

**EXPLANATORY MEMORANDUM**  
**ON THE AGREEMENT FOR EXCHANGE OF INFORMATION**  
**BETWEEN**  
**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF SAMOA**

The purpose of an Agreement on the Exchange of Information between States is to promote international cooperation in tax matters in instances where jurisdictions have not entered into a Double Taxation Agreement. The Model was developed by the OECD Global Forum Working Group on Effective Exchange of Information, in which South Africa participates, to address harmful tax practices. Provision is made for such exchange of information between the States as may be required both for carrying out the provisions of the Agreement and for applying the domestic taxation laws concerning any tax imposed on behalf of the Contracting States. This Agreement is paramount in the campaign against tax fraud and evasion.

In order to achieve full implementation of the international transparency and information exchange standards, a Tax Information Exchange Agreement has been entered into with Samoa ("the Agreement").

The Agreement concluded between the Republic of South Africa and Samoa ("the Parties") closely follows the OECD Model Agreement on Tax Information Exchange. In the explanation which follows, the general principles of each Article of the Agreement are set out.

**PREAMBLE**

The Preamble records that, recognising that the Parties have long been active in the fight against financial and other crimes including the targeting of terrorist financing, the object of the Agreement is to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes.

## **ARTICLE 1**

### **SCOPE OF THE AGREEMENT**

Paragraph 1 specifies that the Parties will provide assistance, through their competent authorities, for exchange of information with regard to the taxes covered by this Agreement. The information should be relevant to the administration and enforcement of the domestic laws of the Parties, in the determination, assessment, enforcement or collection of tax, the investigation of tax matters or the prosecution of criminal tax matters. Furthermore, emphasis is given to the fact that the rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable. The requested Party must also ensure to the best of its ability that the effective exchange of information is not unduly prevented or delayed.

Paragraph 2 provides that a requested Party is not obliged to provide information which is not in the possession of its authorities or obtainable by or in the possession of persons who are within its jurisdiction.

## **ARTICLE 2**

### **TAXES COVERED**

Article 2 identifies the taxes with respect to which the Parties agree to exchange information in accordance with the Agreement.

Paragraph 1 lists the existing taxes imposed by each State while paragraph 2 provides that the Agreement will also apply to identical or substantially similar taxes that are subsequently imposed by either State, if the Parties so agree. Furthermore, competent authorities are also obliged to notify each other should there be changes to a Party's domestic law which may have an effect on the obligations imposed on the Parties in terms of this Agreement.

## **ARTICLE 3**

### **GENERAL DEFINITIONS**

This Article defines various expressions which are used in the body of the Agreement. Several of these definitions are self-evident and are not further explained.

The definition of "South Africa" includes not only the sovereign territory but also those areas outside its territorial sea over which it may exercise jurisdiction in accordance with international law, for example, in relation to the exploitation of natural resources.

The term "criminal tax matters" is defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the Party. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent. This definition does not create an obligation on the part of the requesting Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.

Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax and deliberate omissions of entries in books and records.

The term "information gathering measures" means the methods set out in the domestic laws and administrative or judicial procedures of each Party. Information gathering methods typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent information.

The definition of the term "person" is intended to be very broad. The definition explicitly mentions an individual, a company and any other body of persons. The main example of a "body of persons" is the partnership. However, it also covers other organisational structures such as trusts, foundations, as well as collective investment funds or schemes.

Paragraph 2 provides that terms not defined in the Agreement have the meaning that they have under the domestic taxation laws of that Party at the time of application of the provisions of the Agreement. Any meaning under the taxation laws will take precedence over a meaning under other laws of that Party.

## **ARTICLE 4**

### **EXCHANGE OF INFORMATION UPON REQUEST**

Paragraph 1 provides the general rule that the competent authority of the requested Party must exchange information on request provided it falls within the scope of this Agreement. The requested Party is obliged to exchange information even if it is not needed by that Party for domestic tax purposes or the conduct being investigated would also constitute a crime under the domestic laws of the requested Party. Information must only be requested when the requesting Party is unable to obtain such information by other means unless such other means would give rise to disproportionate difficulty.

In terms of paragraph 2, if the information on hand is insufficient to comply with the request, the requested Party must use the information gathering methods it considers necessary to gather the requested information, irrespective of whether it has a domestic tax interest. Specifying that there is no need for a domestic tax interest ensures that there will be an effective exchange of information even in cases where the requested Party does not impose an income tax or the request relates to an entity not subject to tax within the jurisdiction of the requested Party.

Paragraph 3 includes a provision intended to require the provision of information, if specifically requested by a Contracting Party, in the form of statements from witnesses and certified copies of original records.

Paragraph 4 stipulates that each Party will ensure that its domestic law provides that, within the scope of this Agreement, the following information can be obtained and provided through its competent authority:

- (a) Information held by banks and other financial institutions therefore ruling out bank secrecy. Under this sub-paragraph, person's acting in an agency or fiduciary capacity including nominees or trustees are also included;
- (b)
  - (i) Information regarding the legal and beneficial ownership of persons;
  - (ii) Information on settlors, trustees and beneficiaries.

Paragraph 5 provides that in the case of publicly traded companies or public collective investment schemes, the competent authorities need only provide ownership information that the requested Party can obtain without disproportionate difficulties. It is recognised that where a true public market for ownership interests exists there is less of a risk that such vehicles will be used for tax evasion or other non-compliance with the tax law.

Paragraph 6 stipulates that any request for information must be in writing and formulated in accordance with the requirements of sub-paragraphs (a) to (i). While paragraph 6 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, the Commentary to the OECD Model provides that the sub-paragraphs nevertheless need to be interpreted liberally in order not to frustrate the effective exchange of information.

