

**EXPLANATORY MEMORANDUM**  
**CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX**  
**MATTERS AS AMENDED BY THE 2010 PROTOCOL.**

This Convention is a Multilateral Convention, the signatories thereto being the members of the Council of Europe and the member countries of the Organisation for Economic Co-operation and Development (OECD). After the entry into force of the 2010 Protocol, any State which is not a member of the Council of Europe or of the OECD may request to be invited to sign and ratify this Convention as amended by the 2010 Protocol. This Protocol entered into force on 1 June 2011.

**Preamble**

The preamble sets out the general objective of the Convention which is to promote international co-operation for a better application of a jurisdiction's domestic tax laws, while respecting the fundamental rights of taxpayers.

Cooperation between jurisdictions has become paramount due to the fact that globalisation has increased the possibilities of tax avoidance and tax evasion and such exchanges are exceedingly useful in the endeavour to address harmful tax practices. It is acknowledged that efforts are being made both bilaterally and multilaterally to counteract such evasion. However, as it is considered that a coordinated effort between States should be fostered, this Multilateral Convention has been enacted.

In this Convention provision is made not only for all forms of administrative assistance in matters concerning taxes of any kind but also for the rights of the taxpayer to be ensured through proper legal procedure. Furthermore, the right of the taxpayer to confidentiality of information, in the carrying out of measures or supply of information, and appropriate protection against discrimination and double taxation by the Contracting States, is fully recognised and provided for.

**CHAPTER 1**  
**SCOPE OF THE CONVENTION**

**Article 1**  
***Object of the Convention and Persons Covered***

*Paragraph 1* describes the objective of the Convention which is administrative assistance between Parties in tax matters. Such assistance comprises all mutual assistance activities in tax matters which can be carried out by the public authorities, including the judicial authorities.

The provision of assistance under the Convention is, however, subject to general limitations contained in Chapter IV where taxpayers' rights are safeguarded and where some possibilities of declining requests and limits to the obligation to provide assistance are stated. Moreover, the legal principle of reciprocity is another element of balance in the implementation of the Convention, since a Party cannot ask for a form of assistance that it is not ready to grant to other States.

*Paragraph 2* lists different forms of administrative assistance which the Parties may provide for each other, namely: exchange of information, including simultaneous tax examinations and tax examinations abroad, assistance in recovery, including measures of conservancy and service of documents.

*Paragraph 3* deals with the personal scope of the Convention and makes it clear that administrative assistance between Parties is not restricted by the residence or the nationality of the taxpayer or of the other persons involved.

## **Article 2 Taxes Covered**

This Convention is intended to have very wide scope. It covers all forms of taxes paid with the sole exception of customs duties.

*Paragraph 1* lists the main categories of tax covered by the Convention, grouped to take into account the fact that not all countries are able or willing to provide assistance for certain categories of taxes and may enter reservations under Article 30.

*Paragraph 2* links the Convention to Annex A. Annex A details the taxes which are in force in the Contracting States at the date of signature of the Convention and to which the Contracting States wish the Convention to apply.

*Paragraph 3* provides the possibility for each Party to modify, after the entry into force of the Convention, the list contained in Annex A. It also provides for the procedure to be followed in respect of these changes and the time at which they take effect.

*Paragraph 4* provides that the Convention will also apply to identical or substantially similar taxes that are subsequently imposed in a Contracting State. Notification obligations with regard to such changes are specified in this paragraph.

## **CHAPTER II GENERAL DEFINITIONS**

### **Article 3 Definitions**

*Paragraph 1* defines a number of terms which are used frequently in the body of the Convention. Some terms are self explanatory and need no further explanation.

The term "tax" is used throughout the Convention to signify all kinds of taxes covered by the Convention in accordance with Article 2.

The term "tax claim" as defined, clarifies that the assistance is not to be restricted only to the tax proper, including additions and surcharges, but is also to cover interest on overdue tax and costs incurred in recovery.

The term competent authority is defined by means of a formal criterion: designation by states and inclusion in list B. annexed to the Convention.

The term "nationals" is given a definition based on the definition in Article 24, paragraph 2, of the OECD Model Convention on double taxation.

*Paragraph 2* provides that terms not defined in the Convention will have the meaning that they have under the domestic tax laws concerning the covered taxes of that Party.

*Paragraph 3* provides for the procedure to be followed in relation to changes in Annexes B (competent authorities) and C (definitions) and specifies the time at which they enter into force.

