

TAX INFORMATION EXCHANGE AGREEMENT WITH THE UNITED STATES OF AMERICA

**Lodged au Greffe on 24th September 2002
by the Policy and Resources Committee**



STATES OF JERSEY

STATES GREFFE

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PROPOSITION

THE STATES are asked to decide whether they are of opinion -

- (a) to endorse the proposed Agreement for the exchange of information relating to taxes between the Governments of the United States of America and the States of Jersey, annexed to the report of 23rd September 2002 of the Policy and Resources Committee, and to authorise the President of that Committee to sign the said Agreement on behalf of the States;
- (b) to authorise the President of the Policy and Resources Committee, with the prior approval of that Committee and after it has consulted with H.M. Attorney General, to sign on behalf of the States such further agreements as may be negotiated with other countries or territories, whether or not in precisely the same terms, and to agree that copies of any such agreements should be presented to the States for their information as soon as reasonably possible after they have been signed.

POLICY AND RESOURCES COMMITTEE

Report

1. Members will recall that in the statement of the President of the Policy and Resources Committee to the Assembly on 27th February 2002, they were advised that the Island had made a commitment to the Organisation for Economic Co-operation and Development (OECD) in connection with the latter's initiative in respect of so-called 'harmful tax practices'.
2. The commitment made by the Policy and Resources Committee on behalf of the Island included these provisions -
“Jersey will:
...
(4) provide to tax authorities upon specific request, and in accordance with Tax Information Exchange Agreements to be negotiated with individual countries, information that may be relevant to civil tax matters;

(5) allow information to be exchanged through administrative means, in accordance with Tax Information Exchange Agreements to be negotiated, with persons or authorities concerned with the assessment or collection of tax, or enforcement or prosecution or the determination of appeals in relation to taxes (including Courts and duly authorised administrative bodies);

(6) negotiate Tax Information Exchange Agreements in accordance with the foregoing, subject to there being full reciprocity (i.e. the other party has the same or equivalent provisions for the relevant exchange of information including adequate protection against the unauthorised disclosure of information by the receiving jurisdiction and taking fully into account privacy obligations arising out of Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights and similar obligations).”
3. The letter to the OECD also included references to transparency obligations and in relation to those obligations stated that information on beneficial ownership of companies, partnerships and other legal entities, and bank information and accounts kept by companies, partnerships and trusts would be susceptible to exchange in accordance with Tax Information Exchange Agreements to be negotiated.
4. Members will recall that the OECD initiative also originally included within its scope the issue of 'ring-fenced' tax regimes. The United States of America however made a telling intervention in the debate within the OECD in 2001, following the advent of the Bush Administration, and as a result the OECD demands in relation to the ending of 'ring-fenced' regimes were scaled back. The Secretary of the United States Treasury, Mr. Paul O'Neill, made a public statement in July 2001 to a Congressional Committee to the effect that the U.S.A. wished the emphasis of the OECD's initiative to be now firmly upon exchange of information and thus intended over the ensuing year to seek to negotiate tax information exchange agreements with a significant number of the jurisdictions that had already made, or were expected soon to be making, appropriate commitments to the OECD.
5. In its negotiation of the Jersey-U.S.A. Agreement that is now proposed, the Policy and Resources Committee has paid primary regard to -
 - (i) the need to demonstrate internationally that the Island's commitment to the OECD was a genuine commitment that the Island intends to deliver;
 - (ii) the desirability of reinforcing the already good relations which exist between Jersey and the United States of America in relation to the exchange of information in criminal tax matters;
 - (iii) the need to seek to conclude an agreement which is at least as beneficial as similar agreements that have been made lately by the U.S.A. with other relevant jurisdictions;
 - (iv) the need to arrive at a convenient precedent for future similar agreements.
 - (v) the terms of other similar agreements recently entered into by the United States of America.
6. The Committee considers that the proposed Agreement that has been negotiated with the United States of America reflects the achievement of these primary objectives and does clearly begin to give effect to the Commitment made to the OECD in a manner that will sustain the Island's international reputation. In the circumstances the Committee seeks authorisation from the States that the Agreement may be signed by the President of the Policy and Resources Committee on behalf of the States of Jersey. The signing ceremony would be a not unimportant political event in its

own right, held probably in Washington and presenting an opportunity for Jersey to demonstrate to an important audience its reputation as an international finance centre.

