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REPUBLIC OF SOUTH AFRICA

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The Commissioner
South African Revenue Services
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0001

Attention: Ms Oshna Maharaj

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA AND THE GOVERNMENT OF THE
COMMONWEALTH OF DOMINICA FOR THE EXCHANGE OF
INFORMATION WITH RESPECT TO TAXES AND TAX MATTERS:
YOUR EMAIL DATED 25 JULY 2011 REFERS**

1. We have scrutinised the Agreement between the Government of the Republic of South Africa and the Government of the Commonwealth of Dominica for the exchange of information with respect to taxes and tax matters, in terms of the *Manual on Executive Acts of the President of the Republic of South Africa*; with reference to *the Constitutional Handbook for Members of the Executive*; the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution"); and other relevant legislation and applicable international instruments.

2. The status of the Agreement must be determined and in this regard, the Department's attention is drawn to section 231 of the Constitution which provides as follows:

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

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

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

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

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

3. When considering the provisions of section 231 of the Constitution, which we have quoted in full above, the Department's attention is also drawn to section 231(3) which deals with international agreements of a technical, administrative or executive nature. According to Chapter 5 (par 5 on page 44) of the *Constitutional Handbook for Members of the Executive*, technical administrative and executive agreements are

agreements which –

- (a) Are departmental specific;
- (b) Are of no major political or other significance;
- (c) Have no financial consequences; and
- (d) Do not affect domestic laws.

4. These agreements flow from the everyday activities of government departments and are often drafted in a simplified form.

5. However since this Agreement is not in terms of section 231(3) of the Constitution, technical, administrative or executive in nature, the Agreement would have to comply with the provisions of section 231(2) of the Constitution and be approved by resolution in both the National and the National Council of Provinces.

6. According to J. Dugard, **International Law: A South African Perspective, (3rd Edition), at Page 62**, the constitutional principle of "self-executing", as it appears in section 231(4), basically means that one has to determine if a new Act of Parliament must be passed for every treaty, if it is to be incorporated in South African law or whether existing domestic legislation is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty or whether it is non self-executing in which event legislation will be required. Dugard argues that an international agreement is self-executing when domestic law needs no adaptation so as to enable the direct application of the provisions of the treaty; that is without any legislative intervention by Parliament.

7. We however take cognisance of the provisions of section 108 of the Income Tax Act, 1962 (Act No. 58 of 1962) which provides as follows :

"Prevention of or relief from, double taxation

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

made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and as 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.

(3)

(4)

(5) The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorised officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to have been given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2)."

8. The Department should take cognisance of Promotion of Access to Information Act, 2000 (Act No.2 of 2000), when dealing with Article 7 of the agreement.

9. Your office has indicated that the terms of the Agreement closely follow the principles laid down in the Model Tax Information Exchange Agreement (TIEA) drawn up by the Organisation for Economic Co-operation and Development (OECD) and that South Africa is one of the five observers of the OECD. We have been advised further that

negotiations were undertaken with the Ministry of Finance of Dominica and any divergence in the traditional form and style of this Agreement is as a result of the proposal by Dominican Ministry of Finance. This resulted in this office not commenting on the form and style of the Agreement.

10. As far as we could ascertain, no provision of the Agreement is in conflict with the domestic law of the Republic of South Africa.



MK NABE/ H MEKWA/ S MASAPU

For the CHIEF STATE LAW ADVISER