

VIRGIN ISLANDS

MUTUAL LEGAL ASSISTANCE (TAX MATTERS) (NO. 5) ORDER, 2014

ARRANGEMENT OF SECTIONS

Section

1. ...Citation.
2. ...Application of Part I of the Act.

SCHEDULE

VIRGIN ISLANDS

STATUTORY INSTRUMENT 2014 NO. 91

**MUTUAL LEGAL ASSISTANCE (TAX MATTERS) ACT, 2003
(No. 18 of 2003)**

MUTUAL LEGAL ASSISTANCE (TAX MATTERS) (NO. 5) ORDER, 2014

[Gazetted 29th December, 2014]

The Minister, in exercise of the power conferred by section 3 (3) of the Mutual Legal Assistance (Tax Matters) Act, 2003 (No. 18 of 2003) makes this Order.

Citation.

1. This Order may be cited as the Mutual Legal Assistance (Tax Matters) (No. 5) Order, 2014.

Application of
Part 1 of the Act.
No. 18 of 2003.
Schedule.

2. Part 1 of the Mutual Legal Assistance (Tax Matters) Act, 2003 applies to the Agreement reproduced in the Schedule.

SCHEDULE

[Section 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE BRITISH VIRGIN ISLANDS AND THE GOVERNMENT OF THE REPUBLIC OF KOREA FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES

Whereas the Government of the British Virgin Islands and the Government of the Republic of Korea (“the Contracting Parties”) recognise that their present legislation already provides for cooperation and the exchange of information in criminal 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 2 April 2002, entered into a formal written commitment to the OECD's principles of transparency and exchange of information and subsequently have participated actively in the OECD Global Forum on Taxation;

Whereas the Contracting Parties wish to enhance and facilitate the exchange of information relating to taxes; and

Whereas the Contracting Parties recognise that they will never engage in “fishing expeditions”;

The Government of the British Virgin Islands and the Government of the Republic of Korea, desiring to facilitate the exchange of information with respect to taxes,

Have agreed as follows:

ARTICLE 1

SCOPE OF THE AGREEMENT

The competent authorities of the Contracting Parties shall provide each other with assistance through the exchange of information that is foreseeably relevant to the administration and enforcement of their domestic laws 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. The rights and safeguards secured to persons by the laws or administrative practices of the requested Contracting Party shall remain applicable to the extent that they do not unduly prevent or delay the effective exchange of information.

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, national or citizen of either country, or whether the person by whom the information is held is a resident, national or citizen of either country; 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 the British Virgin Islands,
 - (i) the income tax;
 - (ii) the payroll tax; and
 - (iii) the property tax.
- (b) in the case of the Republic of Korea,
 - (i) the income tax;
 - (ii) the corporation tax;
 - (iii) the inheritance tax;
 - (iv) the gift tax;
 - (v) the value added tax; and
 - (vi) the individual consumption tax;

2. This Agreement shall also apply to any identical or substantially similar taxes imposed by either Contracting party after the date of signature of this Agreement in addition to, or in place of, any of the taxes listed in paragraph 1. 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.

ARTICLE 4
DEFINITIONS

1. For the purposes of this Agreement, unless otherwise defined:

- (a) “British Virgin Islands” means the territory of the Virgin Islands as referred to in the Virgin Islands Constitution Order 2007;
- (b) “Korea” means the Republic of Korea, and when used in a geographical sense, means the territory of the Republic of Korea including any area adjacent to the territorial sea of the Republic of Korea which, in accordance with international law, has been or may hereafter be designated under the laws of the Republic of Korea as an area within which the sovereign rights or jurisdiction of the Republic of Korea with respect to the sea-bed and sub-soil and their natural resources may be exercised;
- (c) “collective investment scheme” means any pooled investment vehicle irrespective of its legal form;
- (d) “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;
- (e) “competent authority” means:
 - (i) in the case of the British Virgin Islands, the Financial Secretary or a person or authority designated by him/her in writing.
 - (ii) in the case of Korea, the Minister of Strategy and Finance or his/her authorised representative;
- (f) “Contracting Party” means the British Virgin Islands or Korea as the context requires;