7. The Assembly will wish to be aware that the negotiations with the U.S.A. have been conducted jointly with Guernsey, mirroring the very successful joint approach adopted in respect of the OECD commitment itself. Guernsey has just signed an agreement in exactly the same terms as that now proposed for Jersey. The Isle of Man is also, it is understood, moving towards being ready to sign a very similar agreement.
8. It should be noted that the question of the execution of this Agreement has been the subject of considerable discussion with Her Majesty's Government. As Members will be aware, traditionally the United Kingdom has been responsible for the Island's external relations, and in normal circumstances, agreements with foreign countries would be made by the United Kingdom on the Island's behalf. For that reason, for example, the Agreement with France concerning fishing rights in Granville Bay was made for the Island by the United Kingdom. Agreements such as these, and indeed such as the one with the United States of America as is now proposed, create obligations. The Committee has taken the view from the outset that it would be undesirable with regard to Jersey's interests for the United Kingdom to face the difficulty that it might be asserted that the obligations under the Agreement were those of the United Kingdom and not of the Island, because if that were to happen, the United Kingdom might then be obliged to assert some power in relation to the substance of the Agreement. In the particular context of a Tax Information Exchange Agreement, the Committee's view is that Jersey's longstanding autonomy in tax matters makes it essential that any such agreement should be negotiated and signed by Island representatives. The Jersey negotiators have from the outset made it clear to the United States that the obligations were to be created for the Island and not the United Kingdom. Of course making any agreement requires that the other party to it is also prepared to enter into it. The Government of the United States of America has shown itself content to enter the Agreement directly with Jersey and the document has accordingly been drafted upon that basis.
9. Discussions have therefore taken place with the United Kingdom Government with a view to ensuring the clarity about obligations needed by all sides. These discussions have been very cordial but have naturally touched upon large questions of principle concerning the nature of Jersey's own international personality. The outcome has been a formal letter of entrustment addressed to the Jersey authorities enabling them to negotiate and conclude an Agreement with the United States notwithstanding the United Kingdom's responsibility for the Island's international relations. The Attorney General has expressed his contentment with this approach and accordingly has confirmed to the Committee that the States has the necessary authority to proceed. This approach has the potential for future use in similar situations to reflect the realities of Jersey's increasing need and entitlement to act internationally on its own account.
10. Members will note the statements in the proposed Agreement to the effect that the Island already exchanges information with the United States on criminal tax matters. Such exchange is made through the office of the Attorney General in the exercise of his powers under either the Investigation of Fraud (Jersey) Law 1991, as amended, or the Criminal Justice (International Co-operation) (Jersey) Law 2001. The proposed Agreement also envisages however exchange of information upon request in relation to civil tax matters from a date not later than 1st January 2006 in line with the commitment made to the OECD. This reflects the fact that the nature of tax offences and the way they are defined in law varies considerably from country to country. To implement this will require certain amendments to the Income Tax legislation in Jersey. The Committee draws the attention of the States to this fact, so that when those amendments are presented to the States, there will be awareness that the reasons for them lie in the OECD commitment and more particularly in the execution of any tax information exchange agreements. The changes which will be necessary will be such as to confer power on the Comptroller of Income Tax to require the production of information in Jersey for the purposes of giving assistance to a foreign tax authority. The detailed legislation will naturally set out such procedures and protections as are appropriate in connection with the exercise of any such powers. Apart from specific legal arrangements it will no doubt be necessary from time to time to review the workings of the Agreement with the US authorities and it is pleasing that, as the negotiations have proceeded, very good relations have been established with the US Treasury. The Policy and Resources Department will work to maintain these.
11. The context of the OECD commitment is such that one can anticipate a number of other countries seeking to make similar agreements with the Island. For resource reasons, it is unlikely that the Committee would be keen to seek to negotiate more than one such agreement at any given time. The content of any future agreement is however likely to be similar to that of the one now proposed with the United States of America although there may well be some differences depending upon political, legislative or economic factors which are perceived in relation to any particular country to be significant. If the States endorse the proposed Agreement with the United States of America, the Committee would be minded to think that the principle of such agreements has also been agreed and that it would therefore be convenient and desirable for the President of the Committee to be given the authority contained

