

EXPLANATORY MEMORANDUM
ON THE DOUBLE TAXATION CONVENTION
BETWEEN
THE REPUBLIC OF SOUTH AFRICA
AND
THE REPUBLIC OF GHANA

It is the practice in most countries for income tax to be imposed both on the world-wide income derived by residents of the country and on income derived by non-residents which arises in the country. The effect of such a system is that income derived by a resident of one country from a source in another country is subjected to tax in both countries. As this position clearly discourages foreign investment, it is normal for countries which have trade relations to conclude double taxation conventions. Such conventions commonly provide that income of a particular nature will either be taxable in only one of the countries, or may be taxed in both countries with one of them allowing a credit for the tax imposed by the other.

The Convention concluded with Ghana closely follows the OECD Model. In the explanation which follows, the general principles of each Article of the Convention are set out.

The entire text has been made gender neutral.

Preamble

The Preamble records that the object of the Convention is to avoid double taxation and prevent fiscal evasion.

Article 1

Persons Covered

The Convention is made applicable to persons who are residents of one or both of the Contracting States. This means, *inter alia*, that a citizen of one of the States who is resident in a third State will not enjoy the benefits of the Convention, apart from the non-discrimination provisions.

Article 2

Taxes Covered

Paragraphs 1 and 2 of this Article provide that the Convention will apply to all taxes on income and on capital gains imposed by the two States irrespective of the manner in which they are levied.

Paragraph 3 lists the existing taxes imposed by each State and paragraph 4 provides that the Convention will also apply to identical or substantially similar taxes that are subsequently imposed by either State.

Article 3

General Definitions

This Article defines various expressions which are used in the body of the Convention. Several of these definitions are self-evident and are not further explained.

The definition of "South Africa" includes not only the sovereign territory but also those areas outside its territorial sea over which it may exercise jurisdiction in accordance with international law, for example, in relation to the exploitation of natural resources.

"Person" is defined to include individuals, companies and other bodies of persons which are treated as entities for tax purposes. The underlined words are of particular relevance to partnerships. Partnerships are not regarded as taxable entities in South Africa; rather, the income of a partnership is taxed in the hands of the partners. Accordingly, should a partnership consisting of a Ghanaian resident and a resident of a third State derive income in South Africa, only the Ghanaian resident will be entitled to the benefits of the Convention on his/her share of the partnership income.

"International traffic" is defined as any transport by ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other State. Special provisions are contained in Article 8 for the taxation of international traffic. The effect of the exclusion mentioned above is that should a company of Ghana operate a purely domestic airline operation within South Africa, that operation will not fall to be dealt with under Article 8, but rather under Article 7 which deals with business profits in general. This provision is intended to place that operation on the same footing as South African domestic airlines.

Paragraph 2 follows the OECD Model in providing that expressions not defined in the Convention bear the meaning that they have under the domestic taxation laws of the States at the time of application of the provisions of the Convention. Any meaning under the taxation laws will take precedence over a meaning under other laws of the State.

Article 4

Resident

The concept of “resident of a Contracting State” is used throughout the Convention and is of importance in three cases:

- (a) in determining the Convention’s personal scope of application as set out in Article 1;
- (b) in solving cases where double taxation arises because of dual residence;
- (c) in solving cases where double taxation arises as a consequence of taxation in the State of residence and in the State in which the income arose, the State of source.

This Article defines the meaning of the term and further solves cases of dual residence.

In paragraph 1 the term “resident of a Contracting State” is defined. The definition refers to the concept of residence adopted in the domestic law of each of the Contracting States. As criteria for taxation as a resident, domicile, residence, place of management or any other criterion of a similar nature is used in the definition.

The term “resident” also includes specific reference to the State itself.

Paragraph 2 provides solutions to the cases where individuals are residents of both Contracting States and sets out a step by step method of finally deciding which State has a preferent right in claiming the individual as its resident.

Paragraph 3 deals with companies and other bodies of persons who are not individuals but who are residents of both States and specifies that in these cases the State in which the place of effective management is situated will have the preferent right to claim the company or body of persons as its resident.