## **CHAPTER III FORMS OF ASSISTANCE**

### **SECTION I EXCHANGE OF INFORMATION**

#### ***Article 4 General provision***

The scope of this Article is wide. It should therefore assist Parties in combating international tax avoidance and evasion to the widest possible extent. The Article makes it clear that the Parties are not at liberty to exchange information, which is unlikely to be relevant for tax purposes.

*Paragraph 1* provides the general rule that the Parties must exchange information that is foreseeably relevant for the correct assessment and recovery of taxes, which are due under domestic tax laws of a State insofar as they are covered by this Convention.

*Paragraph 3* stipulates that if, in terms of its domestic law, any Party is required to inform the person concerned before information is communicated to another state that one of the Depositories must be notified thereof.

#### ***Article 5 Exchange of Information on Request***

Exchange of information on request is the furnishing by the requested state of information relating to a particular case to an applicant state which has specifically requested such information.

*Paragraph 1* stipulates that the requested State must provide the information, stipulated in Article 4, to the applicant State.

*Paragraph 2* stipulates that if the information on hand is insufficient to comply with the request, the competent authority of the requested State should utilise all relevant measures, authorised for the purpose of that State's tax, in order to obtain the information.

#### ***Article 6 Automatic exchange of information***

This Article provides that automatic exchange of information will take place using procedures determined by mutual agreement between two or more Parties.

**Article 7**  
***Spontaneous Exchange of Information***

Spontaneous exchange of information is the passing on of information obtained during examination of a taxpayer's affairs or otherwise, which might be of interest to the receiving state. Information exchanged spontaneously will often be more effective than information exchanged automatically because it mostly concerns particulars detected and selected by a tax official of the sending state during an audit or investigation.

*Paragraph 1* sets out the various instances where a Party shall forward to another Party, without prior request, information of which it has knowledge.

*Paragraph 2* ensures that each Party takes the necessary measures to accommodate this exchange. As the efficiency of spontaneous exchanges depends on the initiative of the supplying State, the competent authority of the latter should take the necessary steps to ensure that information likely to be of interest to the other State is brought to its own attention.

**Article 8**  
***Simultaneous tax examinations***

Simultaneous tax examination is the furnishing of information obtained in the course of the simultaneous examination in each Party concerned, on the basis of an arrangement between two or more competent authorities, of the tax affairs of a person, or persons in which these Parties have a common or related interest. This form of co-operation between tax administrations is likely to prove fruitful, in particular, when dealing with transactions between associated enterprises.

*Paragraph 1* provides for any Party to request a simultaneous tax examination whereupon two or more of the Parties may consult together to determine cases and procedures for simultaneous tax examination. However, it is the decision of an individual Party whether or not to participate in such a simultaneous examination.

*Paragraph 2* explains the concept of simultaneous tax examination. The subject of the examination is described as "the tax affairs of a person or persons in which they (the Parties) have a common or related interest". Once agreement has been reached by the competent authorities on the general lines to be followed, officials of each state will separately carry out their examination within their own jurisdiction.

**Article 9**  
***Tax Examinations Abroad***

Tax examination abroad comprises the obtaining of information through the presence of representatives of the tax administration of the applicant State at an examination of a tax matter in the requested State. Traditionally exchange of information under double taxation conventions and mutual assistance conventions has been carried out in writing, which may prove to be time-consuming and may for that reason be less effective than other less formal procedures. Furthermore, this method facilitates certain situations which require rapid action on the part of the tax administration.

*Paragraph 1* provides for the competent authority of the requested State to permit representatives of the competent authority of the applicant State to be present at the appropriate part of a tax examination in the territory of the requested State.

*Paragraph 2* sets out the procedures to be followed if a request under paragraph 1 has been granted. All decisions on how the examination is to be carried out will be made by the requested State.

*Paragraph 3* provides that a Party may notify one of the Depositaries that, as a general rule, it is not in favour of such requests. The declaration may be made or withdrawn at any time.

### **Article 10** **Conflicting information**

This Article obliges the receiving State to inform the providing State of its findings if it appears that the information received is in conflict with the information in its possession. This enables the latter State to clear up any discrepancies with its taxpayer.

## **SECTION II** **ASSISTANCE IN RECOVERY**

### **Article 11** **Recovery of Claims**

By acceding to the Convention, a State takes upon itself the obligation, within certain limits, to use the powers it has under its domestic law to recover taxes owed to another Party.

*Paragraph 1* stipulates that, upon a request by a Party, the requested State has to take action to recover taxes owed to the applicant State provided the tax claim meets the conditions laid down in this section of the Convention. The recovery has to take place as if the requested State were recovering a tax claim of its own, except in relation to time limits (Article 14) and priority (Article 15).

