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Dated: 4 August 2011

Mr Oupa Magashula
Commissioner
South African Revenue Service
Private Bag X 923
PRETORIA
0001

Attention: Ms Oshna Maharaj

**LEGAL OPINION: JOINT COUNCIL OF EUROPE/OECD CONVENTION ON
MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS AND PROTOCOL:
YOUR 25/6/1 DATED 03 JUNE 2011**

1. We have scrutinized the "Convention on Mutual Administrative Assistance in Tax Matters" (hereinafter referred to as the "Convention") and the Protocol respectively in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and with reference to Chapter 5 of the Constitutional Handbook for members of the Executive with a view to possible conflict with the domestic law of the Republic of South Africa.

2. We also noted the request in the submission dated 3 June 2011 requesting us to comment on any possible conflict with the domestic law of South Africa only.

3. With regard to the Protocol we take cognisance of the provisions of section 108 of the Income Tax Act, 1962 (Act No. 58 of 1962), (hereinafter referred to as the "Income Tax Act") which provides as follows:

"(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 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.

(3)

(4)

(5) The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorized 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 be 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)."

4. The new insertion of Article 21(4) raises concerns with regard to information held by banks and other financial institutions. In a recent Double Taxation Agreement we alerted you to the impact of this type of provision on the domestic law in particular the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000). Your response in this regard was that 'this issue was already cleared with regard to exchange of information through the South African Law Reform Commission'. It was further indicated by you that "the confidentiality safeguards under the treaties and our Income Tax Act meet the required standards in this regard and South Africa is on record as supporting exchanges of information without regard to bank secrecy, a practice in line with the rest of the world". Hence, our understanding concerning this aspect of the Protocol that you have satisfied yourselves that this provision is compliant with our domestic law. It is to be noted that the provisions in the Protocol are made subject to the applicable provisions of the domestic law of the Republic.

Ad entry into force of the draft Agreement

5. The South African Revenue Service's attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996 (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).

(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."

6. The South African Revenue Service has indicated that the Convention and the Protocol will, after signature thereof, be ratified in terms of the provisions of section 231(2) of the Constitution. Since the Convention and the Protocol must in terms of section 108 of the Income Tax Act be approved by Parliament, we agree with the South African Revenue Service that it falls with the scope of section 231(2) of the Constitution.

7. Subject to our foregoing remarks, no provision of the Convention and the Protocol are, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.



M M R MOSIANE/ W J J NEL/ S MASAPU
For the CHIEF STATE LAW ADVISER