

130618 finance

**EXPLANATORY MEMORANDUM**  
**ON THE PROTOCOL AMENDING**  
**THE DOUBLE TAXATION AGREEMENT WITH PROTOCOL**  
**BETWEEN**  
**THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF THE REPUBLIC OF MALTA**

In order to accommodate changes which the Government of the Republic of South Africa and the Government of the Republic of Malta desire to enact to the Double Taxation Agreement entered into between the Republic of South Africa and the Republic of Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Rome, Italy on 16 May 1997 (in this Protocol referred to as "the Agreement"), a Protocol to the Agreement has been negotiated.

The following amendments have been agreed upon.

**ARTICLE I**

Article 4 of the Agreement is amended by:

Deleting paragraph 1 and replacing it with a new paragraph which has the same definition of "resident" for both South Africa and Malta. The definition follows the OECD Model and includes the following points:

- Criteria for taxation as a resident are domicile, residence, place of management or any other criterion of a similar nature;
- The term also includes specific reference to the State itself and any political subdivision or local authority thereof;
- This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

## ARTICLE II

Article 10 is the Article dealing with dividends in the Agreement. In this Protocol paragraph 2 of Article 10 is deleted and the provisions of a new paragraph 2 are introduced in line with other South African treaties.

The new paragraph 2 of Article 10 provides for the common international tax treatment of cross-border dividends, in terms of which the source State in which the dividends are declared may impose a limited withholding tax on the non-resident shareholder.

The limitation on withholding tax rates in the source State, imposed by paragraph 2, is as follows:

- (a) where the dividends are paid by a South African resident company to a resident of Malta who is the beneficial owner of the dividends, the tax levied in South Africa shall not exceed:
  - (i) 5% of the gross amount of the dividends if the beneficial owner is a company which holds at least 10% of the capital of the company paying the dividends. This limitation is intended to encourage substantial (i.e. at least 10%) investment by companies resident in Malta in South African companies;
  - (ii) in all other cases the rate of tax is limited to 10% of the gross amount of the dividends.
- (b) where the dividends are paid by a company resident in Malta to a resident of South Africa who is the beneficial owner thereof, Malta tax on the gross amount of the dividends shall not exceed the tax leviable on the profits out of which the dividends are paid.

The mode of application of these limitations shall be settled by the competent authorities of the two States.

Tax on the profits of the company will not be affected by this paragraph.

## ARTICLE III

Paragraph 1 stipulates that the Government of the Republic of Malta and the Government of the Republic of South Africa will notify each other in writing through the diplomatic channel of completion of their domestic requirements for the entry into force of this Protocol which will form an integral part of the Agreement. This Protocol shall enter into force in both Contracting States on the date of the later of these notifications.

Paragraph 2 specifies that: the Protocol will only come into effect once taxation at shareholder level of dividends becomes effective in South Africa. South Africa is obliged to notify Malta in writing of the completion of the procedures required by its law for the introduction, and date of entry into force, of the new system of taxation of dividends.

## ARTICLE IV

This Article makes provision for the Protocol to remain in force as long as the Agreement remains in force.

**PROTOCOL**  
**AMENDING THE AGREEMENT**  
**BETWEEN**  
**THE GOVERNMENT OF THE REPUBLIC OF**  
**SOUTH AFRICA**  
**AND**  
**THE GOVERNMENT OF THE REPUBLIC OF MALTA**  
**FOR THE AVOIDANCE OF DOUBLE TAXATION**  
**AND**  
**THE PREVENTION OF FISCAL EVASION**  
**WITH RESPECT TO TAXES ON INCOME,**  
**SIGNED AT ROME ON 16 MAY 1997**

## **PREAMBLE**

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

**DESIRING** to amend the Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Rome, Italy on 16 May 1997 (in this Protocol referred to as "the Agreement");

## **HAVE AGREED AS FOLLOWS:**

### **ARTICLE I**

Paragraph 1 of Article 4 of the Agreement shall be deleted and replaced by the following paragraph:

- "1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State."

### **ARTICLE II**

Paragraph 2 of Article 10 of the Agreement shall be deleted and replaced by the following paragraph:

- "2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but:
- (a) where the dividends are paid by a company which is resident of South Africa to a resident of Malta who is the beneficial owner thereof, the tax so charged shall not exceed:
    - (i) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds at least 10 per cent of the capital of the company paying the dividends; or
    - (ii) 10 per cent of the gross amount of the dividends in all other cases.