*Paragraph 2* stipulates the conditions under which a request for assistance in recovery can be made. Briefly the claim must be enforceable in the applicant State and, unless otherwise agreed, is not contested. This paragraph also provides that where a tax claim is made against a person who is not a resident in the applicant state, unless the Parties have entered into a particular agreement to the contrary, that claim may only be recovered if it may no longer be contested.

*Paragraph 3* stipulates that the amount of tax which may be recovered from each of the persons benefitting from an estate, against whom a claim can still be made, shall not exceed the value of that person's portion of the estate, thereby limiting assistance in recovery from the estate of a deceased person to the value of that estate, so that it will not extend to the personal assets of those entitled to the estate.

### **Article 12** **Measures of Conservancy**

On request from the applicant State the requested State must take measures of conservancy even if the matter is contested or can, as yet, not be enforced. "Conservancy" means the conservation of assets belonging to a taxpayer. This is done in order to safeguard the rights of the applicant state even if it is not yet possible to ask for assistance in recovery.

Such measures could include the seizure or the freezing of assets of the taxpayer before final judgement to guarantee that they will still be there when the enforcement takes place.

**Article 13**  
***Documents accompanying the request***

*Paragraph 1* lists the documentation required to accompany a request for administrative assistance. The applicant state is also required to submit with the request for assistance an official copy of the instrument permitting its enforcement in that State as proof of the enforceability of the claim. The purpose of this is to furnish the requested state with a document, which can serve as an authorisation for the actions of enforcement it is requested to perform.

*Paragraph 2* stipulates that the instrument permitting enforcement must be accepted in the requested State or, if not, supplemented or replaced by an instrument permitting enforcement in this State.

**Article 14**  
***Time Limits***

*Paragraph 1* stipulates that questions concerning any period beyond which a claim cannot be enforced shall be governed solely by the domestic law of the applicant State. Since these laws, and these laws only, are to be applied, it follows that as long as the validity of the claim has not expired under these laws, this validity may not be affected by the fact that the time limit of the requested State has expired. Furthermore, the applicant state is obliged to give particulars about its time limit when making the request.

*Paragraph 2*, however, provides that should the requested State have legislation in place under which an act of recovery could interrupt this period, this legislation will also have effect. The requested State is also obliged to inform the applicant State about its measures, since it is essential for the applicant State to keep the position under review in order to ensure that its tax claim can still be enforced.

As legal systems differ considerably with regard to the length of the period beyond which a claim cannot be enforced, paragraph 3 provides that there is no obligation to comply with a request for assistance submitted over fifteen years from the date of the original instrument permitting enforcement.

**Article 15**  
***Priority***

The Article provides that the tax claim in the recovery of which assistance is provided shall not have in the requested State any priority specially accorded to the tax claims of that State. This means that the priorities enjoyed by the requested State for the recovery of its own tax claims are not extended to the tax claims of the applicant State.

**Article 16**  
***Deferral payment***

In terms of this Article, deferral of payment or payment by instalments is permitted where the law or administrative practice of the requested State provides for this. However, the

requested State is required to inform the applicant State before such deferral of payment or payment by instalments is allowed.

### **SECTION III SERVICE OF DOCUMENTS**

#### ***Article 17 Service of documents***

This Article addresses the manner in which documents must be served upon the addressee by the requested State. Both the domestic law of the requested State and the method requested by the applicant State, are taken into account. Furthermore, provision is made for a Party to effect delivery of documents directly through the post.

The translation of documentation is also addressed.

### **CHAPTER IV PROVISIONS RELATING TO ALL FORMS OF ASSISTANCE**

#### ***Article 18 Information to be provided by the applicant State***

*Paragraph 1* refers to all forms of assistance. In order to provide clarity and facilitate a request, this paragraph lists the appropriate requirements when making a request for assistance. When presenting a request for assistance, the applicant State must indicate whether the said request is in conformity with its own law and administrative practice and whether all means available in its own territory have been pursued.

*Paragraph 2* provides that if any other information which may be of assistance comes to light in the applicant State, such information must be forwarded to the requested State.

#### ***Article 20 Response to the request for assistance***

*Paragraph 1* requires that, if a request is complied with, the requested State must inform the applicant State of the action taken, as soon as possible. There is also a requirement to notify the applicant State of the outcome of all measures taken.

*Paragraph 2* stipulates that if a request is declined, the applicant State be furnished with the reasons therefor.