Paragraph 7 stipulates that the requested Party must be prompt in its response and furthermore, to ensure a prompt response, states under:

- (a) the receipt of a request must be acknowledged in writing by the competent authority of the requested Party and any deficiencies therein must be reported within 60 days;
- (b) if 90 days have lapsed, the requested Party must furnish reasons for the delay. Furthermore, if it encounters obstacles or refuses to furnish information, it must immediately notify the requested Party, furnishing a full explanation.

## **ARTICLE 5**

### **TAX EXAMINATIONS ABROAD**

Paragraph 1 provides that the requesting Party may request the requested Party, to the extent permitted under its domestic laws and with the consent of the individuals concerned, to allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party to interview individuals and examine records. The competent authority of the requested Party must be advised of the time and place of any intended meeting arranged by the requesting Party.

Paragraph 2 provides for the competent authority of the requested Party to permit representatives of the competent authority of the requesting Party to attend a tax examination in the territory of the requested Party. It is understood that this request should only be made if the requesting Party is convinced that its presence will contribute greatly to the solution of a domestic tax case or may be regarded as part of an examination on a large scale, encompassing domestic enterprises and residents.

Paragraph 3 sets out the procedures to be followed if a request under paragraph 2 has been granted. All decisions on how the examination is to be carried out will be taken by the authority or the official of the requested Party in charge of the examination.

## **ARTICLE 6**

### **POSSIBILITY OF DECLINING A REQUEST**

This Article identifies the situations in which a requested Party is not required to supply information in response to a request. If the grounds for declining a request under Article 6 are met, the requested Party is given discretion to refuse to provide the information.

Paragraph 1 provides that the competent authority of the requested Party may decline to assist under the following conditions:

- (a) where the request is not made in conformity with this Agreement.
- (b) where the information has been requested and the requesting Party has not pursued all means available in its own territory unless the requesting Party is unable to obtain such information due to the exercise giving rise to disproportionate difficulty;
- (c) where the disclosure of information would be contrary to public policy.

Paragraph 2 ensures that the requested Party is not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process. However, the proviso in this paragraph makes it clear that the Agreement overrides any domestic law or practices that may treat information as a trade, business, industrial, commercial or professional secret or trade process merely because it is held by a person described in paragraph 4 (a) of Article 4 or because it is ownership information.

Paragraph 3 provides for confidentiality in client-attorney communications when:

- (a) in the provision of seeking or providing legal advice;
- (b) to be used in legal proceedings.

Paragraph 4 clarifies that a request for information must not be refused on the basis that the tax claim, to which it relates, is disputed.

Paragraph 5 makes it clear that a requested Party is not required to obtain and provide information that the requesting Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its domestic law. This stipulation is intended to prevent the requesting Party from circumventing its domestic law limitations by requesting information from the other Party thereby making use of greater powers than it possesses under its own laws.

Paragraph 6 is intended to ensure that the Agreement does not result in discrimination between nationals of the requested Party and nationals in the same circumstances of the requesting Party. It provides for the requested Party to decline a request if it would result in the enforcement of a provision of the requesting Party's tax law which discriminates against its nationals.

## **ARTICLE 7**

### **CONFIDENTIALITY**

Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. This Article ensures that adequate protection is given to information received from another Contracting Party.

Paragraph 1 provides that any information received pursuant to this Agreement by either Party must be treated as confidential. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information, which is obtained in the course of their co-operation.

Paragraph 2 stipulates that the information may be disclosed only to persons or authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement.

Paragraph 3 stipulates that the information requested must not be used for any purpose other than for the purposes stated in Article 1 unless written consent is given by the requested Party that supplied the information.

Paragraph 4 precludes disclosure by the requesting Party to any other jurisdiction.

## **ARTICLE 8**

### **COSTS**

Unless otherwise agreed by the competent authorities, indirect costs in providing assistance would be borne by the requested Party and direct costs by the requesting Party. The Article provides for the competent authorities to consult from time to time in relation to this issue and stipulates that the competent authority of the requesting Party must be warned in advance by the competent authority of the requested Party if the costs of providing information with respect to a specific request are expected to be significant.

## **ARTICLE 9**

### **MUTUAL AGREEMENT PROCEDURE**

Paragraph 1 institutes a mutual agreement procedure for resolving any difficulties arising out of the implementation or interpretation of the Agreement.

Paragraph 2 allows the competent authorities to decide on the procedures to be used under Articles 4, 5 and 8 by mutual agreement.

Paragraph 3 provides for the competent authorities to communicate with each other directly.

Paragraph 4 provides that the Parties may agree to other forms of dispute resolution should the mutual agreement procedure fail to resolve a matter.

## **ARTICLE 10**

### **IMPLEMENTATION OF LEGISLATION**

This Article stipulates that the Parties must enact any legislation not in place and which is necessary to ensure that the Agreement is effective.

## **ARTICLE 11**

### **ENTRY INTO FORCE**

This Article stipulates that the Agreement will enter into force in both South Africa and Samoa 30 days after receipt of written notification by the latter Party that their domestic requirements for the entry into force have been completed. Once the Agreement has entered into force, the taxes matters referred to will become effective in accordance with the provisions of this paragraph, differentiation being made between exchange of information in criminal tax matters and exchange of information in all other tax matters.

## **ARTICLE 11**

### **TERMINATION**

Paragraph 1 stipulates that this Agreement will remain in force until terminated by either Party.

Paragraph 2 provides for the notice of termination to be given in writing and sets out the conditions thereto.

Paragraph 3 ensures that the Parties shall remain bound by the obligation of confidentiality under Article 7 with respect to any information obtained under this Agreement.