- (b) where the dividends are paid by a company which is a resident of Malta to a resident of South Africa who is the beneficial owner thereof, Malta tax on the gross amount of the dividends shall not exceed that chargeable on the profits out of which the dividends are paid.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.”

### ARTICLE III

Article 11 of the Agreement is amended by:

- (a) deleting paragraph 3 and substituting the following paragraph:
  - “3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be exempt from tax in that State if:
    - (a) the payer of the interest is the Government of that Contracting State or a political subdivision or a local authority thereof; or
    - (b) the interest is paid to the Government of the other Contracting State or a political subdivision or a local authority thereof; or
    - (c) the interest is paid by the Central Bank of that Contracting State or to the Central Bank of the other Contracting State; or
    - (d) the interest is paid to any institution or body which is wholly owned, directly or indirectly, by the other Contracting State or a political subdivision or a local authority thereof; or
    - (e) the interest arises in respect of any debt instrument listed on a recognised stock exchange.”
- (b) inserting after paragraph 3 the following paragraph:
  - “4. For the purposes of paragraph 3(e), the term “recognised stock exchange” means:
    - (a) in Malta, the Malta Stock Exchange;
    - (b) in South Africa, the Johannesburg Stock Exchange;
    - (c) any other stock exchange agreed upon by the competent authorities of the Contracting States.”

- (c) renumbering the existing paragraphs 4, 5, 6 and 7 as paragraphs 5, 6, 7 and 8 respectively.

#### **ARTICLE IV**

Article 25 of the Agreement 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 Agreement 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 or local authorities, in so far as the taxation thereunder is not contrary to the Agreement. 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 V**

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 Agreement. The Protocol shall enter into force on the date of receipt of the later of these notifications.
2. (a) Subject to subparagraph (b), the provisions of the Protocol shall apply from the date of entry into force thereof;
- (b) Article II of the Protocol shall apply from the date of the introduction in South Africa of the system of taxation at shareholder level of dividends declared. South Africa shall notify Malta in writing, through the diplomatic channel, of the completion of the procedures required by its law for the bringing into force of the South African system of taxation at shareholder level of dividends declared, as well as the date of entry into force of this system.

#### **ARTICLE VI**

This Protocol shall remain in force for as long as the Agreement remains in force.

**IN WITNESS WHEREOF** the undersigned, duly authorised thereto by their respective Governments, have signed and sealed this Protocol in two originals in the English language.

**DONE** at ....., this ..... day of ..... 20.....

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

\_\_\_\_\_  
**FOR THE GOVERNMENT OF THE  
REPUBLIC OF MALTA**





the doj & cd

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

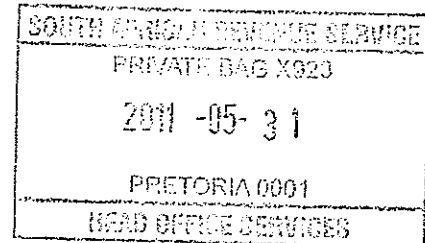


J 464

OFFICE OF THE CHIEF STATE LAW ADVISER  
Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, Momentum Centre East Tower 12<sup>th</sup>  
Floor, Pretorius Street

Ref: 92/2011  
Enq: T Ramcharan  
Tel: (012) 315 1138  
Fax: 0866293153 / 012- 315 1628  
E-mail: tramcharan@justice.gov.za  
Website: <http://www.doj.gov.za>

Date: 3 May 2011



The Commissioner  
South African Revenue Services  
Private Bag X923  
PRETORIA  
0001

**Attention: Ms Oshna Maharaj (Manager: International Development and Treaties)**

**PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF THE  
REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF  
MALTA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF  
FISCAL EVASION WITH RESPECT TO TAXES ON INCOME: YOUR 25/6/1/277 OF 18  
JANUARY 2011 .**

1 We have scrutinized the draft "Protocol Amending the Agreement between the Government of the Republic of South Africa, and the Government of the Republic of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital hereinafter referred to as the "Protocol" in terms of *paragraph 5.20 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* and have indicated suggested amendments and made certain comments on the copy of the Protocol attached hereto

2 The status of the Protocol must be determined and in this regard, the Department's attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa (hereinafter referred to as the "Constitution") which provides as follows:

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

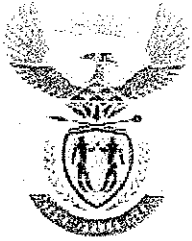
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

to the OECD and that the Protocol is consistent with other protocols already negotiated and signed.