Article 5

Permanent Establishment

One of the main goals of the Convention is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State which arise through a permanent establishment situated in the first-mentioned State. The Article defines what is to be regarded as a permanent establishment.

Paragraph 1 gives a general definition of a “permanent establishment” as being a fixed place of business through which the business of an enterprise is carried on.

Paragraph 2 contains a list, which is not exhaustive, of what is regarded to be a permanent establishment.

Paragraph 3 provides expressly that a building site or construction, assembly or installation project will not constitute a permanent establishment unless it lasts more than six months. Supervisory activities carried on in a Contracting State in connection with such a site or project will also constitute a permanent establishment if they last more than six months and irrespective of the fact that the enterprise carrying on such activities has no fixed place of business in that State.

A number of preparatory or auxiliary activities which are treated as exceptions to the general definition laid down in paragraph 1 are set out in paragraph 4. The paragraph specifies that the term “permanent establishment” will not include the various activities set out therein and the Contracting State in which these activities take place will consequently not be able to tax any profits which might arise if these are the only activities which occur.

Paragraph 5 sets out the generally accepted principle that an enterprise will be treated as having a permanent establishment in a Contracting State if it carries on business in that State through an agent situated in that State, provided that the agent is not of an independent status and provided that such agent has the power to conclude contracts in the name of the enterprise.

Paragraph 6 deals with the situation where an enterprise of a Contracting State carries on business through an independent agent in the other Contracting State and provides that no permanent establishment will be deemed to exist if the activities are carried on through such an agent who is acting in the normal course of business.

Paragraph 7 sets out the principle that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows from the principle that for tax purposes a subsidiary company constitutes an independent legal entity and will be taxed in its State of residence on its own profits.

Article 6

Income from Immovable Property

Paragraph 1 provides that income from immovable property may be taxed in the State in which the property is situated. Income from agriculture and forestry is specifically included in this rule.

Paragraph 2 establishes the general rule that what constitutes fixed property will be decided under the law of the State in which the property is situated. Nevertheless, property accessory to fixed property and livestock and equipment used in agriculture and forestry are specifically included. So too are usufructs and payments for the right to extract minerals and other natural resources.

Paragraph 3 makes it clear that the rule established in paragraph 1 applies irrespective of the manner in which the property is exploited.

Paragraph 4 provides that the provisions of paragraphs 1 and 3 also apply to income derived from fixed property owned by an enterprise or which is used for the performance of independent personal services. In the absence of this provision, it might be argued that this income should be dealt with in terms of the provisions of Article 7 or 14, which establish somewhat different rules for the treatment of business profits and independent personal services income.

Article 7

Business Profits

This Article deals with the taxation of business profits and is to be read together with Article 5 as it uses the test of “permanent establishment” in determining where such profits are to be taxed.

Paragraph 1 specifies that the profits of an enterprise which is a resident of a Contracting State are taxable in that State unless it carries on business in the other Contracting State through a permanent establishment situated in that other State in which case that other State may tax the profits which are attributable to that permanent establishment.

Paragraph 2 deals with the allocation of profits to a permanent establishment and specifies that the profits which are to be attributed to the permanent establishment are those which it would have made if it had been dealing with entirely separate enterprises under arms-length conditions and not with its head office.

Paragraph 3 recognises the fact that in calculating the profits of a permanent establishment, allowance must be made for certain expenses, wherever incurred, which were incurred for the purposes of the permanent establishment. For example, if the head office incurs general administrative expenses it is most likely that a portion of those expenses was in fact incurred on behalf of the permanent establishment and it will therefore be necessary to allocate that portion of the expenses to the permanent establishment in determining its profits. The emphasis here is on the fact that the expenses must have been actually incurred – notional charges are excluded, for example, management fees.

Paragraph 4 provides for profits attributable to a permanent establishment to be determined on the basis of apportionment if this method is customary in a Contracting State. However, the proviso specifies that the result of this method should still be in accordance with the principles of this Article.

Paragraph 5 deals with the situation where a permanent establishment which, although carrying on other business, also carries on purchasing for its head office. The paragraph provides that the profits which are attributed to the permanent establishment cannot be increased by the addition of a notional figure for profits from such purchases which are actually earned by the head office.

Paragraph 6 stipulates that the method of allocation of profits to the permanent establishment should not be changed merely for the reason that a different method may result in more profit becoming taxable in the State of residence of the permanent establishment. This also establishes a degree of certainty regarding the tax treatment to be expected in the State in which the permanent establishment is situated.

It is possible that the term “profits” could include other items of income which are dealt with in other Articles of the Convention. Paragraph 7 stipulates that the preceding provisions of Article 7 shall not affect the provisions of such other Articles. An example of this is where profits include interest which is dealt with separately under Article 11.

Article 8

Shipping and Air Transport

Paragraph 1 provides that profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic are taxable only in that State. Thus, for example, profits derived by South African Airways from its flights into and out of airports in Ghana are taxable only in South Africa.

Paragraph 2 specifies that profits derived from the rental on a bare boat basis of ships or aircraft used in international traffic as well as profits from the use or rental of containers and related equipment which are incidental to the profits mentioned in paragraph 1, are also taxable in accordance with Article 8. It should be noted that where such income is not incidental to international traffic operations, but rather constitutes an independent business in its own right, it will fall to be dealt with under Article 7 as business income.

Paragraph 3 makes the above rules also applicable where the business is conducted through a pool, joint business venture or an operating agency.

Article 9

Associated Enterprises

This Article deals with associated enterprises and in paragraph 1 provides that a Contracting State may recalculate the profits of the enterprises if they have created conditions between themselves which would not be created by enterprises dealing at arms-length with each other. This paragraph is effective in dealing with the effects of transfer pricing between associated enterprises. The concept of what is regarded as being an associated enterprise is also set out in this paragraph.

The recalculation of profits envisaged in paragraph 1 may of course result in double taxation if, for example, one of the Contracting States increases the profits of its enterprise, and subjects the increased amount to tax, although such increased amount may already have been subjected to tax in the hands of its associated enterprise in the other Contracting State.

The provisions of paragraph 2 allow that other State to make a corresponding adjustment to the profits of the associated enterprise and, in so doing, avoid double taxation. It should be noted that the paragraph provides for consultation between the States in deciding on such adjustment.

Article 10

Dividends

Paragraphs 1 and 2 of this Article provide for the common international tax treatment of cross-border dividends, in terms of which the State in which the dividends are declared may impose a limited withholding tax and the State in which the dividends are received may impose full tax.

The limitation on withholding tax rates in the source State imposed by paragraph 2 is as follows:

- (a) where the shareholder is a company which holds at least 10 per cent of the capital of the company paying the dividend, the tax is limited to 5 per cent of the gross dividend. This limitation is intended to encourage substantial (i.e. at least 10 per cent) investment by companies in one State in subsidiaries in the other State;
- (b) where the minimum holding of 10 per cent is not met (i.e. portfolio share investments) the rate of tax is limited to 15 per cent.

Both the above limitations apply only if the registered shareholder is also the beneficial owner, i.e. the limitation does not apply to nominee shareholders.

Paragraph 3 contains the standard definition of what constitutes a dividend.

Paragraph 4 provides that this Article will not apply in cases where a resident of one State carries on business in the other State through a permanent establishment or fixed base and derives dividends from shares the holding of which is effectively connected with the permanent establishment or fixed base. For example, if a South African company carrying on a manufacturing business through a permanent establishment in Ghana were to purchase the shares of a Ghanaian company which supplies it with raw materials, the dividends derived by the South African company on those shares could be taxed in Ghana as part of the business profits of the permanent establishment.

Paragraph 5 deals with the limitation of the right of one of the States to impose tax on dividends declared by, or the undistributed profits of, a company which is a resident of the other State. One situation in which tax may be imposed, is where the shareholding is effectively connected with a permanent establishment, as mentioned in relation to paragraph 4 above.

The second situation can best be explained through an example of a Ghanaian company which carries on business through a branch in South Africa. The paragraph provides that South Africa may not impose tax on the dividends declared by the Ghanaian company even though its profits are partly derived in South Africa, except in so far as the dividends are received by South African resident shareholders.

Article 11

Interest

This Article deals with the taxation of income in the form of interest.

Paragraph 1 specifies that interest which arises in a Contracting State and is paid to a resident of the other Contracting State may be taxed in the State of residence.

Paragraph 2 gives a right of taxation to the source State but limits the amount of tax it imposes to 5 per cent of the gross amount in respect of interest derived by a bank. In all other cases the limit is 10 per cent of the gross amount of the interest, provided that the beneficial owner of the interest is a resident of the other Contracting State.

Paragraph 3 sets out a number of circumstances in which interest shall be exempt from tax in the source State, such taxation being allowed by paragraph 2.

Paragraph 4 contains the standard definition of what is to be regarded as interest.

Paragraph 5 specifies that if the beneficial owner of interest carries on business in the Contracting State in which the interest arises through a permanent establishment or a fixed base situated in that State, the interest may be taxed in that State if the debt in respect of which the interest is paid is effectively connected to that permanent establishment or fixed base. The provisions of Article 11 will not apply to such interest but rather the provisions in Article 7 in the case of a permanent establishment or Article 14 in the case of a fixed base. This paragraph is similar to paragraph 4 of Article 10 dealing with dividends.

Paragraph 6 lays down the principle that the State of source of the interest is the State of which the payer of the interest is a resident. It also provides for an exception to this rule in the case of interest-bearing loans which have an economic link with a permanent establishment or a fixed base operated in the other Contracting State by the payer of the interest. If the loan was contracted for the requirements of the permanent establishment or fixed base and the interest is borne by such permanent establishment or fixed base, the paragraph specifies that the source of the interest is the Contracting State in which the permanent establishment or fixed base is situated.

The purpose of paragraph 7 is to restrict the operation of the provisions of this Article with regard to the taxation of interest in cases where there is a special relationship between the beneficial owner of the interest and the payer or between both of them and a third party. If, in the presence of this relationship, the interest paid exceeds the interest which would have been paid in the absence of such a relationship, the provisions of this Article will not apply to the amount of the interest which is considered to be excessive and such excessive amount will remain taxable in accordance with the laws of both Contracting States. The limitation placed on the source State under paragraph 2 will in such circumstances be negated in respect of the excessive amount. This is an anti-avoidance provision.

Article 12

Royalties

This Article deals with royalties and paragraph 1 provides that royalties which arise in a Contracting State and are paid to a resident of the other Contracting State may be taxed in the State of residence.

Paragraph 2 gives a right of taxation to the source State but limits the amount of tax to 10 per cent of the gross amount of the royalties provided that the recipient is the beneficial owner of the royalties is a resident of the other Contracting State.

Paragraph 3 defines which payments will constitute royalties for purposes of the Article. It includes amounts normally understood as royalties, such as patents, copyrights, trade marks, etc, and also includes payments for the use of, or right to use, industrial, commercial or scientific experience (know-how).

Paragraph 4 provides that the provisions of paragraphs 1 and 2 will not apply if the recipient of the royalties carries on business or performs independent personal services in the State in which the royalties arise through a permanent establishment or fixed base, and the royalties are effectively connected with that permanent establishment or fixed base. In this case, the royalties are in effect regarded as part of the business profits of the permanent establishment or fixed base, and may be taxed by the source State. This paragraph is similar to paragraph 4 of Article 10 dealing with dividends and paragraph 5 of Article 11 dealing with interest.

An example of where this paragraph would apply would be a Ghanaian company with a permanent office in South Africa through which it sold franchise rights for the use of its product brand. South Africa would in this case be entitled to tax the franchise payments received by the Ghanaian company.

Paragraph 5 lays down the principle that the State of source of the royalties is the State of which the payer of the royalties is a resident. It also provides for an exception to this rule in the case of royalties which have an economic link with a permanent establishment or a fixed base operated in the other Contracting State by the payer of the royalties. If the liability to pay the royalties was incurred by the permanent establishment or a fixed base and the royalties are borne by such establishment or fixed base, the paragraph specifies that the source of the royalties is the Contracting State in which the permanent establishment or fixed base is situated.

Paragraph 6 contains an anti-abuse provision. Where the payer and recipient of a royalty are connected persons and the royalty is excessive, the source State may tax the portion which is excessive according to its laws - in other words, the limitation set out in paragraph 2 would only apply to the portion of the royalty which meets the arms-length test.

Article 13

Capital Gains

The Article deals with the taxation of capital gains and covers all kinds of taxes which are imposed on such gains.

Paragraph 1 specifies that the right to tax gains derived from the alienation of immovable property is also given to the Contracting State in which the property is situated although the alienator may be a resident of the other Contracting State.

Paragraph 2 deals with the alienation of movable property which forms part of a permanent establishment or a fixed base which a resident of a Contracting State has in the other Contracting State. It provides that gains from the alienation of such property may also be taxed in the State in which such permanent establishment or fixed base is situated and includes gains from the alienation of the permanent establishment or fixed base as such.

Paragraph 3 provides that gains from the alienation of ships or aircraft operated in international traffic or movable property related to the operation of such ships or aircraft are taxable only in the State in which the enterprise is resident. This follows the principle laid down in Article 8 with regard to the taxation of the business profits of such an enterprise.

Paragraph 4 specifies that gains arising from the alienation of shares in a company, which consist directly or indirectly principally of immovable property located in the other Contracting State, may be taxed in that other State.

Paragraph 5 specifies that gains from the alienation of any property not covered by the preceding paragraphs of this Article may only be taxed in the State of residence of the alienator.

Article 14

Independent Personal Services

Paragraph 1 provides the general rule that independent personal services derived by an individual who is a resident of a Contracting State may be taxed only in that State. The other (source) State is entitled to impose tax only if:

- (a) the individual performing the services has a fixed base regularly available in that State, and then it may tax only the income attributable to that fixed base; or
- (b) the individual is present in that State for more than an aggregate of 183 days in any twelve-month period commencing or ending in the fiscal year concerned, in which case that person is deemed to have a fixed base regularly available in that other State.

Paragraph 2 defines professional services but the definition is not exhaustive.

Article 15

Dependent Personal Services

Paragraph 1 lays down the principle that remuneration in respect of an employment is taxable in the State of residence of the employee unless the services in respect thereof are rendered in the other Contracting State, in which case the remuneration arising from the services rendered in the other State may also be taxed in that other State.

Paragraph 2 limits the right of taxation of the State in which the services are rendered (the source State) in that remuneration for services rendered in that State is taxable only in the State of residence if the following conditions are met:

- (a) the employee is present in the source State for a period or periods not exceeding 183 days in any twelve-month period; and
- (b) the employer who pays the remuneration, or on whose behalf the remuneration is paid, is not a resident of the source State; and
- (c) the relevant remuneration is not borne by a permanent establishment or a fixed base which the employer has in the source State.

It is important to note that all three requirements must be met before the provisions of the paragraph operate.

Paragraph 3 deals with remuneration derived by employees in respect of employment aboard a ship or aircraft operated in international traffic and specifies that such remuneration may be taxed in the State of residence of the operator of such ship or aircraft.

Article 16

Directors' Fees

The Article provides that directors' fees may be taxed by the State in which the company concerned is resident. It does not, however, prevent the director from also being taxed on those fees in the director's State of residence.

Article 17

Entertainers and Sportspersons

In terms of paragraph 1 the income derived by entertainers and sportspersons may be taxed in the Contracting State in which their activities are exercised.

Paragraph 2 expands the principle laid down in paragraph 1 in that it specifies that in cases where income in respect of the activities of entertainers and sportspersons accrues to some other person rather than the entertainer or sportsperson, such income may still be taxed in the Contracting State in which such activities are exercised. This paragraph covers the frequent situation in which a professional sportsperson forms a company and competes in a sporting event in another country not in a personal capacity, but rather as an employee of that person's company. Because the sportsperson's activities in the country continue for a very short period and do not constitute a permanent establishment, neither the sportsperson nor the company would under the normal provisions of the Convention be taxable in that country.

In cases where the activities of entertainers or sportspersons in a Contracting State are exercised in the other State within the framework of a cultural or sports exchange programme which is approved by both States, paragraph 3 specifies that any income derived from those activities in the first-mentioned State will be exempt from tax in that State.

Article 18

Pensions and Annuities

Paragraph 1 provides that pensions and other similar remuneration paid in consideration of past employment, and annuities, may be taxed in the State in which they arise. The State of residence may also tax but must then give a credit for the source State tax.

Paragraph 2 gives the State of source of pension payments and other payments made under a public scheme which is part of the social security system of a Contracting State the sole taxing right, notwithstanding the provisions of paragraph 1.

Paragraph 3 gives the standard definition of an annuity.

Article 19

Government Service

Subparagraph 1(a) provides that remuneration (other than a pension) for services rendered, which is paid by a Contracting State, a political subdivision or a local authority thereof to an individual, is taxable only in that State.

However, subparagraph 1(b) provides that such remuneration is taxable only in the other Contracting State if the services are rendered in that other State by a resident who is also a national of that other State and did not become resident of the other State with the express purpose of rendering the services. An example of this is a South African national, normally resident in South Africa, who is employed by the High Commission of Ghana. Such person would be taxable in South Africa even though the person's salary is paid by Ghana.

Paragraph 2 provides that the same principle which applies to remuneration, as set out in paragraph 1, also applies to pensions paid by a Contracting State, a political subdivision or a local authority thereof. The pension would only be taxable in the other State if the recipient is both a resident and a national of that other State.

Paragraph 3 provides that the provisions of paragraphs 1 and 2 will not apply in respect of remuneration or pensions paid by a Contracting State, a political subdivision or a local authority thereof in respect of services rendered in relation to any business carried on by that Contracting State, political subdivision or local authority thereof. In such circumstances, the provisions of Articles 15, 16, 17 and 18 dealing with remuneration and pensions other than of a public nature will apply.

Article 20

Management Fees

This Article deals with management fees and paragraphs 1 and 2 provide that such fees which arise in a Contracting State and are paid to a resident of the other Contracting State may be taxed in the source State but limits the amount of tax to 10 per cent of the gross amount of the management fees provided that the beneficial owner of the management fees is a resident of the other Contracting State.

Paragraph 3 defines which payments will constitute management fees for purposes of the Article. It includes payments for services of a managerial, technical or consultancy nature. However, payments in consideration for supervisory activities in connection with a building site or construction, assembly or installation project or for supervisory activities in connection with installation which is incidental to the sale of machinery or parts thereof, are not included under the term “management fees”.

Paragraph 4 provides that the provisions of paragraphs 1 and 2 will not apply if the recipient of the management fees carries on business or performs independent personal services in the State in which the management fees arise through a permanent establishment or fixed base, and the obligation in respect of which the management fees are paid is effectively connected with that permanent establishment or fixed base. In such case, the management fees are in effect regarded as part of the business profits of the permanent establishment or fixed base, and may be taxed as business profits by the source State. This paragraph is similar to paragraph 4 of Article 10 dealing with dividends and paragraph 5 of Article 11 dealing with interest.

Paragraph 5 lays down the principle that the State of source of the management fees is the State of which the payer of the management fees is a resident. It also provides for an exception to this rule in the case of management fees which have an economic link with a permanent establishment or a fixed base operated in the other Contracting State by the payer of the management fees. If the obligation to pay the management fees was incurred by the permanent establishment or fixed base and the management fees are borne by such establishment or base or fixed base, the paragraph specifies that the source of the management fees is the Contracting State in which the permanent establishment or fixed base is situated.

Paragraph 6 contains an anti-abuse provision. Where the payer and recipient of the management fees are connected persons and the fees are excessive, the source State may tax the portion which is excessive according to its laws – in other words, the limitation set out in paragraph 2 would only apply to the portion of the management fees which meets the arms-length test.

Article 21

Professors and Students

In terms of paragraph 1, students or business apprentices who are residents of one State but who are undergoing education or training in the other State, will not be taxed in the last-mentioned State on payments received for the purposes of their maintenance, education or training, if those payments are received from outside that State.

Students or business apprentices who during their period of study or training receive a grant or scholarship, which is not covered by paragraph 1, shall in terms of the provisions of paragraph 2, be entitled to the same reductions, exemptions or relief in respect of taxes as is available to a resident of the State in which they are undergoing such education or training.

Paragraph 3 specifies that individuals who engage in teaching or research activities at educational institutions in a Contracting State during a visit of less than two years, shall be exempt from tax in that State in respect of remuneration for such activities which is derived from outside that State.

Paragraph 4 specifies that the provisions of paragraph 3 shall not apply in respect of research which is undertaken for the private benefit of a person or persons.

Article 22

Other Income

This Article deals with the treatment of income which is not dealt with in other Articles of the Convention and specifies in paragraph 1 that such items of income will be taxable only in the State of residence of the recipient thereof.

Paragraph 2 reintroduces the principle established in paragraph 4 of Article 10 dealing with dividends and paragraph 5 of Article 11 dealing with interest that if such income is connected to a permanent establishment or a fixed base which a resident of a Contracting State has in the other Contracting State, then such income may be included in the profits which are attributable to the permanent establishment or fixed base as envisaged in Articles 7 and 14 and taxed in that other Contracting State.

Paragraph 3 states that notwithstanding paragraphs 1 and 2, the source State also retains a taxing right in respect of other income.

Article 23

Limitation of Benefits

In some cases a Contracting State taxes income received from outside that State on the basis of the amount remitted or received rather than the actual amount thereof. Paragraph 1 provides that if the Convention limits the other Contracting State's right to tax such income, then such limitation shall only apply in respect of the amount remitted to or received in the first-mentioned State, in other words, the other State may tax the income not remitted and, therefore, not taxed in the first-mentioned State, in full.

Paragraph 2 provides that where, under the provisions of Article 13, gains may only be taxed in one of the Contracting States, and the recipient of the gain is, under the law of that State, subject to tax in respect of those gains by reference to the amount of the gain received in that State and not by reference to the full amount of the gain, then the provisions of Article 13 shall only be applicable to so much of the gains as are taxed in that State.

Article 24

Elimination of Double Taxation

The provisions of this Article are designed to allow for the actual mechanisms required for the elimination of double taxation. In paragraph (a) the position with regard to the manner in which Ghana will provide relief in cases of double taxation of its residents is set out while South Africa's position with regard to its residents is set out in paragraph (b). Both States use the credit method of relief.

Article 25

Non-discrimination

Paragraph 1 provides that a State may not impose upon nationals possessing the nationality of the other State any tax or requirements connected therewith which is other or more burdensome than that which it imposes on its own nationals in the same circumstances. The underlined words above are crucial to understanding the effect of this paragraph. By way of example, if Ghana imposed a withholding tax (NRST) on dividends paid to non-residents, but did not impose a similar tax on residents, NRST would be paid by South African shareholders but not by Ghanaian shareholders. Nevertheless, this tax does not contravene the provisions of this paragraph, because the shareholders are not in the same circumstances, as they are resident in different States. A Ghanaian national taking up residence in South Africa would also become liable for NRST and the discrimination is thus on the basis of residence and not nationality. This is permitted.

The paragraph extends the application of the non-discrimination provisions to nationals of one of the States who are resident in a third State and on the basis of nationality to companies, defining the nationality of a company as its place of incorporation.

Paragraph 2 provides that where an enterprise of one State has a permanent establishment in the other State, that permanent establishment shall not be less favourably taxed than enterprises of the home State which carry on similar activities. An exception is made, however, in the case of personal allowances, reliefs and reductions on account of civil status or family responsibilities. An example of such an allowance or relief would be the child rebates previously granted by South Africa. These reliefs may be withheld from non-residents.

Paragraph 3 provides that interest, royalties, management fees and other disbursements paid by non-residents deriving income in a State are to be allowed as a deduction by that State in the same manner as that State grants those deductions to residents. It is provided, however, that this paragraph does not override Articles 9(1), 11(7), 12(6) and 20(6), which allow a State to make adjustments in cases where excessive payments are made because of a special relationship between payer and recipient.

Paragraph 4 prevents a State from giving less favourable taxation treatment to foreign-held enterprises than it gives to locally-held enterprises. The paragraph deals only with the taxation of the enterprise – it is still permissible, as discussed in relation to paragraph 1 above, to impose a different tax regime on the owners of the enterprise.

Paragraph 5 provides in subparagraph (a) that Ghana may impose an additional tax on the profits of a company, provided this tax does not exceed five per cent of the amount of such profits after deduction of the corporation tax relating to such profits. This is the so-called branch profits tax. Subparagraph (b) states that nothing in the Convention shall prevent South Africa from imposing a tax on the profits attributable to a permanent establishment in South Africa of a company resident in Ghana, at a rate which does not exceed the rate of normal tax on companies by more than five percentage points.

The Convention generally applies only to the taxes listed in Article 2 but paragraph 6 provides that the non-discrimination provisions of this Article will apply to all taxes of every kind and description.

Article 26

Mutual Agreement Procedure

This Article institutes a mutual agreement procedure for difficulties arising out of the application of the Convention. In paragraphs 1 and 2 it provides that the competent authorities of the Contracting States shall endeavour by mutual agreement to solve the situation of taxpayers subjected to taxation not in accordance with the provisions of the Convention.

In paragraph 3, the competent authorities of the two States are authorised to resolve by mutual agreement any problems relating to the interpretation or application of the Convention, and, furthermore, to consult together for the elimination of double taxation in cases not provided for in the Convention.

Finally, for practical purposes, paragraph 4 authorises the competent authorities to communicate directly with each other for the purpose of reaching mutual agreement in respect of any of these matters.

Article 27

Exchange of Information

Paragraph 1 provides that the States shall exchange such information as may be required both for carrying out the provisions of the Convention and for applying the domestic taxation laws concerning any tax imposed on behalf of the Contracting States or of their political subdivisions. In other words, the competent authorities can exchange information on, for example, value-added tax or sales tax, as the case may be. The exchange is not restricted by Articles 1 and 2. Thus, should South Africa obtain tax information relating to a resident of a third State who is liable to Ghana tax, it may make that information available to Ghana.

Paragraph 1 further provides that information obtained by a State under this provision must be treated with the same degree of secrecy as applies to information obtained under the domestic laws of that State. In addition to this general stipulation on secrecy, it is specifically provided that information obtained under this Article may be disclosed only to persons or authorities involved in the administration of the taxes imposed on behalf of a Contracting State or its political subdivisions, and that those persons and authorities shall use the information only for the purposes of such administration.

In terms of paragraph 2, the preceding provisions will not impose on a State the obligation:

- (a) to do anything which is contrary to the laws and administrative practice of either State;
- (b) to supply information which is not obtainable under the laws of either State or in the normal course of the administration of either State;
- (c) to supply information which discloses any business secret, or information the disclosure of which is contrary to public policy.

Article 28

Assistance in Recovery

Paragraphs 1 and 2 provide that the Contracting States may assist each other in the collection of the taxes which are the subject of the Convention in accordance with the provisions of their domestic law. Claims by the State requesting assistance will not take priority over taxes owed in the State which renders assistance and the secrecy and use of information limitations which are contained in Article 27 will also apply.

Paragraph 3 provides that the competent authorities of the Contracting States shall settle the mode of application of the provisions of Article 28 by mutual agreement.

Article 29

Members of Diplomatic Missions and Consular Posts

The Article ensures that members of diplomatic missions and consular posts are not deprived of any right which is accorded to them under international law or special agreements between Contracting States. In effect this normally means that the remuneration which they receive from their State of residence while they are stationed in the other Contracting State is not subjected to tax in that other State.

Article 30

Entry into Force

Paragraph 1 provides that the Contracting States shall notify each other once the legal procedures required in each country for the bringing into force of the Convention have been completed. The Convention will then enter into force on the date of receipt of the later of these notifications.

Paragraph 2 provides that the date on which the provisions of the Convention will begin to operate in both States, will be the first day of January next following the date of entry into force of the Convention.

Article 31

Termination

Paragraph 1 provides that the Convention shall operate for a minimum period of five years after which it may be terminated by either Contracting State by giving written notice of termination not later than 30 June of any calendar year.

The Convention will then cease to operate from 1 January in the calendar year following such notice on the basis set out in paragraph 2.

General

Attached are opinions from the State Law Advisers of the Departments of Foreign Affairs and Justice.

The entire Convention becomes part of the law of South Africa and is entered into in terms of section 108 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).

Financial Implications

There are no direct financial costs under the Convention for the State.