

No. 18 of 2003

VIRGIN ISLANDS

MUTUAL LEGAL ASSISTANCE (TAX MATTERS) ACT, 2003

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No. 18 of 2003

**Mutual Legal Assistance
(Tax Matters) Act, 2003**

**Virgin
Islands**

**I Assent
THOMAS MACAN
Governor
30th December, 2003**

VIRGIN ISLANDS

No. 18 of 2003

An Act to make provision for giving effect to the terms of the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, for the exchange of information relating to taxes, and any similar agreement to which the Government of the British Virgin Islands is a party, and for matters connected therewith.

[Gazetted 15th January, 2004]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title and
commencement.

1. This Act may be cited as the Mutual Legal Assistance (Tax Matters) Act, 2003 and shall come into force on the 1st day of January, 2004.

Interpretation.

2. (1) In this Act, unless the context otherwise requires,

“Agreement” means

- (a) the USA Agreement; and
- (b) any agreement to which this Act applies by virtue of an Order made under section 3(3);

“Authority” means the Financial Secretary or a person or authority designated by him under section 4;

“Inspector” means a person assigned as Inspector under section 44B(1) of the Income Tax Ordinance;

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“Minister” means the Minister to whom responsibility for finance is assigned;

“Representative” means a representative of a competent authority of a requesting party;

“request” means a request made under the Agreement by a requesting party to the Authority;

“USA Agreement” means the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, for the exchange of information relating to taxes, together with the Competent Authority Agreements annexed thereto, as set out in the Schedule.

Schedule

(2) In this Act, unless the context otherwise requires, any expression which is defined in the Agreement, shall have the same meaning as that given to it in the Agreement.

3. (1) This Act shall apply for the purpose of giving effect to the Agreement.

Implementation of the Agreement.

(2) Where the USA Agreement is amended by the parties thereto, the Minister may, by Order, amend the Schedule accordingly.

(3) Where the Government of the British Virgin Islands becomes a party to an agreement similar to the USA Agreement, the Minister may, by Order, provide that this Act shall apply to that agreement with such necessary modifications as may be specified in the Order and the text of that agreement shall be set out in a Schedule to the Order.

4. (1) The Financial Secretary may, in writing, designate any person or authority to perform the functions of the Authority under this Act and the Agreement.

The Authority.

(2) The Financial Secretary shall cause the designation of a person or authority under subsection (1) to be notified in the *Gazette* as soon as practicable thereafter.

5. (1) The Authority may, for the purposes of complying with a request under the Agreement, by notice in writing, require any person to provide such information as may be specified in the notice, provided that

Power of the Authority to request information.

- (a) the person is reasonably believed to have the information to which the notice relates; and
- (b) the information requested is
 - (i) information held by a bank or other financial institution, or any person acting in an agency or fiduciary capacity, including a nominee or trustee; or
 - (ii) information regarding the beneficial ownership of a company, partnership or other person.

(2) The power under subsection (1) shall not apply to items subject to legal privilege.

(3) The Authority may require any information provided pursuant to this section

- (a) to be provided within such time as is specified in the notice;
- (b) to be provided in such form as the Authority may require; and
- (c) to be verified or authenticated in such manner as the Authority may reasonably require.

(4) The Authority may take copies or extracts of any information produced pursuant to this section.

(5) Where a person claims a lien on a document, the production of the document pursuant to this section is without prejudice to his lien.

(6) A person who, without lawful or reasonable excuse, fails to comply with a notice issued to him under subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or both.

Power of the Authority to apply for a search warrant.

6. (1) Where

- (a) a person who is issued a notice under section 5, fails to comply or only partly complies with such notice, or

- (b) the Authority is of the opinion that if a notice is issued to a person under section 5, it would not be complied with or the documents or information to which the notice relates may be removed, tampered with or destroyed,

the Authority may, without prejudice to section 5(6), apply to a Magistrate for a search warrant and a certificate given by the Authority that the issue of a search warrant is required for the purposes of complying with a request shall be sufficient authority for the issue of the search warrant without further inquiry.

(2) On receipt of an application under subsection (1), the Magistrate may authorise a named representative of the Authority, together with a police officer of the rank of Inspector or above and any other person named in the warrant

- (a) to enter the premises specified in the warrant at any time within one month from the date of the warrant;
- (b) to search the premises and take possession of any information appearing to be information of a type in respect of which the warrant was issued or to take, in relation to such information, any other steps which appear to be necessary for preserving or preventing interference with them;
- (c) to take copies of, or extracts from, any information appearing to be information of a type in respect of which the warrant was issued;
- (d) to require any person on the premises to provide an explanation of any information appearing to be information of a type of which the warrant was issued or to state where such information may be found; and
- (e) to use such force as may be reasonably necessary to execute the warrant.