*Paragraph 3* provides that, if possible, the information be supplied in the requested form.

#### ***Article 21 Protection of persons and limits to the obligation to provide assistance***

This Article is of particular importance in achieving a proper balance between the need to make mutual administrative assistance in tax matters effective and the need to provide safeguards for the taxpayers and also for the requested State where its public policy or its essential interests are concerned.

*Paragraph 1* ensures the rights and safeguards accorded to a person under the laws of the requested State are not reduced by the Convention.

*Paragraph 2* sets limits to the obligation to provide assistance and may therefore offer further safeguards for the taxpayer.

*Paragraph 3* deals with the domestic interest of the requested State. If the information requested by the applicant State is in accordance with the Convention, the requested State must use its information gathering methods 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 4* deals with bank secrecy. It stipulates that in no way must the provisions of this Convention be construed so as to permit a requested 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 fiduciary capacity, therefore ruling out bank secrecy.

## **Article 22 Secrecy**

Respect for the confidentiality of information is essential for the protection of the legitimate interests of taxpayers. The fact that information obtained can be communicated to competent authorities does not imply that it may be disclosed freely by them. This Article ensures that adequate protection is given to information received from another Contracting State.

*Paragraph 1* provides that information obtained by a Party under this Convention must be treated with the same degree of secrecy as applies to information obtained under the domestic laws of that Party.

*Paragraph 2* specifically provides that such information may be disclosed only to persons or authorities involved in the administration of the taxes of that Party, and that those persons and authorities must use the information only for the purposes of such administration. Provision is also made for this information to be disclosed in public court proceedings or in judicial decisions relating to such taxes.

*Paragraph 3* deals with reservations under this Convention. The purpose of a reservation is to release the State which makes it from certain obligations under the Convention. If a Party has made a reservation as provided for in Article 30, it is strictly forbidden for any Party to use such information obtained from that State for purpose of a tax subject to the reservation. Furthermore, it is logical that the limitation imposed on other Parties by the State which has made the reservation should also apply to that State.

*Paragraph 4* provides that in spite of the provisions of Articles 1, 2 and 3, information received by a Party may be used for other purposes, such as sharing with other law enforcement agencies, if allowed under the laws of the supplying Party and authorised by the competent authority of the supplying Party.



### **Article 23** **Proceedings**

*Paragraph 1* stipulates that proceedings can only be brought before the appropriate body of the requested State, due to the fact that although the claim is established under the laws of one state, the recovery is taking place in another state, hence enforcement measures by the requested state may be contested only in that state.

*Paragraph 2* provides that if proceedings relating to the existence or amount of a tax claim are brought before the appropriate body in the applicant State, the applicant State must inform the requested State which will suspend the procedure pending the decision of the body in question. However, the requested State must, if asked by the applicant State, take measures of conservancy to safeguard recovery. Provision is also made for the matter, if necessary, to be discussed by the competent authorities.

*Paragraph 3* stipulates that the final decision in the proceedings be communicated to either the requested or applicant State, as the case may be, with regard to the implications relating to the request for assistance.

## **CHAPTER V** **SPECIAL PROVISIONS**

### **Article 24** **Implementation of the Convention**

This Article establishes the way in which the Convention is to be implemented between Parties and further provides for the monitoring of the implementation of the Convention.

*Paragraph 1* establishes that the Parties will communicate with each other through their respective competent authorities and that such competent authorities shall communicate directly for this purpose.

*Paragraph 2* deals with situations where the implementation of the Convention in a particular case might have serious undesirable consequences, for example, economic or social, difficulties. It requires consultation between the States concerned but if no compromise is reached and a disagreement remains, the requested State is not relieved from its duty to apply the Convention.

*Paragraph 3* gives the co-ordinating body, composed of representatives of the competent authorities of the Parties, the task of monitoring the implementation and development of the Convention under the auspices of the OECD. Where necessary, it may suggest the introduction into the Convention of new methods and procedures which could strengthen the effectiveness of the Convention.

*Paragraph 4* provides for the co-ordinating body to furnish opinions on questions of interpretation if requested by a Party. It should be stressed that the co-ordinating body in this context has only an advisory function.

*Paragraph 5* obliges those States who are affected by a problem of application and interpretation to try to resolve the matter by mutual agreement. If they succeed in coming to an agreement, they shall notify the co-ordinating body. Where particular taxpayers are concerned, this notification will be made subject to the secrecy provisions of Article 22.