in the proposition to sign further agreements, with the approval of the Committee, from time to time in the future. In the event that such further agreements are made, the Committee would naturally ensure that copies were presented to the Assembly for information in a timely manner. The second part of the Proposition accompanying this Report is drafted accordingly.

12. Representatives of the Island's finance industry have been kept informed of the progress of negotiations with the United States and have recognised the importance and value of the proposed Agreement not only because it begins to give effect to the commitment made to the OECD, which the industry wholeheartedly welcomed but also because it will keep the Island in step with the other jurisdictions that have been negotiating similarly with the United States.
13. The Agreement with the United States now proposed is an important step forward for the Island as it seeks to maintain and develop its leading position as an international finance centre in a world of fast changing markets and regulatory standards. It will have a positive impact in particular on sustaining the flow of business to Jersey from the U.S.A., and, more generally, serve as a key further part of the Island's reputational armoury internationally. The Policy and Resources Committee therefore strongly commends the Agreement to the States.

**AGREEMENT BETWEEN THE GOVERNMENT OF THE
UNITED STATES OF AMERICA AND THE
GOVERNMENT OF THE STATES OF JERSEY
FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES**

Whereas Jersey has long been active in international efforts in the fight against financial and other crimes, including recent efforts involving terrorist financing;

Whereas the Internal Revenue Service of the United States has determined Jersey's "know your customer" rules to be acceptable for purposes of the Qualified Intermediary regime, which provides simplified withholding and reporting obligations for payments of income from the United States to an account holder through one or more foreign intermediaries;

Whereas the Government of the States of Jersey and the Government of the United States ("the parties") recognise that present legislation already provides for the exchange of information in criminal tax matters, which under current practice is conducted by the United States through the Department of Justice and by Jersey through its Attorney General;

Whereas the parties wish to establish the terms and conditions governing the exchange of information relating to taxes;

Now, therefore, the parties have agreed as follows:

**Article 1
Scope of the Agreement**

The parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation or prosecution of criminal matters in relation to such persons.

**Article 2
Jurisdiction**

To enable the scope of this Agreement to be implemented, information shall be provided in accordance with this Agreement by the competent authority of the requested party without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a party. A requested party is not obliged to provide information which is neither held by its authorities nor in the possession of persons who are within its territorial jurisdiction.

**Article 3
Taxes Covered**

1. This Agreement shall apply to the following taxes imposed by the parties:
 - (a) in the case of the United States, all federal taxes,
 - (b) in the case of Jersey, all insular taxes.
2. This Agreement shall apply also to any identical or substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the parties so agree. The competent authority of each party shall notify the other of changes in laws which may affect the obligations of that party pursuant to this Agreement.
3. This Agreement shall not apply to the extent that an action or proceeding concerning taxes covered by this Agreement is barred by the requesting party's statute of limitations.
4. This Agreement shall not apply to taxes imposed by states, municipalities or other political subdivisions, or possessions of a party.

**Article 4
Definitions**

1. In this Agreement -

“competent authority” means, for the United States, the Secretary of the Treasury or his delegate;

and for Jersey, the Comptroller of Income Tax or his delegate, except that until a date not later than January 1, 2006, Her Majesty’s Attorney General for Jersey may act as the competent authority in respect of criminal tax matters;

“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;

“criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the requesting party;

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

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

“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;

“resident” means:

- (a) in the case of the United States, any United States citizen and any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws in force in the United States; and
- (b) in the case of Jersey, any person resident in Jersey, for the purposes of the Income Tax (Jersey) Law 1961, as amended.

“tax” means any tax covered by this Agreement.