**AGREEMENT**  
**BETWEEN**  
**THE GOVERNMENT OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF**  
**SAMOA**  
**FOR THE EXCHANGE OF INFORMATION**  
**RELATING TO TAX MATTERS**



## **PREAMBLE**

**WHEREAS** the Government of the Republic of South Africa and the Government of Samoa ("the Parties") have long been active in international efforts in the fight against financial and other crimes, including the targeting of terrorist financing;

**WHEREAS** the Parties wish to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes;

**DESIRING THEREFORE** the Parties in concluding the following Agreement which contains obligations on the part of the Parties only,

**HAVE AGREED AS FOLLOWS:**

## **ARTICLE 1**

### **SCOPE OF THE AGREEMENT**

1. The Parties through their competent authorities shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation of tax matters or the prosecution of criminal tax matters in relation to such persons. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable. The requested Party shall use its best endeavours to ensure that the effective exchange of information is not unduly prevented or delayed.
2. A requested Party is not obliged to provide information which is neither held by its authorities nor in the possession of or obtainable by persons who are within its territorial jurisdiction.

## **ARTICLE 2**

### **TAXES COVERED**

1. The taxes which are the subject of this Agreement are taxes of every kind and description imposed by the Parties at the date of signature of the Agreement.
2. This Agreement shall apply also to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes, or any substantially similar taxes if the Parties so agree. The competent authority of each Party shall notify the other of substantial changes in laws which may affect the obligations of that Party pursuant to this Agreement.

## ARTICLE 3

### GENERAL DEFINITIONS

1. In this Agreement:
  - (a) the term "Samoa" means the Independent State of Samoa and the territorial waters thereof;
  - (b) the term "South Africa" means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea, including the continental shelf, which has been or may hereafter be designated, under the laws of South Africa and in accordance with international law, as an area within which South Africa may exercise sovereign rights of jurisdiction;
  - (c) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
  - (d) the term "competent authority" means:
    - (i) in the case of Samoa, the Minister of Revenue or an authorised representative of the Minister of Revenue; and
    - (ii) in the case of South Africa, the Commissioner of the South African Revenue Service or an authorised representative of the Commissioner;
  - (e) the term "criminal laws" means all criminal laws designated as such under domestic law, irrespective of whether such are contained in the tax laws, the criminal code or other statutes;
  - (f) the term "criminal tax matters" means tax matters involving intentional conduct whether before or after the entry into force of this Agreement which is liable to prosecution under the criminal laws of the requesting Party;
  - (g) the term "information" means any fact, statement, document or record in whatever form;
  - (h) the term "information gathering measures" means laws and administrative or judicial procedures enabling a requested Party to obtain and provide the information requested;
  - (i) the term "person" includes an individual, a company or any other body or group of persons;

- (j) the term "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
  - (k) the term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;
  - (l) the term "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Parties;
  - (m) the term "public collective investment scheme" means any scheme or fund, in which the purchase, sale or redemption of shares or other interests is not implicitly or explicitly restricted to a limited group of investors;
  - (n) the term "requested Party" means the Party to this Agreement which is requested to provide or has provided information in response to a request;
  - (o) the term "requesting Party" means the Party to this Agreement submitting a request for or having received information from the requested Party; and
  - (p) the term "tax" means any tax covered by this Agreement.
2. As regards the application of this Agreement at any time by a Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

## **ARTICLE 4**

### **EXCHANGE OF INFORMATION UPON REQUEST**

1. The competent authority of the requested Party shall provide upon request by the requesting Party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or the conduct being investigated would constitute a crime under the laws of the requested Party if it had occurred in the territory of the requested Party. The competent authority of the requesting Party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty.
2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, the requested Party shall use the information gathering measures it considers relevant to provide the requesting Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of the requesting Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.
4. Each Party shall ensure that it has the authority, subject to the terms of Article 1, to obtain and provide, through its competent authority and upon request:
  - (a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
  - (a) (i) information regarding the legal and beneficial ownership of companies, partnerships, foundations and other persons, including in the case of collective investment schemes, information on shares, units and other interests;
  - (ii) in the case of trusts, information on settlors, trustees and beneficiaries.
5. This Agreement does not create an obligation for a Party to obtain or provide ownership information with respect to publicly traded companies or public collective investment schemes, unless such information can be obtained without giving rise to disproportionate difficulties.
6. The competent authority of the Applicant State shall provide the following information to the competent authority of the Requested State when making a request for information under this Agreement to demonstrate the foreseeable relevance of the information to the request:
  - (a) the identity of the person under examination or investigation;
  - (b) the period for which the information is requested;
  - (c) a statement of the information sought including its nature and the form in which the requesting Party wishes to receive the information from the requested Party;
  - (d) the tax purpose for which the information is sought;
  - (e) the reasons for believing that the information requested is foreseeably relevant to tax administration and enforcement of the requesting Party, with respect to the person identified in subparagraph (a) of this paragraph;
  - (f) grounds for believing that the information requested is present in the requested Party or is in the possession of or obtainable by a person within the jurisdiction of the requested Party;
  - (g) to the extent known, the name and address of any person believed to be in possession or able to obtain the information requested;

- (h) a statement that the request is in conformity with the laws and administrative practices of the requesting Party, that if the requested information was within the jurisdiction of the requesting Party then the competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice and that it is in conformity with this Agreement;
  - (i) a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except where that would give rise to disproportionate difficulty.
7. The competent authority of the requested party shall forward the requested information as promptly as possible to the requesting party. To ensure prompt response the competent authority of the requested party shall:
- (a) confirm receipt of a request in writing to the competent authority of the requesting party and shall notify the competent authority of the requesting party of deficiencies in the request in any within 60 days of the receipt of the request; and
  - (b) if the competent authority of the requested party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information it shall immediately inform the requesting party explaining the reason for its inability the nature of the obstacles or the reasons for its refusal.

