <i>de minimis</i> quantities during every quarter of the taxable year. And, under some treaties, like the Netherlands treaty, a company will not meet the publicly traded test—even if its shares meet the trading requirements—if the company does not have a substantial presence in the country of which it is a resident.</p> <p> CONSULTATION: Consult with the Treaties IPN if the treaty resident's principal class of shares is made up of more than one class of shares and the taxpayer asserts the test applies to the combined principal class of shares rather than to each class of shares separately.</p>	<ul style="list-style-type: none"> ▪ Netherlands Treaty, Art. 26(2)(c)(i) ▪ TE to Netherlands Treaty ▪ Denmark Treaty, Art. 22(8)(f)(i)(A) ▪ TE to Denmark Treaty 	

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Issue 4, Step 3: Additional Factual Development

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 4

Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Determine the total number of shares of FP's principal class of shares traded on a recognized stock exchange during the previous taxable year ▪ Determine the average number of shares of FP's principal class of shares outstanding during the previous taxable year 	<p>In addition to items already requested, request, with respect to the principal class of shares, documents showing:</p> <ul style="list-style-type: none"> ▪ FP's quarterly audited balance sheets or other document(s) showing the number of FP's shares outstanding throughout the previous taxable year ▪ Proof that the aggregate yearly trading of the shares, as published in Luxembourg, the United States, or any other relevant country where the stock is traded, was at least 6 percent during the previous taxable year ▪ Other relevant documents 	

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Issue 4, Step 4: Develop Arguments

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 4

Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

Explanation of Approach	Resources	6103 Protected Resources
<p>The determination of whether FP's principal class of shares is substantially and regularly traded is mechanical under the Luxembourg Treaty (but not all treaties).</p> <p> DECISION POINT: If you decide that FP's principal class of shares is not substantially and regularly traded based on the mechanical application of the rule to the facts gathered, consider whether FP might qualify for treaty benefits under a different test in the LOB article.</p> <p>If you conclude that FP is not entitled to treaty benefits under any of the tests in the LOB article, provide notification of the treaty resident's right to request a discretionary LOB determination or Competent Authority assistance under the MAP article of the treaty.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(2)(d) ▪ TE to Luxembourg Treaty ▪ Luxembourg Treaty, Art. 24(2)-(4) ▪ IPS units on alternative LOB tests (forthcoming) ▪ U.S. Model Treaty, Art. 25 ▪ TE to U.S. Model Treaty ▪ IRM 4.60.2 ▪ Rev. Proc. 2006-54, § 3.08 	

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Issue 4, Step 4: Develop Arguments (cont'd)

Qualification for Treaty Benefits under the Publicly Traded Test

Issue 4

Was FP's principal class of shares substantially and regularly traded on one or more recognized stock exchanges?

Explanation of Approach	Resources	6103 Protected Resources
<p> CAUTION: Even if you decide that FP meets the publicly traded test because its principal class of shares is substantially and regularly traded on a recognized stock exchange, FP's treaty benefits may be limited if FP has shareholding arrangements specified in Article 24(6). Article 24(6) is not addressed in this Unit.</p> <p>If you conclude that FP is not entitled to treaty benefits on the basis of Article 24(6), provide notification of the treaty resident's right to request Competent Authority assistance under the MAP article of the treaty.</p>	<ul style="list-style-type: none"> ▪ Luxembourg Treaty, Art. 24(6) ▪ TE to Luxembourg Treaty ▪ U.S. Model Treaty, Art. 25 ▪ TE to U.S. Model Treaty ▪ IRM 4.60.2 ▪ Rev. Proc. 2006-54, § 3.08 	

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Training and Additional Resources

Chapter 16.1.1 Publicly Traded Test

Type of Resource	Description(s) and/or Instructions for Accessing	References
Reference Materials	<ul style="list-style-type: none"> ▪ Andersen, Analysis of United States Income Tax Treaties, Chapter 22 (available on Westlaw by pasting ITTUS WGL ¶ 22.01 or ITTUS WGL ¶ 22.02 in the “Find by citation” feature) ▪ H. Levine & M. Miller, 936 T.M., U.S. Income Tax Treaties - The Limitation on Benefits Article (available on Westlaw by pasting 20XX WL 4892867 in the “Find by citation feature”) ▪ RIA International Tax Treaties and Explanations (database available on Westlaw (RIA-TREATIES)) ▪ Tax Analysts Worldwide Tax Treaties Combined Files (source available on Lexis) 	<ul style="list-style-type: none"> ▪ ITTUS WGL ¶ 22.01 ▪ ITTUS WGL ¶ 22.02 ▪ 20XX WL 4892867 ▪ RIA-TREATIES

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Glossary of Terms and Acronyms

Acronym	Definition
EU	European Union
FDAP income	Fixed or Determinable Annual or Periodical gains, profits, and income (e.g., Interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments)
FET	Foreign Insurance Excise Tax imposed by IRC § 4371
FP	Foreign Parent
IPN	International Practice Network
IRS	Internal Revenue Service
LOB	Limitation on Benefits
MAP	Mutual Agreement Procedure
SA	<i>Société anonyme</i> , a type of Luxembourg commercial entity that is treated as a <i>per se</i> corporation for U.S. federal tax purposes
SARL	<i>Société à responsabilité limitée</i> , a type of Luxembourg commercial entity that is treated as a foreign eligible entity for U.S. federal tax purposes
SEC	U.S. Securities and Exchange Commission
TAIT	Treaty Assistance and Interpretation Team
TE	Treasury Department Technical Explanation
USS	U.S. Subsidiary

Volume	Part	Chapter	Sub Chapter
Treaties	Limitation on Benefits Issues	Publicly Traded Test	N/A

Index of Related Issues

Issue	Associated UIL(s)	References
Identification of U.S. trade or business or permanent establishment	9421.01	
Inbound financing	9423	
FDAP payments	9424.01	
Limitation on benefits issues	9450.01	TRE/9450.01_02(2013)
Beneficial ownership and conduit issues	9450.02	
Determination of permanent establishment status	9450.06	TRE/9450.06_01(2013) TRE/9450.06_02(2013) TRE/9450.06_03(2013)
Determination of appropriate treaty withholding rate	9450.07	
Other technical (non-process) treaty issues	9450.11	
MAP procedural issues	9450.12	