2. For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term “United States” means the United States of America, including Puerto Rico, the Virgin Islands, Guam, and any other United States possession or territory.

For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term “Jersey” means the island of Jersey.

3. Any term not defined in this Agreement, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 10, shall have the meaning which it has under the laws of the parties relating to the taxes which are the subject of this Agreement.

Article 5
Exchange of Information Upon Request

- 1. The competent authority of the requested party shall provide upon request by the requesting party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the requested party needs such information for its own tax purposes or the conduct being investigated would constitute a crime under the laws of the requested party if it had occurred in the territory of the requested party. The competent authority of the requesting party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty.
- 2. If the information in the 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 it has the authority, for the purposes referred to in Article 1 of this Agreement and subject to Article 2 of this Agreement, to obtain and provide, through its competent authority and 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, including in the case of collective investment funds, information on shares, units and other interests; and in the case of trusts, information on settlors, trustees and beneficiaries, provided that this Agreement does not create an obligation for a party to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds, unless such information can be obtained without giving rise to disproportionate difficulties.
5. Any request for information made by a party shall be framed with the greatest degree of specificity possible. In all cases, such requests shall specify in writing the following:
 - (a) the identity of the taxpayer under examination or investigation;
 - (b) the period of time with respect to which the information is requested;
 - (c) the nature of the information requested and the form in which the requesting party would prefer to receive it;
 - (d) the matter under the requesting party's tax law with respect to which the information is sought;
 - (e) the reasons for believing that the information requested is foreseeably relevant or material to tax administration and enforcement of the requesting party, with respect to the person identified in subparagraph (a) of this paragraph;
 - (f) reasonable grounds for believing that the information requested is present in the requested party or is in the possession of a person within the jurisdiction of the requested party;
 - (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 statement 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 or in the normal course of administrative practice in similar circumstances, both for its own tax purposes and in response to a valid request from the requested party under this Agreement;
 - (i) a statement that the requesting party has pursued all reasonable means available in its own territory to obtain the information, except where that would give rise to disproportionate difficulty.

Article 6

Tax Investigations Abroad

1. By reasonable notice given in advance, a party may request that the other party allow officials of the requesting party to enter the territory of the requested party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals concerned. The competent party of the requesting party shall notify the competent authority of the requested party of the time and place of the intended meeting with the individuals 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 attend a tax examination 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 to obtain the information, 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:
 - (a) to provide items subject to legal privilege, nor any trade, business, industrial, commercial or professional secret or trade process, provided that information described in Article 5(4) shall not by reason of that fact alone be treated as such a secret or trade process; or
 - (b) to carry out administrative measures at variance with its laws and administrative practices, provided that nothing in this subparagraph shall affect the obligations of a party under Article 5(4).
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 under its own laws for the purpose of the administration/enforcement of its own tax laws or 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.
2. Information provided to the competent authority of a requesting party may not be used for any purpose other than for the purposes stated in Article 1, without the prior express written consent of the requested party.
3. Information provided shall be disclosed only to persons or authorities (including judicial, administrative, and Congressional oversight authorities) 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.
4. Information provided to a requesting party under this Agreement may not be disclosed to any third party, including an agency or employee of any other government.

Article 9

Costs

The requesting party shall reimburse the requested party for all direct costs incurred in providing information pursuant to this Agreement. The respective competent authorities shall consult from time to time with regard to this Article, and in particular the competent authority of the requested party shall consult with the competent authority of the requesting party if the costs of providing information with respect to a specific request are expected to be significant.

Article 10
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 11
Mutual Assistance Procedure

If both competent authorities of the parties consider it appropriate to do so they may agree to exchange technical know-how, develop new audit techniques, identify new areas of non-compliance, and jointly study non-compliance areas.

Article 12
Entry into Force

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 matters forthwith and, in respect of other matters covered in Article 1, on January 1, 2006 or such earlier date as may be agreed in an exchange of letters by the competent authorities.

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 the Agreement.

Done at Washington in duplicate this _____ day of _____, 2002.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

FOR THE GOVERNMENT OF THE
STATES OF JERSEY