## **ARTICLE 5**

### **TAX EXAMINATIONS ABROAD**

1. With reasonable notice, the requesting Party may request that the requested Party allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals or other persons concerned. The competent authority of the requesting Party shall notify the competent authority of the requested Party of the time and place of the intended meeting with the individuals concerned.
2. At the request of the competent authority of the requesting Party, the competent authority of the requested Party may permit representatives of the competent authority of the requesting Party to attend a tax examination in the territory of the requested Party.

3. If the request referred to in paragraph 2 is granted, the competent authority of the requested Party conducting the examination shall, as soon as possible, notify the competent authority of the requesting Party of the time and place of the examination, the authority or person authorised to carry out the examination and the procedures and conditions required by the requested Party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the requested Party conducting the examination.

## **ARTICLE 6**

### **POSSIBILITY OF DECLINING A REQUEST**

1. The competent authority of the requested Party may decline to assist:
  - (a) where the request is not made in conformity with this Agreement;
  - (b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or
  - (c) where the disclosure of the information requested would be contrary to public policy of the requested Party.
2. This Agreement shall not impose upon a requested Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in paragraph 4 of Article 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.
3. The provisions of this Agreement shall not impose on a Contracting State the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
  - (a) produced for the purposes of seeking or providing legal advice; or
  - (b) produced for the purposes of use in existing or contemplated legal proceedings.
4. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.
5. The requested Party shall not be required to obtain and provide information which, if the requested information was within the jurisdiction of the requesting Party, the competent authority of the requesting Party would not be able to obtain under its laws or in the normal course of administrative practice.

6. The requested Party may decline a request for information if the information is requested by the requesting Party to administer or enforce a provision of the tax law of the requesting Party, or any requirement connected therewith, which discriminates against a national or citizen of the requested Party as compared with a national or citizen of the requesting Party in the same circumstances.

## **ARTICLE 7**

### **CONFIDENTIALITY**

1. All information provided and received by the competent authorities of the Parties shall be kept confidential.
2. Such information shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the purposes specified in Article 1, and used by such persons or authorities only for such purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in judicial decisions.
3. Such information may not be used for any purpose other than for the purposes stated in Article 1 without the express written consent of the competent authority of the requested Party.
4. Information provided to a requesting Party under this Agreement may not be disclosed to any other jurisdiction.

## **ARTICLE 8**

### **COSTS**

Unless the competent authorities of the Parties otherwise agree, indirect costs incurred in providing assistance shall be borne by the requested Party, and direct costs incurred in providing assistance (including costs of engaging external advisors in connection with litigation or otherwise) shall be borne by the requesting Party. The respective competent authorities shall consult from time to time with regard to this Article, and in particular the competent authority of the requested Party shall consult with the competent authority of the requesting Party in advance if the costs of providing information with respect to a specific request are expected to be significant.

## **ARTICLE 9**

### **MUTUAL AGREEMENT PROCEDURE**

1. Where difficulties or doubts arise between the Parties regarding the implementation or interpretation of this Agreement, the respective competent authorities shall use their best efforts to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Parties may mutually agree on the procedures to be used under Articles 4, 5 and 8.
3. The competent authorities of the Parties may communicate with each other directly for purposes of reaching agreement under this Article.
4. The Parties shall agree on other forms of dispute resolution should this become necessary.

## **ARTICLE 10**

### **IMPLEMENTATION LEGISLATION**

The Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement

## **ARTICLE 11**

### **ENTRY INTO FORCE**

This Agreement shall enter into force 30 days after receipt of written notification by the latter Party of completion of all legal formalities required for entry into force. Upon the date of entry into force, it shall have effect:

- (a) for criminal tax matters on that date; and
- (b) for all other matters covered in Article 1 on that date, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

## **ARTICLE 12**

### **TERMINATION**

1. This Agreement shall remain in force until terminated by either Party.
2. Either Party may terminate this Agreement by giving notice of termination in writing through the diplomatic channel. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Party. All requests received up to the effective date of termination will be dealt with in accordance with the terms of this Agreement.
3. If the Agreement is terminated the Parties shall remain bound by the provisions of Article 7 with respect to any information obtained under this Agreement.



**IN WITNESS WHEREOF** the undersigned, being duly authorised by their respective Governments, have signed and sealed this Agreement in two originals in the English language, both texts being equally authentic.

**DONE** at ..... on ..... day of .....  
in the year 20.....

\_\_\_\_\_  
**FOR THE GOVERNMENT OF THE  
THE REPUBLIC OF SOUTH AFRICA**

\_\_\_\_\_  
**FOR THE GOVERNMENT OF  
SAMOA**



# international relations & cooperation

Department:  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

## OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)

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11gcz000121901  
RO 427/2011  
Ref. 29/2/WSM

JC Msibi  
Route: FCC102

### **AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF SAMOA FOR THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS**

1. Your request for legal advice under reference BL1/SAM/3/A26 dated 14 December 2011 has reference.
2. We have noted that the terms of the said Agreement are in line with the standard OECD model normally utilized for agreements of this nature. We also noted the comments of the State Law Advisers of the Department of Justice and Constitutional Development, from which it is taken that there is no conflict between the Agreement and the provisions of the domestic law of South Africa.
3. We have scrutinized the Agreement from an international law point of view and the Agreement is not in conflict with South Africa's other international law obligations.
4. In order to obtain Presidential approval, the Agreement needs to be certified by this Office. The documentation required for certification consists of -
  - two copies of the President's Minute;
  - two copies of the Explanatory Memorandum setting out the purpose of the Agreement and proposed date of signature;
  - two copies of the finally agreed text of the Agreement;
  - two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office;
  - completed certification checklist (attached herewith); and
  - all documentation in folder Z137.
5. Once the President has signed the Minute, the Agreement cannot be amended in any way.