- (g) “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;
- (h) “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the requesting Party;
- (i) “information” means any fact, statement, document or record in whatever form;
- (j) “information gathering measures” means judicial, regulatory or administrative laws and procedures enabling a Contracting Party to obtain and provide the information requested;
- (k) “national” means
 - (i) in relation to the British Virgin Islands, any person who belongs to the British Virgin Islands by virtue of the Virgin Islands Constitution Order 2007 (Statutory Instrument 2007 No.1678) or has a certificate of residence of the British Virgin Islands by virtue of the Immigration and Passport Ordinance (Cap.130); and any legal person, partnership, association or other entity deriving its status as such from the laws in force in the British Virgin Islands;
 - (ii) in relation to Korea, any individual possessing the nationality of Korea and any legal person, partnership or association deriving its status as such from the laws in force in Korea;
- (l) “person” includes an individual (“natural person”), a company and any other body or group of persons;
- (m) “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;

- (n) “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of a company;
- (o) “recognised stock exchange” means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- (p) “public collective investment fund or scheme” means any collective investment fund or scheme, in which the purchase, sale or redemption of shares or other interests is not implicitly or explicitly restricted to a limited group of investors;
- (q) “requested Party” means the Contracting party which is requested to provide or has provided information in response to a request;
- (r) “requesting Party” means the Contracting party submitting a request for or having received information from the requested Party;
- (s) “tax” means any tax covered by this Agreement.

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 and request such additional information as may be 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 the fact 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; and 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 sought and the form in which the requesting Party would prefer to receive the information;
- (d) the tax purposes for which the information is sought and the reasons for believing that the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting Party;
- (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;
- (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 statement that the request is in conformity with this Agreement and the laws and administrative practices of the requesting Party, and that if the requested information were within the jurisdiction of the requesting Party then the competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice;

- (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 the 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; and
- (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 in writing explaining the reasons for its inability to obtain and provide the information or the obstacles encountered or for 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 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 intended meeting with the persons concerned.

2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may, in accordance with its domestic laws, permit representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the territory of the second-mentioned Party.

3. If the request referred to in paragraph 2 is granted, the competent authority of the Contracting Party conducting the tax examination shall, as soon as possible, notify the competent authority of the other Contracting Party about 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 first-mentioned Party for the conduct of the examination. All decisions regarding the conduct of the tax examination shall be made by the 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 to obtain the information, except where recourse to such means would give rise to disproportionate difficulties; or
- (c) where the disclosure of the information requested would be contrary to the public policy (*ordre public*) of the requested Party.

2. The provisions of this Agreement shall not impose upon a Contracting Party any obligation to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the

foregoing, information described in Article 5, paragraph 4 shall not by reason of that fact alone constitute such a secret or process.

3. (a) The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or barrister where such communications are:

- (i) produced for the purposes of seeking or providing legal advice, or
- (ii) produced for the purposes of use in existing or contemplated legal proceedings.

(b) Information held with the intention of furthering a criminal purpose is not subject to legal privilege, and nothing in this Article shall prevent an attorney, solicitor or barrister from providing the name and address of a client where doing so would not constitute a breach of legal privilege.

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

5. The requested Party shall not be required to obtain and provide information which, if the requested information was within the jurisdiction of the requesting Party, the competent authority of the requesting Party would not be able to obtain under its laws or in the normal course of administrative practice.

6. 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 or citizen of the requested Party as compared with a national or citizen 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 shall be disclosed only to persons or authorities (including courts and administrative bodies) officially concerned with the purposes specified in Article 1 and used by such persons or authorities only for such purposes, including the determination of any appeal, or the oversight of the above. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings.

2. The information may not be used for any purpose other than for the purposes stated in Article 1 without the express written consent of the competent authority of the requested Party.

3. Information provided to the 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. However, the rights and safeguards may not be applied by the requested Party in a manner that unduly prevents or delays the effective exchange of information.

ARTICLE 10
ADMINISTRATIVE COSTS

The costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be borne as agreed by the Contracting Parties.

ARTICLE 11
IMPLEMENTATION

The Contracting Parties shall take all necessary steps to comply with, and give effect to, the terms of this Agreement.

ARTICLE 12
LANGUAGE

Requests for assistance and responses thereto shall be drawn up in English

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 on other forms of dispute resolution.

