

GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE
OF INFORMATION FOR TAX PURPOSES

Peer Review Report
Phase 1
Legal and Regulatory Framework

BOTSWANA



September 2010
(reflecting the legal and regulatory
framework as at May 2010)

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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 90 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, and in Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary as updated in 2004, which has been incorporated in the UN Model Tax Convention.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 plus Phase 2 – reviews. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to www.oecd.org/tax/transparency.

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in the Republic of Botswana.

2. Botswana is not a member of the Global Forum, but was identified as a jurisdiction that is relevant to the Global Forum's work as a result of the establishment of the Botswana International Financial Services Centre (the Botswana IFSC). The Botswana IFSC is intended to serve as an entry point for capital investment in Africa and leverages on Botswana's reputation as one of the most stable democracies in the region as well as one of Africa's most vibrant economies. Botswana IFSC companies benefit from a favourable tax environment but are not otherwise subject to special regimes governing entity formation or registration. Therefore, the rules applicable in Botswana generally are also relevant for Botswana IFSC companies.

3. The review of Botswana's legal and regulatory framework reveals a number of serious deficiencies which, taken together, make it impossible for Botswana to engage in effective exchange of information in tax matters. These are:

- Nominees – while Botswana's rules regarding the availability of ownership information are generally adequate regarding legal ownership, there is no provision to ensure that beneficial ownership information is available where the legal owner holds an interest on behalf of another person.
- Bank Secrecy – bank information can only be obtained where relevant to a civil or criminal proceeding taking place in Botswana.
- Inadequate confidentiality rules – information held by Botswana's tax authorities can be disclosed in a number of different circumstances beyond those prescribed by international standards.
- Lack of exchange of information agreements – Botswana only has one agreement in place that appears to provide for effective exchange of information in tax matters.

4. Botswana does not have in place elements which are crucial to it achieving an effective exchange of information and therefore will not move to a Phase 2 review until it has acted on recommendations contained in this report to achieve an improved legal and regulatory framework. Botswana's position will be reviewed when it provides a detailed written report to the Peer Review Group within 12 months of the adoption of this report.

5. The Peer Review Group wishes to acknowledge the spirit of co-operation shown by Botswana throughout the process and takes note with satisfaction of Botswana's intention to join the Global Forum in the near future.

Introduction

Information and methodology used for the peer review of Botswana

6. The assessment of the legal and regulatory framework of Botswana was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference*, and was prepared using the Global Forum's *Methodology for Peer reviews and Non-Member Reviews*. The assessment was based on the laws, regulations, and exchange-of-information mechanisms in force or effect as at May 2010, other materials supplied by Botswana, and information supplied by partner jurisdictions.

7. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Botswana's legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element a determination is made that either: (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations for improvement where relevant.

8. The assessment was conducted by an assessment team consisting of one representative of the Global Forum Secretariat and two expert assessors: Ms. Hyonae Park, Ministry of Strategy & Finance, Republic of Korea; and Ms. Oshna Maharaj, Manager, International Development and Treaties, Legislative Research and Development, Legal and Policy, South African Revenue Service ; and Mr. Andrew Auerbach from the Global Forum Secretariat. The assessment team assessed the legal and regulatory framework for transparency and exchange of information and relevant exchange-of-information mechanisms in Botswana.

Overview of Botswana

9. Botswana is one of Africa's most stable democracies and one of its fastest growing and performing economies. From independence in 1966 to date, Botswana has transformed from one of the poorest nations in the world to a middle income country. Botswana enjoys one of sub-Saharan Africa's highest GDP's per capita (USD 14 906 based on purchasing-power-parity - IMF). While Botswana's economy has been growing steadily

in recent years, the economy is estimated to have contracted by 6 percent in 2009. Diamonds play an important role in Botswana's economy. Although revenue from minerals (mostly diamonds) has declined over time, it is still the largest contributor to government revenue (accounting for an estimated 35.8 per cent in 2008-09, down from 40.55 per cent in 2007/08). In value terms, diamonds continue to account for more than 70 per cent of the country's exports. Tourism, financial services, subsistence farming, and cattle-raising are other key sectors. Botswana's financial sector includes banks, insurance companies and a growing stock market. The sectors recording the highest growth in 2008 were services and the public sector. More specifically, value added in the banking, insurance and business services sector is estimated to have grown at almost twice the rate of 5.9 per cent posted in 2007. (*African Economic Outlook*)