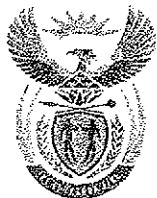
#### CONFIDENTIALITY NOTE:

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).

6. The Agreement needs to be bound as soon as the President's approval had been obtained. You are invited to make an appointment for this purpose as soon as you have received the President's Minute with Ms Rika van der Walt, Treaty Section at x10872.
7. The Agreement is subject to ratification in accordance with section 231(2) of the Constitution of the Republic of South Africa, 1996.
8. The originally signed Agreement must be deposited with the Treaty Section for safekeeping immediately after signature.
9. We trust that our comments will be of assistance to you

**ADV JGS DE WET**  
**CHIEF STATE LAW ADVISER (IL)**

**PRETORIA**  
**19 DECEMBER 2011**



the doj & cd

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER

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Date: 17 November 2011

Commissioner  
South African Revenue Service  
P.O. Box 402  
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0001

Dear Mr Magashula

Attention: Shelley-Anne Carreira (Manager: International Development and Treaties)

**AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE INDEPENDENT STATE OF SAMOA FOR THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS: YOUR 25/6/1/367 DATED 7 NOVEMBER 2011**

1.1 We have scrutinized the draft "Agreement between the Government of the Republic of South Africa and the Government of the Independent State of Samoa for the Exchange of Information relating to Tax Matters" (hereinafter referred to as the "draft Agreement"), in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and with reference to *Chapter 5 of the Constitutional Handbook for Members of the Executive* and have indicated suggested amendments and made certain comments on the electronic version of the draft Agreement, a copy of which is attached hereto.

1.2 According to the Department, the draft Agreement is drafted along principles laid down in the Model TIEA drawn up by the Organisation for Economic Co-operation and Development, which model is extensively used by most countries. In view thereof we have, besides the amendments suggested to the Preamble of the draft Agreement, which was done in order to ensure consistency with international

terms and words are used in Articles 1 and 2 that are only defined later on in Article 3. This may lead to confusion. Acronyms may not be used prior to the term being defined. In such a case the acronym must be written out in full, until after it has been defined. The same is applicable to phrases and words which have been defined later on, for example the name Samoa and the term “requested Party”.

2.5 The use of the word “term” preceding the term or word to be defined, is not grammatically accurate in the case where a **word** (as opposed to a term) is being defined, for example the words Samoa, company, information, person and tax. We have suggested amendments to Article 3 which the Parties are free to accept or reject.

2.6 The word “company” is defined to mean any body corporate or any entity that is treated as a body corporate for tax purposes. The term “body corporate” has a very specific meaning within the context of the South African domestic law, which may not necessary cover all companies envisaged in the draft Agreement. We therefore suggest that this word be redefined as follows:

“‘company’ means any company as defined as such for tax purposes in the domestic law in force in the territories of the Parties;”

#### Ad Article 4: Exchange of Information upon Request

2.7 We suggest that the following paragraph be inserted after paragraph 7 of Article 4 of the draft Agreement:

“8. Exchange of information pursuant to the provisions of this Agreement shall be done subject to the domestic law in force in the territory of the requested Party.”

We urge the Parties to strongly consider inserting the above suggested provision as this will ensure that the Parties do not act in conflict with their domestic law when providing information requested.

#### Ad Article 8: Costs

The date of entry into force shall be 30 days after the date of the last notification.”

2.12 The Department’s attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”), which section provides for international agreements and reads as follows:

“231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”.

According to the Department, the Parties have agreed to follow the procedure as set out in section 231(2) of the Constitution.

2.13 The Department’s attention is further drawn to *paragraph 5.21* of the *Manual on Executive Acts of the President of the Republic of South Africa* which obliges the Department of International Relations and Cooperation to confirm whether or not an international instrument is “technical, administrative or executive” in nature.

#### Ad Article 12: Duration and Termination

**EXPLANATORY MEMORANDUM**  
**ON THE AGREEMENT FOR EXCHANGE OF INFORMATION**  
**BETWEEN**  
**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA**

The purpose of an Agreement on the Exchange of Information between States is to promote international cooperation in tax matters in instances where jurisdictions have not entered into a Double Taxation Agreement. The Model was developed by the OECD Global Forum Working Group on Effective Exchange of Information, in which South Africa participates, to address harmful tax practices. Provision is made for such exchange of information between the States as may be required both for carrying out the provisions of the Agreement and for applying the domestic taxation laws concerning any tax imposed on behalf of the Contracting States. This Agreement is paramount in the campaign against tax fraud and evasion.

In order to achieve full implementation of the international transparency and information exchange standards, a Tax Information Exchange Agreement has been entered into with Costa Rica ("the Agreement").

The Agreement concluded between the Republic of South Africa and the Republic of Costa Rica ("the Contracting Parties" and in the singular "a Contracting Party")) closely follows the OECD Model Agreement on Tax Information Exchange. In the explanation which follows, the general principles of each Article of the Agreement are set out.

**PREAMBLE**

The Preamble records that both Contracting States desiring to facilitate effective exchange of information relating to taxes have entered into an Agreement therefor.

**ARTICLE 1**

**SCOPE OF THE AGREEMENT**

Article 1 specifies that the Contracting Parties will provide assistance, through their competent authorities, for exchange of information with regard to the taxes covered by this Agreement. The information should be relevant to the administration and enforcement of the domestic laws of the Contracting Parties, in the determination, assessment, enforcement or collection of tax, the investigation of tax matters or the prosecution of criminal tax matters.