ARTICLE 14
ENTRY INTO FORCE

Each Contracting Party shall notify the other of the completion of the procedures required by its law for the bringing into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall thereupon have effect:

- (a) with respect to criminal tax matters on that date; and
- (b) with respect to all other matters covered in Article 1, on that date, but only in respect of taxable periods beginning on or after that date, or where there is no taxable period, for all charges to tax arising on or after that date.

ARTICLE 15
TERMINATION

1. This Agreement shall remain in force until terminated by either Contracting Party.
2. Either Contracting Party may terminate this Agreement by giving notice of termination through diplomatic channels. Such termination shall become effective on the first day of the month following the expiration of a period of three (3) months after the date of receipt of the notice of termination by the other Contracting Party.
3. If this Agreement is terminated for any reason, the Contracting Parties shall remain bound by the provisions of Article 8 with respect to any information obtained under this Agreement. All requests received up to the effective date of termination shall be dealt with in accordance with the terms of this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at London, on this 5th day of December, 2014 in the English and Korean languages, both texts being equally authentic.

**FOR THE GOVERNMENT OF
THE BRITISH VIRGIN ISLANDS**

(Hon. Dr. D. Orlando Smith, OBE)
Premier of the
British Virgin Islands

**FOR THE GOVERNMENT OF
THE REPUBLIC OF KOREA**

(Mr. Lim Sungnam)
Ambassador Extraordinary &
Plenipotentiary of the Republic of
Korea

Protocol

1. With respect to subparagraph (a) of paragraph 5 of Article 5 (Exchange of Information Upon Request), it is understood that the competent authorities of the requesting Party shall provide the identity information of the person, typically the name and, if available, other particulars facilitating that person's identification, such as the address and his/her account number.

2. With respect to Article 10 (Administrative Costs),

a) costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested Party shall be borne by the requested Party when such costs are incurred for the purpose of responding to a request for information. Such ordinary costs would normally cover internal administration costs and any minor external costs;

b) all other costs that are not ordinary costs are considered extraordinary costs and shall be borne by the requesting Party. Examples of “extraordinary costs”: include, but are not limited to, the following:

- (i) reasonable fees charged by third parties for carrying out research;
- (ii) reasonable fees charged by third parties for copying documents;
- (iii) reasonable costs of engaging experts, interpreters, or translators;
- (iv) reasonable costs of conveying documents to the requesting Party;
- (v) reasonable litigation costs of the requested Party in relation to a specific request for information; and
- (vi) reasonable costs for obtaining depositions or testimony.

c) the Contracting Parties shall consult each other in any particular case where extraordinary costs are likely to exceed US\$500 to determine whether the requesting Party will continue to pursue the request and bear the cost.

3. Neither Contracting Party 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 information is being exchanged effectively in accordance with the provisions of this Agreement.

- a) 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 the 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.
- b) Without limiting the generality of subparagraph a) 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.
- c) A “prejudicial or restrictive measure” does not include generally applicable measures, applied by either Contracting Party against members of the OECD or against “jurisdictions that have engaged in a Taxation Information Exchange Agreement with such Contracting Party”, such as controlled foreign companies, foreign investment funds, transfer or trusts, transfer pricing, thin capitalisation, operation of dual exempt and foreign tax credit systems or general information reporting rules that relate to the disclosure of information from other countries or jurisdictions, or transactions with such countries or jurisdictions, such as record keeping requirements imposed on foreign owned subsidiaries to ensure access to information concerning parent companies. The meaning of the term “generally applicable measures” is subject to the OECD Global Forum's agreed definition of “generally applicable measures” arising from the conclusion and establishment of the OECD's Global Level Playing Field.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Protocol.

Done in duplicate at London, on this 5th day of December, 2014 in the English and Korean languages, both texts being equally authentic.

**FOR THE GOVERNMENT OF
THE BRITISH VIRGIN ISLANDS**

(Hon. Dr. D. Orlando Smith, OBE)
Premier of the
British Virgin Islands

**FOR THE GOVERNMENT OF
THE REPUBLIC OF KOREA**

(Mr. Lim Sungnam)
Ambassador Extraordinary &
Plenipotentiary of the Republic of
Korea

Made by the Minister this 18th day of December, 2014.

(Sgd) Dr. D. Orlando Smith, OBE,
Minister for Finance.