

**EXPLANATORY MEMORANDUM  
ON THE PROTOCOL AMENDING  
THE DOUBLE TAXATION CONVENTION**

**BETWEEN**

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

**AND**

**THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND**

In order to accommodate changes which the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland (hereafter referred to as “the United Kingdom”) wish to enact to the Double Taxation Convention entered into between Republic of South Africa and the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains which was signed at London on 4 July 2002 (hereafter referred to as “the Convention”), a Protocol to the Convention has been negotiated.

The following amendments have been agreed upon.

**ARTICLE 1**

Paragraph 1 of Article 3 has been amended to include definitions for “property investment company” and “qualifying dividend”.in relation to a property investment company. For the purposes of interpretation, South Africa provides for these terms to be agreed between the competent authorities while in the United Kingdom interpretation will be in terms of their domestic legislation.

**ARTICLE II**

Article 10 is the Article dealing with dividends in the Convention. In this Protocol the original Article 10 is deleted and a new Article 10 is introduced, the provisions of which are in line with other South African treaties.

Paragraphs 1 and 2 of this Article provide 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 and the State of residence of the shareholder in which the dividends are received has an unlimited taxing right.

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

- (a) where the shareholder is a company which holds directly at least 10% of the capital of the company paying the dividend, the tax is limited to 5% of the gross dividend. This limitation is intended to encourage substantial (i.e. at least 10%) investment by companies resident in one State in companies in the other State;
- (b) if the dividend is paid by a property investment company which is a resident of a Contracting State, tax may be levied at a rate of 15% of the gross amount;
- (c) in all other cases the rate of tax is limited to 10% of the gross amount of the dividends

The above limitations apply only if the registered shareholder is also the beneficial owner, i.e. the limitation does not apply to nominee shareholders.

Paragraph 3 contains the standard definition of what constitutes a dividend and also includes any item which is treated as a dividend in terms of the domestic law of the Contracting State of which the payee company is resident.

Paragraph 4 provides that paragraphs 1 and 2 of this Article will not apply in cases where the beneficial owner being a resident of one State, carries on business in the other State through a permanent establishment and derives dividends from shares, the holding of which is effectively connected with the permanent establishment. In other words, the holding is then regarded to be part of the business assets of the permanent establishment. The source State is therefore not limited in its taxing rights which are then exercised under the provisions of Article 7 of the Agreement.

Paragraph 5 deals with the limitation of the right of one of the States to impose tax on dividends declared by, or the undistributed profits of, a company which is a resident of the other State. One situation in which tax may be imposed is where the shareholding is effectively connected with a permanent establishment, as mentioned in relation to paragraph 4 above.

The second situation can best be explained through an example of a company, resident in the United Kingdom, which carries on business through a branch in South Africa. The paragraph provides that South Africa may not impose tax on the dividends declared by such company, even though its profits are partly derived in South Africa, except in so far as the dividends are received by South African resident shareholders.

Paragraph 6 provides that the provisions of Article 10 will not apply if the right giving rise to the dividend was created or assigned mainly for the purpose of taking advantage of the Article by means of that creation or assignment. This is an anti-avoidance provision.

### ARTICLE III

Article III introduces an updated Article 25 to the Convention dealing with exchange of information.

Paragraph 1 provides that the States shall exchange such information as is relevant both for carrying out the provisions of this Convention 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 Convention. Thus, should South Africa obtain tax information relating to a resident of a third State who is liable for tax in the United Kingdom, it may make that information available to the United Kingdom. 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. This information may also be disclosed in public court proceedings or in judicial decisions.

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 IV

A new Article 25A is inserted immediately after Article 25 of the Convention dealing with Assistance in the Collection of Taxes.

Paragraph 1 stipulates that the Contracting States will lend each other assistance in the collection of revenue claims and will not be restricted by Articles 1 and 2 of the Convention. The mode of application may be settled by the competent authorities of the Contracting States.

Paragraph 2 defines the term "revenue claim."

Paragraph 3 provides for the competent authority of a Contracting State to arrange for a revenue claim, proved to be payable in that Contracting State, to be collected by that other State in terms of its domestic law.

Paragraph 4 stipulates that a Contracting State shall take measures to collect taxes if approached to do so by the competent authority of the other Contracting State even if at the time such measures are applied the revenue claim is not enforceable in the other Contracting State or the person by whom it is owed has a right to prevent its collection.

Paragraph 5 states that the Contracting State collecting the revenue claim, in terms of paragraphs 3 and 4, shall not be subjected to time limits or given any priority under the laws of that State, due to its nature. If the other Contracting State has domestic law giving such priority, this will not be taken into account.

Paragraph 6 stipulates that no legal or court action concerning the revenue claim of a Contracting State will be instigated in the State of collection.

Paragraph 7 provides that when a Revenue claim has been made by a Contracting State to the other Contracting State in terms of paragraph 3 or 4, and such claim is rescinded in the first mentioned State, the competent authority of this State shall promptly notify the competent authority of the other State of this fact. At the option of the State of collection, the State of request shall either suspend or withdraw its request.

Paragraph 8 stipulates that this Article must not be construed as imposing an obligation on the State of Collection:

- (a) to carry out administrative measures at variance with the laws and administrative practice of either State;
- (b) contrary to public policy;
- (c) to provide assistance if the other Contracting State has not pursued all reasonable measures under its own domestic laws for collection;
- (d) if the administrative burden is clearly disproportionate to the benefit derived by the other Contracting State;
- (e) if the requested State considers that the taxes are contrary to generally accepted taxation principles.

#### **ARTICLE V**

This Article stipulates that if South Africa enters into a similar Convention with a third State and the rates for taxation of dividends in the source State are lower than those specified in sub-paragraphs 2 (a) and (c) of Article 10 of this Protocol, South Africa must immediately inform the Government of the United Kingdom in writing through the diplomatic channel and enter into negotiations with the Government of the United Kingdom with a view to providing comparable tax rates to those provided for the third State .

#### **ARTICLE VI**

This Article stipulates that the Government of the United Kingdom 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. This Protocol shall enter into force in both Contracting States on the date of the later of these notifications. Once the Protocol has entered into force, the taxes referred to will become effective in accordance with the provisions of this paragraph.

#### **ARTICLE VII**

This Article makes provision for the Protocol to remain in force as long as the Convention remains in force and provides for the signing hereof.