Furthermore, emphasis is given to the fact that confidentiality must be maintained and that the rights and safeguards, secured to persons by the laws or administrative practice of the requested Party, remain applicable. The requested Party must also ensure to the best of its ability, that the effective exchange of information is not unduly prevented or delayed.

## **ARTICLE 2**

### **JURISDICTION**

A requested Party is not obliged to provide information which is not in the possession of its authorities or obtainable by or in the possession of persons who are within its jurisdiction.

## **ARTICLE 3**

### **TAXES COVERED**

Article 3 identifies the taxes with respect to which the Contracting Parties agree to exchange information in accordance with the Agreement.

Paragraph 1 lists the existing taxes imposed by each State while paragraph 2 provides that the Agreement will also apply to identical or substantially similar taxes that are subsequently imposed by either State, if the Contracting Parties so agree. Furthermore, competent authorities are also obliged to notify each other should there be changes to a Party's domestic law which may have an effect on the obligations imposed on the Parties in terms of this Agreement.

## **ARTICLE 4**

### **GENERAL DEFINITIONS**

This Article defines various expressions which are used in the body of the Agreement. Several of these definitions are self-evident and are not further explained.

The definition of "South Africa" includes not only the sovereign territory but also those areas outside its territorial sea over which it may exercise jurisdiction in accordance with international law, for example, in relation to the exploitation of natural resources.

The term "criminal tax matters" is defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the Contracting Party. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent. This definition does not create an obligation on the part of the requesting Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.

Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax and deliberate omissions of entries in books and records.



The term "information gathering methods" means the methods set out in the domestic laws and administrative or judicial procedures of each Party. Information gathering methods typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent information.

The definition of the term "person" is intended to be very broad. The definition explicitly mentions an individual, a company and any other body of persons. The main example of a "body of persons" is the partnership. However, it also covers other organisational structures such as trusts, foundations, as well as collective investment funds or schemes.

Paragraph 2 provides that terms not defined in the Agreement have the meaning that they have under the domestic taxation laws of that Party at the time of application of the provisions of the Agreement. Any meaning under the taxation laws will take precedence over a meaning under other laws of that Party.

## **ARTICLE 5**

### **EXCHANGE OF INFORMATION UPON REQUEST**

Paragraph 1 provides the general rule that the competent authority of the requested Party must exchange information on request provided it falls within the scope of this Agreement. The requested Party is obliged to exchange information even if it is not needed by that Party for domestic tax purposes or the conduct being investigated would also constitute a crime under the domestic laws of the requested Party.

In terms of paragraph 2, if the information on hand is insufficient to comply with the request, the requested Party must use the information gathering methods it considers necessary to gather the requested information, irrespective of whether it has a domestic tax interest. Specifying that there is no need for a domestic tax interest ensures that there will be an effective exchange of information even in cases where the requested Party does not impose an income tax or the request relates to an entity not subject to tax within the jurisdiction of the requested Party.

Paragraph 3 includes a provision intended to require the provision of information, if specifically requested by a Contracting Party, in the form of statements from witnesses and certified copies of original records.

Paragraph 4 stipulates that each Party will ensure that its domestic law provides that, within the scope of this Agreement, the following information can be obtained and provided through its competent authority:

- (a) Information held by banks and other financial institutions therefore ruling out bank secrecy. Under this sub-paragraph, person's acting in an agency or fiduciary capacity including nominees or trustees are also included;
- (b) Information regarding persons as listed. It, however provides that in the case of publicly traded companies or public collective investment schemes, the competent authorities need only provide ownership information that the requested Party can obtain without disproportionate difficulties, hereby recognising that where a true public market for ownership interests exists, there is less of a risk that such vehicles will be used for tax evasion or other non-compliance with the tax law

Paragraph 5 stipulates that any request for information must be provided in accordance with the requirements of sub-paragraphs (a) to (g). While paragraph 5 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, the Commentary to the OECD Model provides that the sub-paragraphs nevertheless need to be interpreted liberally in order not to frustrate the effective exchange of information.

Paragraph 6 provides that the requested Party must use its best endeavours to forward the requested information with the least possible delay and further stipulates that receipt of a request must be acknowledged by the competent authority of the requested Party. The competent authority of the requested Party must provide reasons for delays or refusal.

## **ARTICLE 6**

### **TAX EXAMINATIONS ABROAD**

Paragraph 1 provides that the requesting Party may request the requested Party, to the extent permitted under its domestic laws and with the consent of the individuals concerned, to allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party to interview individuals and examine records. The competent authority of the Requested Party must be advised of the time and place of any intended meeting arranged by the requesting Party.

Paragraph 2 provides for the competent authority of the requested Party to permit representatives of the competent authority of the requesting Party to attend a tax examination in the territory of the requested Party. Such representatives may only be present at the appropriate time.

Paragraph 3 sets out the procedures to be followed if a request under paragraph 2 has been granted. All decisions on how the examination is to be carried out will be taken by the authority or the official of the requested Party in charge of the examination.

## **ARTICLE 7**

### **POSSIBILITY OF DECLINING A REQUEST**

This Article identifies the situations in which a requested Party is not required to supply information in response to a request. If the grounds for declining a request under Article 7 are met, the requested Party is given discretion to refuse to provide the information.

Paragraph 1 makes it clear that a requested Party is not required to obtain and provide information that the requesting Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its domestic law or where the request is not made in conformity with this Agreement. This stipulation is intended to prevent the requesting Party from circumventing its domestic law limitations by requesting information from the other Party thereby making use of greater powers than it possesses under its own laws.

Paragraph 2 ensures that the requested Party is not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process. However, the proviso in this paragraph makes it clear that the Agreement overrides any domestic law or practices that may treat information as a trade, business, industrial, commercial or professional secret or trade process merely because it is held by a person described in paragraph 4 (a) of Article 5 or because it is ownership information.

