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The Director-General
South African Revenue Service
Private Bag X 923
PRETORIA
0001

Dear Mr O Magashula

Attention: Ms Shelley-Anne Carreira

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF GIBRALTAR FOR THE EXCHANGE OF INFORMATION RELATING TO TAX MATTERS: YOUR 25/6/1/325 DATED 13 MAY 2011 REFERS

1. Background and request

1.1 The South African Revenue Service ["SARS"] informs us that the Government of the Republic of South Africa intends to enter into an *Agreement for the Exchange of Information Relating to Tax Matters* ["TIEA"] with the Government of Gibraltar and that negotiations were undertaken with the Revenue Authority of that country in this regard. Consensus has now been reached at official level and SARS requests us to verify the draft TIEA for any possible conflict with South African domestic law.

1.2 Gibraltar is a British overseas territory which, under its current Constitution, has almost complete internal democratic self-government through an elected parliament. The British monarch is head of state and is represented by the Governor of Gibraltar. On 27

February 2002 Gibraltar entered into a political commitment to reflect the principles of the Organisation for Economic Co-operation and Development ["the OECD"] which has been striving to promote transparency and exchange of information relating to tax matters on a global scale. **Both South Africa and Gibraltar have concluded several similar agreements with other countries and territories** but *Gibraltar can only do so under the Terms of its Entrustment from the United Kingdom*. Those agreements, including the TIEA under consideration, closely follow the principles laid down in the Model TIEA drawn up by the OECD, which Model is extensively used by most countries.

2. Discussion

2.1 We have scrutinized the TIEA with reference to-

- (a) the *Manual on Executive Acts of the President of the Republic of South Africa* ["the Manual"];
- (b) the Constitution of the Republic of South Africa, 1996;
- (c) other relevant legislation;
- (d) applicable international instruments; and
- (e) the *Constitutional Handbook for Members of the Executive*,

with a view to possible conflict with the domestic law of South Africa. We have also considered whether the TIEA is a self-executing or non-self-executing agreement or an agreement of a technical, administrative or executive nature.

2.2 The Manual requires that all international agreements submitted to the President for approval must have been scrutinised by our office for consistency with domestic law and appropriate and correct legal drafting.¹ The Manual points out that an international agreement includes any written agreement between the Republic of South Africa and another state or states.² Paragraph 5.1 of the Manual alludes to two frameworks for concluding international agreements, namely:

- One which applies to international agreements which require *ratification or accession* in order to be brought into effect; and
- another which applies to international agreements which merely require the signature of a duly authorised representative of a contracting state party to come into effect.

¹ Chapter 5, paragraph 5.20.

² See Chapter 5.

3. Summary and comments on TIEA

To be of assistance, we will very briefly summarise the provisions of the Agreement and, where necessary, comment on the provisions.

Preamble and Article 1

The purpose and scope of the TIEA is to provide for the exchange between the competent authorities of South Africa and Gibraltar of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by the TIEA.

Article 2

The taxes which are covered by the TIEA are taxes of every kind and description imposed by the Parties at the date of signature thereof. This application of the TIEA may, by mutual agreement, be extended to identical taxes imposed after such date in addition to or in place of the existing taxes or any substantially similar taxes.

Article 3

This Article defines certain words and expressions which are supposedly used in the TIEA.

Article 4

The information exchanged under the TIEA in respect of criminal and civil tax matters is exchanged between the competent authorities of South Africa and Gibraltar where it is relevant to the assessment and collection of tax. A request for information must be formulated with the greatest possible detail by specifying:

- The identity of the person under examination or investigation;
- the period for which the information is requested;
- the nature and form of the information;
- the tax purpose for which the information is sought;
- the reasons for believing that the information sought is relevant to tax administration, enforcement or evasion;
- grounds for believing is present in the jurisdiction of requested Party;
- the name and address of any person believed to be in possession or able to obtain the information;

- a statement that the request is in conformity with the laws and administrative practices of the requesting competent authority and that it is in agreement with the TIEA; and
- a statement that the requesting Party has pursued all means available in its own territory to obtain the information.

From the above, it should be clear that the competent authority of the requesting Party cannot simply ask for information under the TIEA as strict criteria must first be met. The request has to be made in the greatest possible detail and has to show that all methods of obtaining the required information have been investigated domestically first. It can therefore not be just a question of requesting information which will be furnished recklessly or as a result of a "fishing expedition". Also, such information can only be provided *subject to the domestic laws of the requested Party*. In this regard SARS should take cognisance of the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) when considering a request for information in terms of this Article. SARS's attention is also drawn to the provisions of section 108 of the Income Tax Act, 1962 (Act No. 58 of 1962) which provides as follows:

(1) The National Executive may enter into agreement with the government of any country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of 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).*"

Article 5

This Article in essence provides that a Party to the TIEA may allow representatives of the other Party to conduct and attend tax examinations in its territory. This Article also specifies that this is subject to the extent permitted under the domestic laws of the requested Party.

Article 6

The competent authority of the requested Party may under certain circumstances decline to assist in the execution of a request made by the requesting Party under the TIEA.

Article 7

All information provided and received by the competent authorities of the Parties must be kept confidential, except under certain circumstances.

Article 8

Unless otherwise agreed, *indirect* costs incurred in providing assistance in executing a request shall be borne by the requested Party and *direct* costs incurred in providing such assistance shall be borne by the requesting Party. Consultation between the Parties in this regard is also provided for. Since the TIEA may have financial consequences, the provisions of the Public Finance Management Act, 1999 (Act No. 1 of 1999) and paragraph 5.16 of the Manual must be complied with.

Article 9

This article provides for mutual agreement between the Parties on matters such as dispute resolution, interpretation and procedures to be followed.

Articles 10 and 11

These Articles deal with the entry into force and termination of the TIEA.

4. Status of TIEA

4.1 In determining the status of the Agreement it is vital to look at the constitutional principle of what is a self or non-self regulatory agreement. In this regard section 231 of the Constitution 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).

(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."

4.2 We have considered the status of the TIEA *vis-à-vis* section 231 of the Constitution and we have little doubt that it is an agreement which falls within the ambit of section 231(2) of the Constitution. SARS also informs us that the TIEA will, after signature thereof, be ratified in terms of the provisions of section 231(2) of the Constitution. However, we wish to draw SARS's attention to paragraph 5.21 of the Manual which obliges the Department of International Relations and Cooperation to confirm that the TIEA does indeed fall within the ambit of section 231(2) of the Constitution.

5. Ad General

Although we are not aware of any international instrument in terms of which the Republic of South Africa and the Government of Gibraltar are obliged to render mutual legal assistance in criminal matters to each other, we are of the opinion that such an instrument may also address the assistance contemplated in the TIEA. For that reason we suggest that a provision catering for such an event be inserted in the TIEA. Such a provision should be drafted along the following lines:

"Nothing in this Agreement shall affect other rights, obligations and responsibilities of the Parties under international law."

6. Conclusion

Subject to our foregoing remarks and our comments on the text of the draft TIEA, there is no provision thereof, as far as we could ascertain, that is in conflict with the domestic law of South Africa.

Yours sincerely



P PIENAAR/ H MEKWA/ S MASAPU
For the CHIEF STATE LAW ADVISER