Botswana Tax System

10. Botswana generally operates a territorial tax system, however, foreign-source investment income is deemed to be from a source in Botswana. Resident individuals are subject to tax on a progressive scale from 5-25 percent. Corporate income tax is levied on the Botswana source taxable income on all companies, other than tax exempt bodies and small companies that elect to be treated as partnerships or sole proprietorships. A company, for income tax purposes, includes any body corporate and any association or society, but excludes a partnership. The corporate income tax rate is split into 2-tiers: a basic company tax of 15 percent and an additional company tax of 10 percent. Non-resident entities carrying on business in Botswana are liable to tax in Botswana on the same basis as resident companies, except the 2-tier system of taxation is not applicable. Instead, these branches are subject to tax at a single rate of 25 percent.

The Botswana International Financial Services Centre

11. In 2003, Botswana established the International Financial Services Centre (IFSC), with the aim of developing Botswana as a hub for cross border financial and business services into Africa and the region. As Botswana is one of the most stable and economically developed countries in the region, it is a natural destination for capital from neighbouring jurisdictions, as well as being a natural staging ground for investment into Africa generally. The Botswana IFSC is one of the initiatives that the government of Botswana has taken to reduce the country's reliance on mineral revenues, especially diamonds.

12. The attraction of the IFSC is the generous tax benefits that are granted to IFSC entities. These include a discounted corporate tax rate of 15

percent of profits (*Income Tax Act*, 8th Schedule), although they are taxable on their worldwide income (*Income Tax Act*, s. 139). Payments of interest, dividends, management fees and royalties are exempt from tax when paid to a non-resident (*Income Tax Act*, ss. 33, 58). IFSC companies are also exempted from VAT and capital gains tax.

13. The IFSC appears to be focused primarily on international banking and insurance industries. The activities permitted in the IFSC are:

- banking and financing operations transacted in foreign currency;
- the broking and trading of securities denominated in foreign currency;
- investment advice;
- management and custodial functions in relation to collective investment schemes;
- insurance and related activities;
- registrars and transfer agency services;
- exploitation of intellectual property;
- development and supply of computer software for use in the provision of services described above;
- accounting and financial administration.
- holding and administration of group companies;
- shared financial services;
- business process outsourcing (BPOs) and call centres; and
- mutual funds

14. In 2008, Botswana established the Non-Bank Financial Institutions Regulatory Authority (NBFIRA), which took over the supervision and oversight of all non-bank financial institutions in the country from the Ministry of Finance and Development Planning. Banks in the IFSC (and Botswana generally) are regulated by the Bank of Botswana.

Under the *Income Tax Act*, IFSC companies are required to undertake to abide by the reporting requirements under the *Bank of Botswana Act*.

15. Botswana's robust economy and political stability set it apart from many of its neighbours and in Africa generally. While Botswana continues to rely upon mining for a disproportionately large percentage of its GDP, the government is anxious to diversify its economy. The efforts put into the development of an international financial services centre as a destination for capital investment in Botswana and within the region is an important part of this strategy and underscores the need for Botswana to fully respect the international standards of transparency and exchange of information for tax purposes.

Compliance with the Standards

A. Availability of Information

Overview

16. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report assesses the adequacy of Botswana's legal and regulatory framework on availability of information.

17. In most cases, ownership and identity information are available for relevant entities and arrangements. All companies formed under Botswana's laws must maintain a shareholder register or register of members that identifies the legal owner of the company. Any transfers in ownership must be recorded in the register. While there is no explicit prohibition on bearer shares in the *Companies Act*, Botswana's officials have confirmed that such shares are not issued.

18. Foreign companies limited by shares that are operating in Botswana are required to register with the Registrar of Companies where they are "carrying on business" in Botswana, and to file an annual return that includes the name and address of each shareholder. While there is no requirement that these companies maintain a share register or other ownership information as required by companies incorporated in Botswana, a resident of Botswana

must be appointed to accept service of process and to be answerable for all matters required of the company under the *Companies Act*. In addition, a foreign corporation doing business in Botswana will be required to register for tax purposes, and provide background information, which does not necessarily include the name of the shareholders but must include details of the company's bank account (name of bank, branch, account number).

19. In the case of nominee shareholders, there does not appear to be any provision made for ensuring that information is available that identifies the person on whose behalf the nominee holds the shares. The absence of such information is problematic, as company formation can be accomplished by legal representatives who hold the shares on behalf of an unidentified client.