Paragraph 3 ensures client /attorney confidentiality when communications involve seeking or providing legal advice; or for use in existing or contemplated legal proceedings.

Paragraph 4 provides that the requested Party may decline a request where the disclosure of information would be contrary to public policy.

Paragraph 5 ensures that a request is not refused on the ground that the tax claim giving rise to the request is disputed.

Paragraph 6 is intended to ensure that the Agreement does not result in discrimination between nationals of the requested Party and nationals in the same circumstances of the requesting Party. It provides for the requested Party to decline a request if it would result in the enforcement of a provision of the requesting Party's tax law which discriminates against its nationals.

## **ARTICLE 8**

### **CONFIDENTIALITY**

Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. This Article ensures that adequate protection is given to information received from another Contracting Party.

This Article provides that any information received pursuant to this Agreement by either Party must be treated as confidential. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information, which is obtained in the course of their co-operation. It further stipulates that the information may be disclosed only to persons or authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement and precludes disclosure by the requesting Party to any other jurisdiction without the express written consent of the competent authority of the requested Party.

## **ARTICLE 9**

### **COSTS**

Unless otherwise agreed by the competent authorities, indirect costs in providing assistance would be borne by the requested Party and direct costs by the requesting Party. The Article provides for the competent authorities to consult from time to time in relation to this issue and stipulates that the competent authority of the requesting Party must be warned in advance by the competent authority of the requested Party if the costs of providing information with respect to a specific request are expected to be significant.

## **ARTICLE 10**

### **IMPLEMENTATION LEGISLATION**

This Article stipulates that the Contracting Parties must enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

## **ARTICLE 11**

### **MUTUAL AGREEMENT PROCEDURE**

Paragraph 1 institutes a mutual agreement procedure for resolving any difficulties arising out of the implementation or interpretation of the Agreement.

Paragraph 2 allows the competent authorities to decide on the procedures to be used under Articles 5, 6 and 9 by mutual agreement.

Paragraph 3 provides for the competent authorities to communicate with each other directly.

Paragraph 4 provides that the Contracting Parties may agree to other forms of dispute resolution should the mutual agreement procedure fail to resolve a matter.

## **ARTICLE 12**

### **ENTRY INTO FORCE**

This Article stipulates that the Agreement will enter into force in both South Africa and Costa Rica when each party has notified the other of the completion of their legal procedures for entry into force. Once the Agreement has entered into force, the tax matters referred to will become effective in accordance with the provisions of this paragraph.

## **ARTICLE 13**

### **TERMINATION**

Paragraph 1 allows for either Contracting party to terminate the Agreement.

Paragraph 2 provides for the effective date of such termination.

Paragraph 3 ensures that the Parties shall remain bound by the obligation of confidentiality under Article 8 with respect to any information obtained under this Agreement.

**AGREEMENT**  
**BETWEEN**  
**THE GOVERNMENT OF**  
**THE REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF THE**  
**REPUBLIC OF COSTA RICA**  
**FOR THE EXCHANGE OF INFORMATION**  
**RELATING TO TAX MATTERS**

## **PREAMBLE**

The Government of the Republic of South Africa and the Government of the Republic of Costa Rica (hereinafter jointly referred to as "the Contracting Parties" and separately as "a Contracting Party") desiring to facilitate the exchange of information with respect to taxes;

**HAVE AGREED AS FOLLOWS:**

## **ARTICLE 1**

### **SCOPE OF THE AGREEMENT**

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

## **ARTICLE 2**

### **JURISDICTION**

A requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

## **ARTICLE 3**

### **TAXES COVERED**

1. The taxes which are the subject of this Agreement are:
  - (a) in the Republic of Costa Rica: taxes of every type and description collected by the Ministry of Finance at the date of signature; and

- (b) in the Republic of South Africa: taxes of every type and description imposed by the Government of the Republic of South Africa at the date of signature of this Agreement.
- 2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

## **ARTICLE 4**

### **DEFINITIONS**

- 1. In this Agreement:
  - (a) the term "Contracting Party" means Costa Rica or South Africa as the context requires;
  - (b) the term "Costa Rica" means the land, maritime, and air space under its sovereignty and the exclusive economic zone and the continental shelf within which it exercises sovereign rights and jurisdiction in accordance with international law and its domestic law;
  - (c) the term "South Africa" means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea, including the continental shelf, which has been or may hereafter be designated, under the laws of South Africa and in accordance with international law, as an area within which South Africa may exercise sovereign rights of jurisdiction;
  - (d) the term "competent authority" means:
    - (i) in the case of Costa Rica, the, Director of the Tax Administration or an authorised representative of the Director; and
    - (ii) in the case of South Africa, the Commissioner of the South African Revenue Service or an authorised representative of the Commissioner;
  - (e) the term "person" includes an individual, a company or any other body of persons;

- (f) the term “company” means anybody corporate or any entity that is treated as a body corporate for tax purposes;
- (g) the term “publicly traded company” means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold “by the public” if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- (h) the term “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of the company;
- (i) the term “recognised stock exchange” means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- (j) the term “collective investment fund or scheme” means any pooled investment vehicle, irrespective of legal form. The term “public collective investment fund or scheme” means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed “by the public” if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;
- (k) the term “tax” means any tax to which the Agreement applies;
- (l) the term “applicant Party” means the Contracting Party requesting information;
- (m) the term “requested Party” means the Contracting Party requested to provide information;
- (n) the term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;
- (o) the term “information” means any fact, statement or record in any form whatever;
- (p) the term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;
- (q) the term “criminal laws” means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.