6. In view of the aforementioned and subject to our foregoing remarks and our comments and amendments on the text of the Protocol, no provision of the proposed Protocol is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

**For the CHIEF STATE LAW ADVISER**  
**T RAMCHARAN/ WJJ NEL/ S MASAPU**



# international relations & cooperation

Department:  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)  
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

11gcz0140823A  
29/2/MLT  
RO 266/11

For Attention: Mr DM Stemmer  
Route: KAC 107

**PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF MALTA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME, SIGNED AT ROME ON 16 MAY 1997**

1. Your request for legal advice dated 19 August 2011 under reference number J405.../2010 refers.
2. The State Law Advisers (IL) have scrutinised the aforementioned Protocol to the Double Taxation Agreement from an international law perspective.
3. We have noted the comments made by the Department of Justice and Constitutional Development (DOJCD) and SARS and are in concurrence therewith. We wish to comment as follows:
4. It is understood that Double Taxation Agreements and Protocols thereto, are customarily submitted for Parliamentary approval in terms of Section 231 (2) of the Constitution of the Republic of South Africa, 1996 and provisions of the Income Tax Act, 1962. We are of the view that this Protocol to the Double Taxation Agreement can be signed and submitted to Parliament for approval in accordance with the aforementioned legislation.
5. Presidential approval to sign will be required in terms of Section 231 (1) of the Constitution. In order to obtain Presidential approval the Protocol 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 Protocol and proposed date of signature;
  - two copies of the finally agreed text of the Protocol;
  - two copies of the legal opinions from the State Law Advisers at the DOJCD and this Office;
  - Completed certification checklist (attached herewith)
  - all documentation in folder Z137.
6. Once the President has signed the Minute, the Protocol cannot be amended in any way.
7. The Protocol 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 Mrs R van der Walt, at 012 351 0872.

**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).

8. The originally signed Protocol must be deposited with the Treaty Section for safekeeping immediately after signature.
9. Finally, you are reminded that the Protocol, once signed, needs to be tabled in Parliament for information purposes within a reasonable time by the responsible line function department.
10. Subject to these comments the Protocol would be acceptable from an international law point of view and not in conflict with South Africa's other international obligations.
11. We trust that our comments will be of assistance to you.

**T NAIDU**  
**STATE LAW ADVISER (IL)**

**PRETORIA**  
**23 AUGUST 2011**

**EXPLANATORY MEMORANDUM**  
**ON THE PROTOCOL AMENDING**  
**THE DOUBLE TAXATION AGREEMENT**  
**BETWEEN**  
**THE REPUBLIC OF SOUTH AFRICA**  
**AND**  
**THE KINGDOM OF NORWAY**

In order to accommodate changes which the Government of the Republic of South Africa and the Government of the Kingdom of Norway are desiring to enact to the Double Taxation Convention entered into between the Republic of South Africa and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Cape Town on 12 February 1996 (in this Protocol referred to as "the Agreement"), a Protocol to the Agreement has been negotiated.

The following amendments have been agreed upon.

**ARTICLE I**

Article I introduces an updated Article 26 to the Agreement dealing with exchange of information.

Paragraph 1 provides that the States will exchange such information as is relevant both for carrying out the provisions of this Agreement and for applying the domestic taxation laws concerning any tax imposed on behalf of the Contracting States or of their political subdivisions or local authorities, in particular for the prevention of fraud or evasion of such taxes. The exchange of information is not restricted by Articles 1 and 2 of the Agreement. Thus, should South Africa obtain tax information relating to a resident of a third State who is liable for tax in Norway, it may make that information available to Norway. The exchange extends to taxes of every kind and description.

Paragraph 2 provides that information obtained by a State under this provision must be treated with the same degree of secrecy as applies to information obtained under the domestic laws of that State. In addition to this general stipulation on secrecy, it is specifically provided that it may be disclosed only to persons or authorities involved in the administration of the taxes imposed on behalf of a Contracting State or its political subdivisions or local authorities, and that those persons and authorities shall use the information only for the purposes of such administration.

In terms of paragraph 3, the provisions of paragraphs 1 and 2 will not impose on a State the obligation:

- (a) to do anything which is contrary to the laws and administrative practice of either State;

- (b) to supply information which is not obtainable under the laws of either State or in the normal course of the administration of either State;
- (c) to supply information which discloses any business secret, or information the disclosure of which is contrary to public policy.

