



international relations & cooperation

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SIGNING AND RATIFICATION OF CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

1. Your request of 1 August 2011 for a legal opinion on the signature and ratification by South Africa of the "Convention on Mutual Administrative Assistance in Tax Matters" (hereinafter "the Convention") and the "Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters" (hereinafter "the Protocol") bears reference.
2. You have requested us to comment on three questions, namely:
 - Does the Convention conform with South African legal requirements?
 - What are the national requirements that SARS has to comply with before the Convention can be signed?
 - Are there any other issues which the Directorate should be aware of and which should be communicated to SARS in this regard?
3. We will address these questions in turn.

Does the Convention conform with South African legal requirements?

4. In our view the Convention and Protocol are in line with international law and South Africa's international obligations.

What are the national requirements that SARS has to comply with before the Convention can be signed?

5. Section 231(1) of the Constitution of the Republic of South Africa provides that the negotiating and signing of international agreements is the responsibility of the national executive, which, in terms of section 91(1) of the Constitution, consists of the President, Deputy President and Ministers. As signing of an international agreement is a responsibility of the national executive, Parliamentary approval is not required for a member of the national executive to sign an international agreement. What is required, is authorisation of the member of the national executive (in this case the Minister of Finance) to sign it on behalf of the national executive, and this is obtained by means of a President's Minute to be signed by the President and countersigned by the Minister whose portfolio

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the agreement is concerned with (Par 5.17 of the Manual on Executive Acts of the President of the Republic of South Africa, 1999).

6. To obtain a President's Minute, this Office must certify the Convention and SARS should submit to us two copies of the President's Minute, an Explanatory Memorandum setting out the purpose of the Convention and the intended date of signature, and two copies of the final text of the Convention in folder Z137, in order for us to certify it.
7. In this respect, it should be noted that the Convention has been amended by the Protocol. The "Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters" provides in paragraph 227 that "States not members of the Council of Europe or of the OECD, which become Parties to the Convention after the entry into force of the 2010 Protocol, can only become Parties to the Convention as amended by that Protocol." As South Africa is not a member of the OECD or the Council of Europe, and the Protocol has entered into force on 1 June 2011, it means that the Minister of Finance will only sign one instrument, the Convention as amended by the Protocol, and not two, namely the Convention and the Protocol. The President's Minute should reflect that the instrument that is to be signed, is the Convention as amended by the Protocol. This interpretation has been confirmed by the law advisers of the OECD.
8. The Convention, as amended, provides for ratification thereof in Article 27(5), and for the depositing of any allowed reservations in Article 29(1) at the time of the depositing of the instrument of ratification. We conclude that the Convention falls under Section 231(2) of the Constitution, which means that Parliamentary approval must be obtained before it can be ratified. Once Parliamentary approval has been obtained, an Instrument of Ratification can be drawn up and be deposited, after which it shall enter into force for South Africa in terms of Article 28(5) on the first day of the month following the expiration of a period of three months after the date of depositing of the Instrument of Ratification with one of the Depositories, the OECD or the Council of Europe.

Are there any other issues which the Directorate should be aware of and which should be communicated to SARS in this regard?

9. We have noted that the Minister of Finance will also require an Instrument of Full Powers to be presented when the Convention is signed, and understand that SARS is in the process of obtaining such an Instrument of Full Power.
10. We trust that the above will be of assistance to SARS.

Andre Stemmet
SENIOR STATE LAW ADVISER (INTERNATIONAL LAW)

16 August 2011
PRETORIA