7. (1) Where the competent authority of a requesting party requests that its Representative interview, and examine the records of, a person in the British Virgin Islands and the person concerned notifies the Authority, in writing, that he consents to the interview and examination, the Representative may interview, and examine the records of, the person in the British Virgin Islands at such time and place as are agreed upon, in writing, by the Authority and the person concerned.

Interviews and tax examinations.

(2) In conducting an interview and examination under subsection (1), a Representative may

- (a) take statements from the person being interviewed;
- (b) with the consent of the person being interviewed, make copies, or take extracts from, any record.

(3) A Representative shall not have the power

- (a) to compel a person to answer any question;
- (b) to compel a person to remain in any place for the purpose of an interview;
- (c) to compel a person to produce any document or thing;
- (d) to enter and search premises without the consent of the owner or occupier of the premises; or
- (e) to seize or take documents or other things without the consent of the person being interviewed.

(4) A person shall, at any time when he is being interviewed by a Representative, have the right to be advised, at his own expense, by a legal practitioner of his choice.

(5) A statement made to a Representative in the course of an interview under this section shall not, in any proceedings, be used in evidence against the person making the statement.

(6) Where the competent authority of a requesting party so requests, the Authority may, in writing, authorise a Representative to be present when an Inspector is carrying out his functions and powers under section 44B of the Income Tax Ordinance or any other person or authority is carrying out similar tax-related functions or powers under an enactment.

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Protection of persons disclosing confidential information.

8. (1) A person who divulges any confidential information or makes any statement for the purposes of a request shall be deemed not to commit any offence under any law by reason only of such disclosure or the making of such statement, and such disclosure or statement shall be deemed not to be a breach of any confidential relationship between that person and any other person.

(2) No civil claim or action whatsoever shall lie against a person who makes a disclosure or statement referred to in subsection (1) or against such person's principal or employer by reason of such disclosure or statement.

9. (1) The particulars of and all matters relating to a request shall be treated as confidential, and no person who is notified of a request, or is required to take any action, or supply any information in response to or in relation to any matters to which a request relates, shall disclose the fact of the receipt of such request or any of the particulars required or information supplied to any other person except in accordance with the Agreement.

Confidentiality with regard to a request.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding two years, or both.

10. For the purposes of this Act and the Agreement, the service of any notice or document shall be sufficient if delivered by hand or posted by registered post to the registered or other officer of the addressee and affidavit testimony of delivery of the notice or document by hand or supporting the registration certificate shall be deemed sufficient proof of such service.

Service of documents.

SCHEDULE

[Section 2(1)]

THE U.S.A. AGREEMENT

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, INCLUDING THE GOVERNMENT OF THE BRITISH VIRGIN ISLANDS, FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, (“the parties”), desiring to facilitate the exchange of information relating to taxes, have agreed as follows:

ARTICLE 1

SCOPE OF AGREEMENT

The competent authorities of the parties shall provide assistance through exchange of information relating to the administration and enforcement of the domestic laws of the parties concerning the taxes and the tax matters covered by this Agreement, including information that may be relevant to the determination, assessment, verification, enforcement or collection of tax claims with respect to persons subject to such taxes, or to the investigation or prosecution of criminal tax

evasion in relation to such persons. The territorial scope of this Agreement, in respect of the United Kingdom, is the territory of the British Virgin Islands.

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 party, or whether the person by whom the information is held is a resident or national of a 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

TAX COVERED

The taxes covered by this Agreement are in the case of the United States of America, federal income taxes; and in the case of the British Virgin Islands, such taxes as may from time to time, be imposed by law; provided that the types of tax covered may be extended by agreement between the competent authorities in the form of an exchange of letters.