*Paragraph 6* provides that the Secretary General of OECD shall inform all the Parties and signatory States of opinions furnished by the co-ordinating body according to the provisions of paragraph 4 and of mutual agreements reached under paragraph 5. Agreements reached, however, obviously concern only those States which have made the agreement under paragraph 5.

**Article 25**  
**Language**

This Article deals with the language in which requests for assistance and answers thereto should be drawn up. In order to avoid practical difficulties which might hamper or slow down mutual assistance, the principle adopted in this context is to facilitate the task of the Parties by providing maximum flexibility. Parties are therefore free to agree on using in their bilateral relations one of the official languages of the Council of Europe and OECD (English or French) or any other language(s) agreed bilaterally.

**Article 26**  
**Costs**

On the sharing of costs, this Article provides that ordinary costs incurred by the requested State in providing assistance will not give rise to reimbursement by the applicant State. Extraordinary costs, however, should be borne by the applicant State unless otherwise agreed bilaterally. Extraordinary costs relate mostly to payments made to third parties such as translators and other experts.

**CHAPTER VI**  
**FINAL PROVISIONS**

**Article 27**  
***Other international agreements or arrangements***

*Paragraph 1* ensures that when two or more States are Parties both to this Convention and to other agreements with provisions in this field, the most effective instrument can be used in any particular situation. The reference to other instruments is very wide and includes bilateral agreements for the avoidance of double taxation or for mutual administrative assistance. States are at liberty to choose whichever instrument they think most appropriate to the particular case. They cannot, however, simultaneously apply more than one instrument to a given case, since each instrument is self-contained, having its own characteristics and aims and its provisions may be incompatible with other instruments.

*Paragraph 2* addresses matters related to members of the European Union.

**Article 28**  
***Signature and entry into force of the Convention***

*Paragraph 1* states that the Convention is open for signature by the member States of the Council of Europe and the Member countries of OECD and is subject to ratification, acceptance and approval.

*Paragraph 2 and 3* deal with entry into force of the Convention.

*Paragraph 4* allows for member States of the Council of Europe or Member countries of the OECD which are not Parties to the Convention, to become Parties to the Convention or the Convention as amended by the Protocol once the 2010 Protocol enters into force.

*Paragraph 5* allows for the opening up of the Convention beyond OECD and Council of Europe membership. This offers a valuable opportunity for countries to swiftly implement their commitments to the internationally agreed standards of transparency and exchange of information for tax purposes and for emerging and developing countries to secure the benefits of the new cooperative tax environment. The decision to invite States which so request to become Party to this Convention shall be taken by consensus by the Parties to the Convention through the Coordinating Body. In taking this decision, the Parties will take into account, inter alia, the confidentiality rules and practices of the State concerned.

*Paragraph 6* relates to the effective dates on which the Convention as amended by the 2010 Protocol shall have effect.

### **Article 29** ***Territorial application of the Convention***

This article refers to territorial application and allows each State to specify its territory to which the Convention will apply.

### **Article 30** ***Reservations***

*Paragraph 1* recognises that a State may not, for practical, constitutional or political reasons, be able at the time of signature to provide to other States the full assistance envisaged by the Convention. All States must, however, be able to provide information concerning income, profits, capital gains and net wealth taxes levied at central government level. Similarly, while able to provide assistance in the establishment of liability to tax, they may not be able to do so in the recovery of tax claims or service of documents in relation to all or any particular type of tax. The permissible reservations are listed in this paragraph.

*Paragraph 2* stipulates that only the reservations listed in paragraph 1 will be allowed.

*Paragraph 3* allows States to make reservations after the entry into force of the Convention.

*Paragraph 4* enables reservations to be withdrawn. From the date of receipt of the notification of withdrawal by a State, that State may be called upon for relevant assistance by other Parties.

*Paragraph 5* shows the effects of reservations entered under paragraph 1 or 3. If a State signs with such a reservation, then it may decline to provide assistance in relation to taxes which are the subject of the reservation, or in relation to the form of assistance which is the subject of the reservation. By the same token, it cannot call for such assistance from the other Parties.

However, even where a Contracting State has entered a general reservation against providing administrative assistance to other Parties for one particular type of tax or one form of assistance, that State is not prevented from providing such assistance in particular cases, if it so wishes.

**Article 31**  
**Denunciation**

This Article deals with denunciation and allows for denunciation with a three month notice period. The secrecy provisions will still apply in relation to any information obtained under the Convention.

**Article 32**  
**Depositaries and their functions**

Article 32 lists the functions of the two Depositaries of the Convention who will notify the other member States of any declarations, notifications or reservations received.