2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

## **ARTICLE 5**

### **EXCHANGE OF INFORMATION UPON REQUEST**

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.
2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use the information gathering measures it considers relevant to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.
3. If specifically requested by the competent authority of the applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.
4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:
  - (a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;
  - (b) information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:
  - (a) the identity of the person under examination or investigation;
  - (b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;
  - (c) the tax purpose for which the information is sought;
  - (d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;
  - (e) to the extent known, the name and address of any person believed to be in possession of the requested information;
  - (f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;
  - (g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.
6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:
  - (a) confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request;
  - (b) if the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

## **ARTICLE 6**

### **TAX EXAMINATIONS ABROAD**

1. A Contracting Party may allow representatives of the competent authority of the other Contracting Party to enter the territory of the first-mentioned Party, to the extent permitted under its domestic laws, to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.
2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party.
3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

## **ARTICLE 7**

### **POSSIBILITY OF DECLINING A REQUEST**

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.
2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.
3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

- (a) produced for the purposes of seeking or providing legal advice; or
  - (b) produced for the purposes of use in existing or contemplated legal proceedings.
- 4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).
  - 5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.
  - 6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

## **ARTICLE 8**

### **CONFIDENTIALITY**

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

## **ARTICLE 9**

### **COSTS**

Unless the competent authorities of the Parties otherwise agree, indirect costs incurred in providing assistance shall be borne by the requested Party, and direct costs incurred in providing assistance (including costs of engaging external advisors in connection with litigation or otherwise) shall be borne by the requesting Party. The respective competent authorities shall consult from time to time with regard to this Article, and in particular the competent authority of the requested Party shall consult with the competent authority of the requesting Party in advance if the costs of providing information with respect to a specific request are expected to be significant.

## **ARTICLE 10**

### **IMPLEMENTATION LEGISLATION**

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

## **ARTICLE 11**

### **MUTUAL AGREEMENT PROCEDURE**

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.
2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5, 6 and 9.
3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reaching agreement under this Article.
4. The Contracting Parties may also agree on other forms of dispute resolution.

## **ARTICLE 12**

### **ENTRY INTO FORCE**

This Agreement shall enter into force when each Party has notified the other, through the diplomatic channel, of the completion of its necessary internal procedures for entry into force. Upon entry into force, it shall have effect:

- (a) for criminal tax matters on that date; and
- (b) for all other matters covered in Article 1 on that date, but only in respect of taxable periods beginning on or after that date, or where there is no taxable period, all charges to tax arising on or after that date.

## **ARTICLE 13**

### **TERMINATION**

1. Either Contracting Party may terminate the Agreement by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.
3. Following termination of the Agreement the Contracting Parties shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

**IN WITNESS WHEREOF** the undersigned, being duly authorised by their respective Governments, have signed and sealed this Agreement in two originals in the English and Spanish languages, both texts being equally authentic.

**DONE** at ..... on ..... day of .....  
in the year 20.....

\_\_\_\_\_  
**FOR THE GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA**

\_\_\_\_\_  
**FOR THE GOVERNMENT OF  
THE REPUBLIC OF COSTA RICA**



# international relations & cooperation

Department  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

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File: 29/2/CRI

Ref: RO.187/2011

Attention: Nicole Pillay  
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## AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA FOR THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS

1. Your request for legal advice received on 22 June 2011, under reference BL1/CRI/4/T3/A26, refers.
2. We have taken note of the comments made by the State Law Advisers at the Department of Justice and Constitutional Development in their legal opinion dated 15 June 2011 with regard to the aforementioned Agreement. Having scrutinised the Agreement, we have commented and made some track changes directly in the text of the attached Agreement for the attention of the colleagues in the line function Department (SARS).
3. Subject to our comments and the track changes made directly in the text of the attached Agreement, this Agreement (attached) is acceptable from an international law point of view and as such, not in conflict with South Africa's international obligations.
4. Please be advised of the provisions of Section 231(1) of the Constitution of the Republic of South Africa, 1996, which state that "the negotiating and signing of all international agreements is the responsibility of the national executive." This therefore means that the President of the Republic of South Africa as Head of the National Executive must, with the concurrence of the relevant Minister, approve the signing of the finally agreed upon text of the Agreement on behalf of the Government of the Republic of South Africa.
5. The President's approval needs to be obtained before the Agreement can be signed. In order to obtain Presidential approval the Agreement need to be certified by this Office. The documentation required for certification consists of:
  - two copies of the President's Minute;

### CONFIDENTIALITY NOTE:

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).



the doj & cd

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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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Date: 15 June 2011

The Manager  
South African Revenue Service  
Private Bag X 923  
**PRETORIA**  
0001

Attention: Ms S Carreira

**AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA REGARDING THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS ON INCOME: YOUR 25/6/1/299 DATED 15 APRIL 2011**

1. We have scrutinized the draft "Agreement between the Government of the Republic of South Africa and the Government of the Republic of Costa Rica for the Exchange of Information relating to Tax matters" in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and *Chapter 5 of the Constitutional Handbook for Members of the Executive* with a view to possible conflict with the domestic law of the Republic of South Africa.

2. With regard to the Agreement we take cognisance of the provisions of section 108 of the Income Tax Act, 1962 (Act No. 58 of 1962) which provides as follows:

"Prevention of or relief from, double taxation

(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made



treaties and our Income Tax Act meet the required standards in this regard and South Africa is on record as supporting exchanges of information without regard to bank secrecy, a practice in line with the rest of the world". Hence, our understanding concerning this aspect of the Agreement that you have satisfied yourselves that this provision is compliant with our domestic law and that there would be no further need from our side to probe further into the impact of this provision on the domestic laws. It is to be noted that the provisions in the Agreement are made subject to the applicable provisions of the domestic law of the Republic.

4. The South African Revenue Service's attention is drawn to section 231 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution") which must be complied with and which provides as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved

