

**AGREEMENT BETWEEN**

**THE GOVERNMENT OF AUSTRALIA**

**AND**

**THE GOVERNMENT OF THE BRITISH VIRGIN ISLANDS**

**FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES**

# **AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE BRITISH VIRGIN ISLANDS FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES**

**Whereas** Australia and the British Virgin Islands (“the Contracting Parties”) recognise that present legislation already provides a framework for mutual legal assistance and cooperation in the exchange of criminal information in tax matters;

**Whereas** the Contracting Parties have long been active in international efforts in the fight against financial and other crimes including the targeting of terrorist financing;

**Whereas** it is acknowledged that the Contracting Parties are competent to negotiate and conclude a tax information exchange agreement;

**Whereas** the British Virgin Islands on the 2nd April 2002 entered into a formal written commitment to the Organisation for Economic Cooperation and Development’s (OECD) principles of transparency and exchange of information and have subsequently actively participated in the OECD Global Forum on Taxation;

**Whereas** the Contracting Parties wish to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes:

**Therefore**, the Contracting Parties have agreed to conclude the following Agreement which contains obligations on the part of the Contracting Parties only:

## **ARTICLE 1**

### **SCOPE OF AGREEMENT**

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning the taxes and the tax matters covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, verification, enforcement, recovery or collection of tax claims with respect to persons subject to such taxes, or the investigation or prosecution of tax matters in relation to such persons. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8.

## **ARTICLE 2**

### **JURISDICTION**

To enable the appropriate implementation of this Agreement, information shall be provided in accordance with this Agreement by the competent authority of the Requested Party:

- (a) without regard to whether the person to whom the information relates is a resident or national of a Contracting Party, or whether the person by whom the information is held is a resident or national of a Contracting Party; and
- (b) provided that the information is present within the territory, or in the possession or control of a person subject to the jurisdiction, of the Requested Party.

## **ARTICLE 3**

### **TAXES COVERED**

1. The taxes covered by this Agreement are:
  - (a) in the case of Australia, taxes of every kind and description imposed under federal laws administered by the Commissioner of Taxation; and
  - (b) in the case of the British Virgin Islands, such taxes as may from time to time, be imposed by law.

2. This Agreement shall also apply to any identical or substantially similar taxes imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The Agreement shall also apply to such other taxes as may be agreed in an exchange of letters between the Contracting Parties. The competent authorities of the Contracting Parties shall notify each other of any relevant changes to the taxation and related information gathering measures covered by this Agreement.

3. This Agreement shall not apply to taxes imposed by states, municipalities or other political subdivisions, or possessions of a Contracting Party.

## ARTICLE 4

### DEFINITIONS

1. In this Agreement-

(a) "Australia", when used in a geographical sense, excludes all external territories other than:

- (i) the Territory of Norfolk Island;
- (ii) the Territory of Christmas Island;
- (iii) the Territory of Cocos (Keeling) Islands;
- (iv) the Territory of Ashmore and Cartier Islands;
- (v) the Territory of Heard Island and McDonald Islands; and
- (vi) the Coral Sea Islands Territory,

and includes any area adjacent to the territorial limits of Australia (including only the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone and the seabed and subsoil of the continental shelf;

(b) "British Virgin Islands" means the territory of the Virgin Islands as referred to in the Virgin Islands Constitution Order 2007;

(c) "belonger" means in respect of the British Virgin Islands a person who is deemed to belong to the Territory under section 2 (2) of the Virgin Islands Constitution Order 2007;

(d) "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other

interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

- (e) "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- (f) "competent authority" means in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner and for the British Virgin Islands, the Financial Secretary or a person or authority designated by the Secretary in writing;
- (g) "Contracting Party" means Australia or the British Virgin Islands as the context requires;
- (h) "criminal laws" means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes;
- (i) "criminal tax matters" means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the Requesting Party;
- (j) "information" means any fact, statement, document or record in whatever form;
- (k) "information gathering measures" means judicial, regulatory or administrative procedures that enable a Requested Party to obtain and provide the information requested;
- (l) "information subject to legal privilege" means:
  - (i) communications between a professional legal advisor and a client made in connection with the giving of legal advice to the client;
  - (ii) communications between a professional legal advisor and a client or any person representing the client or between such an advisor or the client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
  - (iii) information enclosed with or referred to in such communications and made:
    - (A) in connection with the giving of legal advice; or

