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PROTOCOL AMENDING THE CONVENTION

BETWEEN

THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA

AND

THE GOVERNMENT OF THE
REPUBLIC OF BOTSWANA

FOR THE AVOIDANCE OF

DOUBLE TAXATION AND THE PREVENTION

OF FISCAL EVASION

WITH RESPECT TO TAXES ON INCOME,

WITH PROTOCOL

The Government of the Republic of South Africa and the Government of the Republic of Botswana;

DESIRING to amend the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with Protocol, signed at Gaborone on 7 August 2003 (in this Protocol referred to as "the Convention"),

HAVE AGREED AS FOLLOWS:

ARTICLE I

Article 25 of the Convention shall be deleted and replaced by the following:

"ARTICLE 25

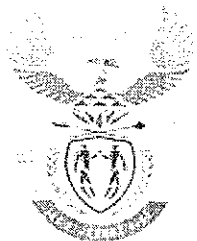
EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions, in particular for the prevention of fraud or evasion of such taxes, in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
 - (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).
4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

ARTICLE II

1. Each of the Contracting States shall notify to the other in writing, through the diplomatic channel, of the completion of the procedures required by its law for the bringing into force of this Protocol, which shall form an integral part of the Convention. The Protocol shall enter into force on the date of receipt of the later of these notifications.
2. The provisions of the Protocol shall thereupon have effect beginning on the first day of January next following the year in which the Protocol enters into force.



international relations & cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

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10GCZ006070901
File: 29/2/BWA
Ref: RO 211/2010

Attention: Thilivhali Ratshitanga
Directorate: BLSNAD
Route: DAA103

PROTOCOL AMENDING THE CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

1. Your request for legal advice received on 8 July 2010, 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 7 April 2010. Having scrutinised the aforementioned Protocol, we comment as follows:
 - 2.1 **Ad Title:** Delete the comma and the last two words “, WITH PROTOCOL” from the Title. Therefore, the Title should read “**PROTOCOL AMENDING THE CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME**”. We are aware of the fact that the Convention that is being amended has a Protocol attached to it. This Protocol is an integral part of the Convention hence there is no need to add “, WITH PROTOCOL” to the Title.
3. The aforementioned Protocol is in our opinion consistent with international law and 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 Protocol on behalf of the Government of the Republic of South Africa.

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).

5. The President's approval needs to be obtained before the Protocol can be signed. In order to obtain Presidential approval the Protocol need 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 Protocol and proposed date of signature;
 - two copies of the finally agreed upon text of the Protocol;
 - 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.
6. This Protocol falls under the purview of section 231(2) of the Constitution which requires Parliamentary approval to be binding on the Republic. The approval in terms of Section 231(2) of the Constitution is a prerequisite for ratification.
7. In order to facilitate the process of Parliamentary approval the line function department has to submit the signed Protocol to Cabinet for consent by way of a Cabinet memorandum. This legal opinion and the legal opinion from the Department of Justice must accompany the Cabinet Memorandum. This Protocol can only be submitted to Parliament for approval once Cabinet has consented to such submission.
8. We trust that our comments will be of assistance to you.

THEMBILE JOYINI
PRINCIPAL STATE LAW ADVISER (IL)

9 JULY 2010
PRETORIA



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER

Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, E-mail: OCSL-APretoria@justice.gov.za
Momentum Centre East Tower 12th Floor, Pretorius Street

Ref: 213/2013
Enq: M Tladi
Tel: (012) 315 1140
e-mail: mtladi@justice.gov.za
website: <http://www.doj.gov.za>
Date: 23 April 2013

The Commissioner
South African Revenue Service
Private Bag X923
PRETORIA
0001

Dear Mr Magashula,

Attention: Oshna Maharaj

**PROTOCOL AMENDING THE CONVENTION BETWEEN THE AND THE
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE
GOVERNMENT OF THE REPUBLIC OF BOTSWANA FOR THE
AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF
FISCAL EVASION WITH RESPECT TO TAXES ON INCOME: YOUR E-
MAIL DATED 2 APRIL 2013 REFERS**

1. On the 7th April 2010, we scrutinised the draft "Protocol amending the Convention between the Government of the Republic of South Africa and the Government of the Republic of Botswana for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income," with a view to its possible conflict with the domestic law of South Africa and as far as we could ascertain, there was no such conflict.
2. SARS informs us that they have been advised by their Parliamentary Office that they are experiencing considerable challenges with regards to having the Protocol tabled before Parliament for purposes of approval, because the Department of Justice and Constitutional

Development has not expressly classified the Protocol, as a section 231(2) agreement.

3. According to the National Treasury, in keeping with their experience and existing precedent, the draft Protocol falls within the scope of section 231(2) of the Constitution. In other words, the Protocol has to be tabled before both Houses of Parliament and receive their stamp of approval, before it could be binding on the Republic of South Africa. In line with *paragraph 5.5 of the Manual on the Executive Acts of the President of the Republic of South Africa (the Manual)*, the department responsible for processing an agreement must determine, in conjunction with the Office of the Chief State Law Adviser and the Office of the Chief State Law Adviser (International Law), whether an agreement is of a technical, administrative or executive nature, as contemplated in section 231(3) of the Constitution of the Republic of South Africa, 1996. It is in this light that the National Treasury has expressed its views in the manner it has, as regards the classification of this Protocol.

4. We are on all fours with the approach adopted by the National Treasury as regards the classification of this Protocol.

5. The National Treasury's attention is further drawn to paragraph 5.21 of the Manual which obliges the Department of International Relations and Cooperation to confirm whether or not an international instrument is "technical, administrative or executive" in nature.



M. TLADI/SM MASAPU

CHIEF STATE LAW ADVISER

TABLING OF DOCUMENT IN PARLIAMENT
National Assembly (NA) AND National Council of Provinces (NCOP)

The following documents must be tabled in Parliament and are submitted for your kind consideration.

**PROTOCOL AMENDING THE DOUBLE TAXATION CONVENTION
BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA
AND THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA**

PARLIAMENTARY SERVICES

DATE: 23 MAY 2013

MINISTER OF FINANCE

Submitted for your kind consideration for tabling in both Houses of Parliament,
the National Assembly (NA) and National Council of Provinces (NCOP)

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
DATE:

Presented to **MINISTER OF FINANCE** on for Ministerial
consideration.

APPROVED / NOT APPROVED

MINISTER

DATE: