

GOVERNMENT NOTICE

SOUTH AFRICAN REVENUE SERVICE

No. 423

6 June 2012

INCOME TAX ACT, 1962

**PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF
SEYCHELLES FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF
FISCAL EVASION WITH RESPECT TO TAXES ON INCOME**

In terms of section 108(2) of the Income Tax Act, 1962 (Act No 58 of 1962), read in conjunction with section 231(4) of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), it is hereby notified that the Protocol amending the agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income set out in the Schedule to this Notice has been entered into with the Government of the Republic of Seychelles and has been approved by Parliament in terms of section 231(2) of the Constitution.

It is further notified in terms of paragraph 1 of Article XV of the Agreement that the date of entry into force is 15 May 2012.

PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE REPUBLIC OF SEYCHELLES FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

PREAMBLE

The Government of the Republic of South Africa and the Government of the Republic of Seychelles, desiring to amend the Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Cape Town on 26 August 1998 (in this Protocol referred to as “the Agreement”),

HAVE AGREED AS FOLLOWS:

Article I

Article 3 of the Agreement is amended by:

- (a) deleting the full stop at the end of subparagraph (g) of paragraph 1 and substituting a semicolon; and
- (b) adding after subparagraph (g) of paragraph 1 the following subparagraphs:
 - “(h) the term “business” includes the performance of professional services and of other activities of an independent character;
 - (i) the term “enterprise” applies to the carrying on of any business.”

Article II

Article 4 of the Agreement is amended by deleting paragraph 1 and substituting the following:

- “1. For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of that person’s domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources therein.”

Article III

Article 5 of the Agreement is amended by:

- (a) deleting the full stop at the end of subparagraph (b) of paragraph 3 and substituting a semicolon; and
- (b) adding after subparagraph (b) of paragraph 3 the following subparagraph:
 - “(c) the performance of professional services or other activities of an independent character by an individual, but only where those services or activities continue within the Contracting State for a period or periods aggregating more than 183 days within any twelve month period.”

Article IV

Article 6 of the Agreement is amended by deleting paragraph 4 and substituting the following:

- “4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.”

Article V

The Contracting States agree that in the event of South Africa abolishing its current system of taxation at company level of dividends declared and introducing a system of taxation at shareholder level of dividends declared, Article 10 of the Agreement shall be deleted and substituted by the following:

“Article 10

Dividends

- 1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
- 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:
 - (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds at least 10 per cent of the capital of the company paying the dividends; or
 - (b) 10 per cent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term “dividends” as used in this Article means income from shares or other rights participating in profits (not being debt-claims), as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company’s undistributed profits to a tax on the company’s undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.”

Article VI

Article 11 of the Agreement is amended by deleting paragraphs 3 and 4 and substituting the following:

- “3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.
4. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.”

Article VII

Article 12 of the Agreement is amended by deleting paragraphs 3 and 4 and substituting the following:

- “3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply.

4. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment with which the right or property in respect of which the royalties are paid is effectively connected, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.”

Article VIII

Article 13 of the Agreement is amended by:

- (a) deleting paragraph 2 and substituting the following:
 - “2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.”;
- (b) adding after paragraph 3 the following paragraph:
 - “4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.”; and
- (c) renumbering the existing paragraph “4” as “5” and inserting the words “of this Article” after the words “preceding paragraphs” in the second line of the renumbered paragraph 5.

Article IX

Article 14 is deleted in its entirety.

Article X

Article 15 of the Agreement is amended by deleting subparagraph (c) of paragraph 2 and substituting the following:

- “(c) the remuneration is not borne by a permanent establishment which the employer has in the other State.”

Article XI

Article 17 of the Agreement is amended by:

- (a) replacing the words "Articles 7, 14 and 15" in the first line of paragraph 1 with the words "Articles 7 and 15"; and
- (b) replacing the words "Articles 7, 14 and 15" in the fourth line of paragraph 2 with the words "Articles 7 and 15".

Article XII

Article 22 of the Agreement is amended by deleting paragraph 2 and substituting the following:

- "2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case, the provisions of Article 7 shall apply."

Article XIII

Article 23 of the Agreement is amended by deleting subparagraph (b) of paragraph 1 and substituting the following:

- "(b) In South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa (which shall not affect the general principle hereof), Seychelles tax paid by residents of South Africa in respect of income taxable in Seychelles, in accordance with the provisions of this Agreement, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income."

Article XIV

Article 26 of the Agreement shall be deleted and replaced by the following:

“Article 26

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting 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 a fiduciary capacity or because it relates to ownership interests in a person.

6. The competent authorities of the Contracting States shall agree upon the mode of application of this Article.”

Article XV

1. Each of the Contracting States shall notify to the other in writing, through the diplomatic channel, of the completion of the procedures required by its law for the bringing into force of this Protocol, which shall form an integral part of the Agreement. The Protocol shall enter into force on the date of receipt of the later of these notifications.

2. The provisions of the Protocol shall apply from the date of introduction of the system of taxation at shareholder level of dividends declared.

Article XVI

This Protocol shall remain in force as long as the Agreement signed on 26 August 1998, remains in force.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed and sealed this Protocol in two originals in the English language, both texts being equally authentic.

DONE at Pretoria, on this 4th day of April in the year 2011.

**FOR THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA**

**FOR THE GOVERNMENT OF THE
REPUBLIC OF SEYCHELLES**