(B) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when the information is in the possession of a person who is entitled to possession of it. Information held with the intention of furthering a criminal purpose is not subject to legal privilege, and nothing in this Article shall prevent a professional legal advisor from providing the name and address of a client where doing so would not constitute a breach of legal privilege;

- (m) "national" means
- (i) in relation to Australia , any person who is an Australian citizen;
  - (ii) in relation to the British Virgin Islands, any person who belongs to the British Virgin Islands or is a permanent resident of the British Virgin Islands;
- (n) "person" means a natural person, a company or any entity that is treated as a body corporate for tax purposes, or any other body or group of persons;
- (o) "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;
- (p) "professional legal advisor" means an attorney or legal practitioner, solicitor or other admitted legal representative.
- (q) "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- (r) "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- (s) "Requested Party" means the party to this Agreement which is requested to provide or has provided information in response to a request;
- (t) "Requesting Party" means the party to this Agreement submitting a request for or having received information from the Requested Party;
- (u) "tax" means any tax covered by this Agreement pursuant to Article 3.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Contracting Party, any meaning under the applicable tax laws of that Contracting Party prevailing over a meaning given to the term under other laws of that Contracting Party.

## ARTICLE 5

### EXCHANGE OF INFORMATION UPON REQUEST

1. The competent authority of a Requested Party shall provide upon request in writing by the Requesting Party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if it occurred in the territory of the Requested Party. If the information received by the competent authority of the Requested Party is not sufficient to enable it to comply with the request for information, it shall advise the competent authority of the Requesting Party of that fact, with suggestions of the additional information required to enable the effective processing of the request.

2. If the information in possession of the competent authority of the Requested Party is not sufficient to enable it to comply with the request for the information, the Requested Party shall use all relevant information gathering measures to provide the Requesting Party with the information requested, notwithstanding that the Requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of the Requesting Party, the competent authority of the Requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request:

- (a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
- (b) information regarding the legal and beneficial ownership of companies, partnerships, trusts and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees, beneficiaries and protectors. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds

or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the Requesting Party shall provide the following information to the competent authority of the Requested Party when making a request for information under this Agreement, in order to demonstrate the foreseeable relevance of the information to the request:

- (a) the identity of the person under examination or investigation;
- (b) the period for which the information is requested;
- (c) the nature and type of the information requested, including a description of the specific evidence, information or other assistance sought, and the form in which the Requesting Party wishes to receive the information;
- (d) the tax purposes for which the information is sought;
- (e) reasonable grounds for believing that the information requested is present in the territory of the Requested Party or is in the possession or control of a person subject to the jurisdiction of the Requested Party and may be foreseeably relevant to the tax purpose of the request;
- (f) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- (g) a declaration that the request conforms to the law and administrative practice of the Requesting Party and would be obtainable by the Requesting Party under its laws in similar circumstances, both for its own tax purposes and in response to a valid request from the Requested Party under this Agreement;
- (h) a statement that the Requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the Requested Party shall forward the requested information as promptly as possible to the competent authority of the Requesting Party. To ensure a prompt response, the competent authority of the Requested Party shall:

- (a) confirm receipt of a request in writing to the competent authority of the Requesting Party, and shall notify the competent authority of the Requesting Party of any deficiencies in the request within 60 days of receipt of the request.

- (b) if the competent authority of the Requested Party has been unable to obtain and provide the information requested within 90 days of receipt of the request, or if obstacles are encountered in furnishing the information, or if the competent authority of the Requested Party refuses to provide the information, it shall immediately inform the competent authority of the Requesting Party and explain the reasons for its inability or the obstacles or its refusal.

## **ARTICLE 6**

### **TAX EXAMINATIONS OR INVESTIGATIONS ABROAD**

1. The Requested Party may, to the extent permitted under its domestic laws, following reasonable notice of not less than 14 days from the Requesting Party, allow representatives of the competent authority of the Requesting Party to enter the territory of the Requested Party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the Requesting Party shall notify the competent authority of the Requested Party of the time and place of the meeting with the persons concerned.
2. At the request of the competent authority of the Requesting Party, the competent authority of the Requested Party, in accordance with its domestic laws, may permit representatives of the competent authority of the Requesting Party to be present when a tax examination is being carried out in the territory of the Requested Party.
3. If the request referred to in paragraph 2 is granted, the competent authority of the Requested Party conducting the examination shall, as soon as possible, notify the competent authority of the Requesting Party of the time and place of the examination, the authority or person authorised to carry out the examination and the procedures and conditions required by the Requested Party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the Requested Party conducting the examination, in accordance with its domestic laws.

## **ARTICLE 7**

### **POSSIBILITY OF DECLINING A REQUEST**

1. The competent authority of the Requested Party may decline to assist:
  - (a) where the request is not made in conformity with this Agreement;

- (b) where the Requesting Party has not pursued all means available in its own territory, except where recourse to such means would give rise to disproportionate difficulty; or
- (c) where the disclosure of the information requested would be contrary to the public policy (ordre public) of the Requested Party.

2. This Agreement shall not impose upon a Contracting Party any obligation to provide information subject to legal privilege, or information that would disclose any trade, business, industrial, commercial or professional secret or trade process. Information described in paragraph 4 of Article 5 shall not by reason of that fact alone constitute such a secret or process.

3. A request for information shall not be refused on the ground that the tax liability or claim giving rise to the request is disputed by the taxpayer.

4. The Requested Party shall not be required to obtain and provide information that the Requesting Party would be unable to obtain in similar circumstances:

- (a) under its own laws for the purpose of the enforcement or administration of its own tax laws; or
- (b) in response to a valid request from the Requested Party under this Agreement.

5. The Requested Party may decline a request for information if the information is requested by the Requesting Party to administer or enforce a provision of the tax law of the Requesting Party, or any requirement connected therewith, which discriminates against a national of the Requested Party as compared with a national of the Requesting Party in the same circumstances.

## **ARTICLE 8**

### **CONFIDENTIALITY**

1. All information provided and received by the competent authorities of the Contracting Parties shall be kept confidential and may be disclosed only to persons or authorities (including courts and administrative bodies and, in the case of the British Virgin Islands, a select committee of the House of Assembly) officially concerned with the purposes specified in Article 1, and used by such persons or authorities only for such purposes or for oversight purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings.

2. The information may not be disclosed to any other person or entity or authority without the express written consent of the competent authority of the Requested Party.

3. Information provided to a Requesting Party shall not be disclosed to any other jurisdiction.

## **ARTICLE 9**

### **SAFEGUARDS**

Nothing in this Agreement shall affect the rights and safeguards secured to persons by the laws or administrative practice of the Requested Party. The rights and safeguards may not be applied by the Requested Party in a manner that unduly prevents or delays effective exchange of information.

## **ARTICLE 10**

### **ADMINISTRATIVE COSTS**

Costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be borne in accordance with a Memorandum of Understanding to be determined by the competent authorities of the Contracting Parties.

## **ARTICLE 11**

### **NO PREJUDICIAL OR RESTRICTIVE MEASURES**

1. Neither of the Contracting Parties shall apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either Contracting Party so long as this Agreement is in force and effective.

2. A "prejudicial or restrictive measure based on harmful tax practices" is a measure applied by one Contracting Party to residents or nationals of either Contracting Party on the basis that the other Contracting Party does not engage in effective exchange of information and/or because it lacks transparency in the operation of its laws, regulations or administrative practices, or on the basis of no or nominal taxes and one of the preceding criteria.

3. Without limiting the generality of paragraph 2, the term "prejudicial or restrictive measure" includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements.

## **ARTICLE 12**

### **IMPLEMENTING LEGISLATION**

The Contracting Parties shall (where they have not already done so) enact any legislation necessary to comply with, and give effect to, the terms of this Agreement.

## **ARTICLE 13**

### **MUTUAL AGREEMENT PROCEDURE**

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of this Agreement, the respective competent authorities shall use their best efforts to resolve the matter by mutual agreement.
2. In addition to the endeavours referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually determine the procedures to be used under Articles 5 and 6.
3. The competent authorities of the Contracting Parties may communicate with each other directly for the purposes of this Agreement.
4. The Contracting Parties may also agree in writing on other forms of dispute resolution.

## **ARTICLE 14**

### **ENTRY INTO FORCE**

1. The Government of Australia and the Government of the British Virgin Islands shall notify each other in writing through the appropriate channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall thereupon have effect:
  - (a) from the date of entry into force of this agreement with respect to criminal tax matters relating to taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date; and
  - (b) from 1 January 2009 with respect to all other matters covered in Article 1 relating to taxable periods beginning on or after 1 January 2009, or where there is no taxable period, all charges to tax arising on or after 1 January 2009.