ARTICLE 4

DEFINITIONS

In this Agreement –

“competent authority” means, for the United States of America, the Secretary of the Treasury or his delegate, and for the British Virgin Islands, the Financial Secretary or a person or authority designated by him in writing;

“criminal tax evasion” means wilfully, with dishonest intent to defraud the public revenue, evading or attempting to evade any tax liability where an affirmative act constituting an evasion or attempted evasion has occurred. The tax liability must be of a significant or substantial amount, either as an absolute amount or in relation to an annual tax liability, and the conduct involved must constitute a systematic effort or pattern of activity designed

or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities of either party. The competent authorities shall agree on the scope and extent falling within this definition;

“information” means any fact, statement, document or record in whatever form;

“information gathering measures” means judicial, regulatory or administrative procedures enabling a requested party to obtain and provide the information requested;

“items subject to legal privilege” means:

- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
- (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his 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
- (c) items enclosed with or referred to in such communications and made –
 - (i) in connection with the giving of legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

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

“person” means a natural person, a company or any other body or group of persons;

“requested party” means the party to this Agreement which is requested to provide or has provided information in response to a request;

“requesting party” means the party to this Agreement submitting a request for or having received information from the requested party;

“tax” means any tax covered by this Agreement.

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 information, the requested party shall take all relevant information gathering measures to provide the requesting party with the information requested, notwithstanding that the requested party may not, at that time, 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 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 beneficial ownership of companies, partnerships and other persons.

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 relevance of the information sought to the request:

- (a) the name of the authority seeking the information or conducting the investigation or proceeding to which the request relates;
- (b) the identity of the taxpayer under examination or investigation;

- (c) the nature and type of the information requested, including a description of the specific evidence, information or other assistance sought;
- (d) the tax purposes for which the information is sought;
- (e) the period of time with respect to which the information is requested;
- (f) 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 relevant to the tax purposes of the request;
- (g) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- (h) 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.

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 a reasonable period relative to the nature 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 to 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, 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 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.

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 of the requested party.

2. This Agreement shall not impose upon a party any obligation to provide items subject to legal privilege, nor any trade, business, industrial, commercial or professional secret or trade process. Information described in Article 5(4) 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 giving rise to the request is disputed by the taxpayer.

4. The requested party shall not be required to obtain and provide information which the requesting party would be unable to obtain in similar circumstances:

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

ARTICLE 8

CONFIDENTIALITY

1. All information provided and received by the competent authorities of the parties shall be kept confidential and shall be disclosed only to persons or authorities (including judicial, administrative and, in the case of the United States, Congressional oversight authorities or, in the case of the British Virgin Islands, a select committee of the Legislative Council) 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. Except as provided in paragraph 1, information provided under this Agreement shall not be disclosed to any third party.

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, provided and to the extent that these are not so burdensome or time-consuming as to act as impediments to access to the information.

ARTICLE 10

ADMINISTRATION COSTS OR DIFFICULTIES

1. The requesting party shall reimburse the requested party for direct out of pocket costs of processing each request (including direct out of pocket costs of litigation directly relating to such request), as agreed by the parties.

2. In the event that compliance with the obligations under this Agreement occasions undue difficulty for either party, either as a result of the number or complexity of requests, the respective competent authorities shall consult with a view to resolving the difficulty under Article 11.

ARTICLE 11

MUTUAL AGREEMENT PROCEDURE

Where difficulties or doubts arise between the 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.

ARTICLE 12

ENTRY INTO FORCE

1. This Agreement shall enter into force when each party has notified the other of the completion of its necessary internal procedures for entry into force. Upon entry into force it shall have effect for criminal tax evasion beginning on 1 January 2004, and with respect to all other matters covered in Article 1 beginning on 1 January 2006.

2. Upon entry into force, the provisions of the Agreement shall have effect with respect to criminal tax evasion for taxable periods commencing from 2003, and shall have effect with respect to all other matters for taxable periods commencing from 2006.

ARTICLE 13

TERMINATION

1. This Agreement shall remain in force until terminated by either party.
2. Either party may terminate this Agreement by giving notice of termination in writing. Such termination shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of notice of termination by the other party.
3. A party which terminates this Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorised in that behalf by the respective parties, have signed this Agreement.

Done at Washington, in duplicate, this 3rd day of April, 2002.

For the Government of
the United States of
America:

PAUL O'NEILL

For the Government of
the United Kingdom of
Great Britain and Northern
Ireland:

CHRISTOPHER MEYER

For the Government of
the British Virgin Islands:

F. J. SAVAGE

**COMPETENT AUTHORITY AGREEMENT BETWEEN THE
DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA
AND THE MINISTRY OF FINANCE, BRITISH VIRGIN ISLANDS**

The Competent Authorities agree that “criminal tax evasion” as defined in Article 4 of the Tax Information Exchange Agreement (“the Agreement”) between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, shall be interpreted as follows:

1. “Criminal tax evasion” shall include, but not necessarily be limited to, the following offenses under U.S. law, provided that the conduct involved otherwise falls within the definition of criminal tax evasion provided in Article 4 of the Agreement:
 - A. attempting to evade or defeat the assessment or collection of a tax;
 - B. signing and filing a document, required by law to be filed to advise tax authorities of the amount of tax due, or pertaining to the collection or payment thereof, that is false as to any material matter;
 - C. aiding or assisting in the preparation of a document, required by law to advise tax authorities of the amount of tax due, that is false as to any material matter, whether or not such falsity is with the knowledge or consent of the person authorized or required to present such document;
 - D. corruptly obstructing or impeding, or endeavouring to obstruct or impede, the due administration of tax assessment and collection; and
 - E. conspiring to commit any of the above-stated offenses or conspiring to defraud the government.

In determining whether any of these offenses “relates to a tax liability that is significant or substantial either as an absolute amount or in relation to an annual tax liability” (as required by the definition in Article 4 of the Agreement), it shall not be required that the tax liability in question (1) be owed by the perpetrator of the offense himself or itself (for example, where the perpetrator aids and assists in the preparation of another taxpayer’s document); (2) relate to the tax year referenced in the document forming the basis of the offense; or (3) be exactly determined or formally assessed at the time of the offense or the making of the request for assistance, provided that the request contains evidence of a tax liability sufficient to meet the requirements of the Agreement. Furthermore in the case of any above-stated offense which does not require an existing tax liability as an element, such as an offense described in B, C, D and perhaps E, the requesting party may show that the offense “relates to a tax liability that is significant or substantial either as an absolute amount or in relation to an annual tax liability” by establishing that the perpetrator had a tax evasion motive falling within this description.

2. The following factual circumstances, especially where they appear in a combination or pattern, shall be relevant to the Competent Authority’s determination whether the conduct described in a request constitutes a

systematic effort or pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities:

- A. preparing, causing to be prepared, signing or filing any document that is (1) required by law to be filed to advise tax authorities of the amount of tax due and (2) false as to any matter necessary to the determination of such tax or having a tendency to impede the tax authorities in verifying or auditing the document;
- B. keeping a double set of books, one of which is directed at establishing the true amount of tax due and the other of which is directed at establishing less than the true amount of tax due and is used to prepare, or is available to support, a false declaration to tax authorities regarding the amount of tax due;
- C. making false entries or alterations, directed at establishing less than the true amount of tax due, to a set of books that is used to prepare, or is available to support, a false declaration to tax authorities regarding the amount of tax due;
- D. creating false invoices or documents, or altering invoices or documents that are used to prepare, or are available to support, a false declaration to tax authorities regarding the amount of tax due;
- E. destroying books or records that establish the true amount of tax due;
- F. concealing assets or sources of income that constitute evidence of, or that could be used to satisfy, the true amount of tax due; and
- G. handling one's affairs to avoid making the usual records that constitute evidence of the true amount of tax due.

Department of Treasury
Internal Revenue Service
United States of America

Ministry of Finance
Government of the
British Virgin Islands

CAROL A. DUNAHOO
Director, International
Large and Mid-Size Business Division

FRANK J. SAVAGE
Governor

Date: April 3, 2002

Date: April 3, 2002

**COMPETENT AUTHORITY AGREEMENT BETWEEN THE
DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA
AND THE MINISTRY OF FINANCE, BRITISH VIRGIN ISLANDS**

With reference to the Tax Information Exchange Agreement (“the Agreement”) between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the British Virgin Islands, the Competent Authorities agree as follows:

1. With reference to Article 5, Section 2 of the Agreement, in the event that a requesting party is unable to provide additional information as requested of it pursuant to the provisions of Article 5, Section 1, this circumstance may frustrate the information gathering measures available to the requested party.
2. Accordingly, it is understood by the parties that the Competent Authorities will work together in an effort to ensure that, where a request is received by the requested party, it is able to properly and effectively implement the appropriate information gathering measures.

Department of Treasury
Internal Revenue Service
United States of America

Ministry of Finance
Government of the
British Virgin Islands

CAROL A. DUNAHOO
Director, International
Large and Mid-Size Business Division

FRANK J. SAVAGE
Governor

Date: April 3, 2002

Date: April 3, 2002

Passed by the Legislative Council this 30th day of December, 2003.

V. INEZ ARCHIBALD,
Speaker.

DENNISTON FRASER,
Clerk of the Legislative Council.