In terms of paragraph 4, a Contracting State is obliged to exchange information even in cases where the requested information is not needed by that State for domestic tax purposes. Paragraph 4 further makes it clear that the obligation to exchange information is subject to the limitations of paragraph 3 but a Contracting State cannot decline to supply information solely because it has no domestic interest in such information.

Paragraph 5 provides that the requested Contracting State shall not decline to supply information to the requesting Contracting State solely because the requested information is held by a bank or other financial institution. Paragraph 5 therefore overrides the provisions of paragraph 3 to the extent that paragraph 3 would otherwise permit the requested State to decline to supply the requested information on grounds of bank secrecy. Paragraph 5 further provides that the requested State shall not refuse to supply the requested information on grounds that the information is held by persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures.

## ARTICLE II

Paragraph 1 stipulates that the Government of the Republic of South Africa Government of the Kingdom of Norway will notify each other in writing through the diplomatic channel of completion of their domestic requirements for the entry into force of this Protocol which will form an integral part of the Agreement.

Paragraph 2 specifies that this Protocol shall enter into force in both Contracting States on the date of the later of these notifications and that this will be the effective date of the Protocol, in both States.

## ARTICLE III

This Article makes provision for the Protocol to remain in force as long as the Agreement remains in force.

**PROTOCOL**

**AMENDING THE CONVENTION**

**BETWEEN**

**THE REPUBLIC OF SOUTH AFRICA**

**AND**

**THE KINGDOM OF NORWAY**

**FOR THE AVOIDANCE OF**

**DOUBLE TAXATION AND THE PREVENTION**

**OF FISCAL EVASION**

**WITH RESPECT TO TAXES ON INCOME**

The Government of the Republic of South Africa and the Government of the Kingdom of Norway;

**DESIRING** to amend the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed at Cape Town on 12 February 1996 (in this Protocol referred to as "the Convention"),

**HAVE AGREED AS FOLLOWS:**

## **ARTICLE I**

Article 26 of the Convention shall be deleted and replaced by the following:

### **"ARTICLE 26**

#### **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 or local authorities, 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. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.
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.
- 2. The Protocol shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect on that date.

## ARTICLE III

This Protocol shall remain in force as long as the Convention remains in force and shall apply as long as the Convention itself is applicable.

**IN WITNESS WHEREOF** the undersigned, duly authorised thereto by their respective Governments, have signed this Protocol.

**DONE** in two originals at ..... this.....day of ..... 20....., in the English language.

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

**FOR THE GOVERNMENT OF THE  
KINGDOM OF NORWAY**





# international relations & cooperation

Department:  
International Relations and Cooperation  
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)  
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

8 November 2011

Ms Shelley-Anne Carreira  
Manager: International Development and Treaties  
Legislative Policy: Legal and Policy Division  
South African Revenue Service  
Brooklyn

Dear Ms Carreira

## NORWAY: PROTOCOL AMENDING THE DOUBLE TAXATION AGREEMENT

1. Your request for a legal opinion on the "Protocol amending the Convention between the Republic of South Africa and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income" (hereinafter "the Protocol") bears reference.
2. We have studied the Protocol and find it in order from an international law point of view.
3. With regard to the procedures to be followed for its entry into force, we notice that its entry into force clause, Article II, provides as follows:
  - "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 law for the bringing into force of this Protocol, which shall form an integral part of the Convention.
  2. This Protocol shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect on that date."
4. Provision is further made in the *testimonium* for signature by duly authorised representatives of the respective Governments. From the above it is clear that a distinction must be made between the signature of the Protocol, and the procedures that will result in its entry into force: signature will not have the effect of entry into force.
5. As regards signature, Section 231 of the *Constitution of the Republic of South Africa, 1996* ("the Constitution") provides as follows:

### 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 negotiating and signing of all international agreements is the responsibility of the national executive".

6. In terms of Section 85 of the Constitution, the national executive consists of the President, the Deputy President and the members of the Cabinet (Ministers): consequently the people that are authorised to sign international agreements. The procedures required to authorise the responsible Minister (in this case the Minister of Finance) to sign the Protocol, is in terms of the *Manual on Executive Acts of the President of the Republic of South Africa* ("the Manual") that such authorisation must take place by means of a President's Minute, signed by the President and co-signed by the responsible Minister. The Protocol must also be certified by this Office before the Presidency can be approached to have the President's Minute signed. In this respect, we require two copies of the President's Minute, an Explanatory Memorandum setting out the purpose of the Protocol and the intended date of signature, and two copies of the finally agreed Protocol in a Z137 cover.
7. Once the Protocol has been signed, the question arises whether approval by means of the President's Minute constitutes the "completion of all legal formalities", or whether a further procedure must be followed?
8. The Constitution provides in Section 231 in this regard as follows:
  - "(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".
9. The question is therefore, essentially, whether the Protocol must be processed in terms of Section 231(2), which entails approval by the two houses of Parliament, or Section 231(3), which requires only approval for signature by means of a President's Minute. If the Protocol is of a technical, administrative or executive nature, or does not require ratification or accession, Presidential approval will suffice. Ratification or accession is not required, hence the question that must be asked is whether it is of a technical, administrative or executive nature.
10. The Manual provides as follows with respect to this distinction in paragraph 5.5:

"The terms technical, administrative and executive agreements are used interchangeably and refer to the following categories of international agreements:

  - (a) Agreements which are departmentally specific;
  - (b) Agreements which are not of major political or other significance;
  - (c) Agreements which have no financial consequences, and do not affect domestic law. These are agreements flowing from the everyday activities of government departments and are often drafted in simplified form."
11. From paragraph (b) above, it is clear that agreements which have financial consequences or "affect" domestic law, will be considered as agreements which are not of technical, administrative or executive nature, and which must hence be processed in terms of Section 231(2) and be approved by Parliament.
12. In this respect, it should be noted that international agreements of the nature of the present Protocol, is the subject of specific legislation, namely the *Income Tax Act* (Act No. 58 of 1962) ("the Act"), which provides as follows in Section 108:
  - "(1) The National Executive may enter into an agreement with the government of any other country whereby arrangements are made with such government with a view to

...the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.

- (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in Section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act."

13. It appears that there is a legislative injunction in Section 108(2) that an "agreement with the government of any country whereby arrangements are made with such government with a view to ...the rendering of reciprocal assistance in the administration of and the collection of taxes" must be approved by Parliament, and then be published in the Government Gazette, which actions will have legislative effect.
14. Bearing in mind the scope of the Protocol as provided for in Article 1, which is to amend Article 26 of the "Convention between the Republic of South Africa and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income" which authorises the Competent Authorities of the Contracting States to "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 on behalf of the Contracting States, or their political subdivisions or local authorities, in particular for the prevention of fraud or evasion or such taxes, in so far as the taxation thereunder is not contrary to the Convention", we conclude that the Agreement will fall under the category of agreements provided for in Section 108(1).
15. We therefore conclude, both in terms of the guidelines provided in the Manual on Executive Acts and in terms of the specific injunction contained in Section 108(2), that agreements of the nature of this Protocol must be approved by Parliament.
16. Once such approval has been given, notification can be given in terms of Article II(1) of the Protocol of completion of the South African procedures, and once it enters into force, publication in the Gazette must take place in terms of Article 108(2) of the Act.
17. We trust that the above will be of assistance.

Yours sincerely

Andre Stemmet  
Senior State Law Adviser (International Law)

Ref: 29/2/NOR  
RO175/2011





~~Amien Brookfield Park~~  
the doj & cd 25/6/1/223

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: [OCSLAPretoria@justice.gov.za](mailto:OCSLAPretoria@justice.gov.za)  
Momentum Centre East Tower 12<sup>th</sup> Floor, Pretorius Street

Ref: 25/2011  
Enq: Adv L. McLachlan  
Tel: (012) 315 1127  
E-mail: [jmclachlan@justice.gov.za](mailto:jmclachlan@justice.gov.za)  
Website: <http://www.doj.gov.za>

Date: 17 February 2011

The Commissioner  
South African Revenue Service  
Private Bag X923  
Pretoria  
0001

<b>SOUTH AFRICAN REVENUE SERVICE</b>
PRIVATE BAG X923
2011 -02- 2 4
PRETORIA 0001
<b>HEAD OFFICE SERVICES</b>

For attention: Ms Shelley-Anne Carreira (Manager: International Development and Treaties)

**PROTOCOL AMENDING THE CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE KINGDOM OF NORWAY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME: YOUR 25/6/1/223 DATED 31 JANUARY 2011.**

1. We have scrutinized the draft "Protocol Amending the Convention between the Government of the Republic of South Africa and the Government of the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income" in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and have indicated suggested amendments and made certain comments on the copy of the Protocol attached hereto.

2. We also have the following comments:

**Ad entry into force**

2.1 The South African Revenue Service's attention is drawn to section 231 of