20. For partnerships, the tax law requires partners earning income in Botswana through a partnership or which carries on business in Botswana to file annual tax returns. The partnership is also required to file a return. The tax return for a partnership must be completed by the precedent resident acting partner or the resident agent and must include the name and address of each partner.

21. In the case of trusts, the tax laws require that income of the trust is taxed in the hands of the trustee. For these purposes the term "trustee" is very broadly defined and includes any person administering trust assets or any person acting in any fiduciary capacity. While Botswana's tax system is a territorial one, investment income earned by a resident of Botswana is deemed to be from a source situated in Botswana. Accordingly, even where a Botswana resident trustee invests the trust property outside of Botswana, the trustee must register for tax purposes and file annual returns. Neither the registration form nor the trust tax return requires the identity of the settlor or beneficiary to be stated.

22. Societies must be registered but only information concerning the identity of the officers of the society must be provided. The society is not obligated to maintain a register of membership.

23. Accounting records are required to be maintained, except in the case of societies, although underlying documentation must only be maintained where an entity is carrying on a business.

24. Overall, many of the elements are in place to ensure the availability of ownership, identity, accounting and bank information. However, some improvements are needed to ensure effective exchange of information, notably with respect to the availability of information on the owners of companies where shares are held by nominees, the maintenance of identity information concerning trusts, and the maintenance of underlying

documentation (such as receipts, invoices, contracts) as part of the obligation to maintain accounting records.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

Companies (ToR¹ A.1.1)

25. *The Companies Act* (Ch. 42:01) provides for the creation of three types of companies:

- Companies limited by shares
- Close companies
- Companies limited by guarantee

26. The Registrar of Companies is responsible for maintaining a register of all companies registered or deemed to be registered under the *Companies Act*, all external companies and dormant companies. The *Companies Act* sets out the essential requirements for incorporation (*Companies Act*, ss. 19-24) and requires that an application for incorporation must be made to the Registrar that includes the full name and residential address of every shareholder or member of the proposed company (*Companies Act*, s. 21(2)(c)). The application must be accompanied by a declaration by a person engaged in the formation of the company that the application complies with the provisions of the Act, and this person must be: a legal practitioner; a member of the Botswana Institute of Accountants; a member of the Southern African Institute of Chartered Secretaries and Administrators; or such other class of persons as the Minister may prescribe.

27. Information concerning the issuance of additional shares following incorporation or the transfer of shares issued on incorporation is not provided to the Registrar. This information is maintained by companies limited by shares. The company is required to maintain in Botswana a share register, which shall state, with respect to each class of shares the names and the latest known address of each person who is, or has within the last seven years been, a shareholder (*Companies Act*, s. 83). The name of any transferee

¹ *Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information*

shareholder must be entered on the share register (*Companies Act*, s. 81). In order to transfer shares, the transferor must provide a transfer form to the company (or an agent of the company that maintains the register). On receipt of the form, the company shall enter the name of the transferee on the share register as holder of the shares. The share register must be available for public inspection (*Companies Act*, s. 218(1)(c)).

28. Close companies are private companies not having more than 5 members, each of which must be an individual and which applies for registration under Part XIX of the *Companies Act*. The management of a close company is vested in its members, and each member stands in a fiduciary relationship to the company and the other members (*Companies Act*, s. 264). Close companies may not carry on the business of banking or insurance. As with companies limited by guarantee, the provisions of the *Companies Act* apply with necessary modifications to a close company, references to shareholders are read as referring to members. Consequently, close companies must maintain a register of members. For close companies, wherever a change has occurred with respect to the names and addresses of each member, in addition to the obligation to update the share register, notice in writing of this change must be provided to the Registrar within 30 days (*Companies Act*, s. 261).

29. Companies without share capital, including companies limited by guarantee, are subject to similar requirements and must maintain a register of members that includes the name and address of each person who has been a member of the company (*Companies Act*, s. 244).

30. A private company is a company that has no more than 25 shareholders and is subject to less stringent governance rules. In particular, private companies are exempt from certain bookkeeping and accounting requirements, however, these exemptions do not affect the requirements for maintenance of ownership information under the general rules.

31. The *Companies Act* provides for the registration of foreign companies doing business in Botswana. External companies that either have a place of business in Botswana or are carrying on business in Botswana must register with the Registrar (*Companies Act*, s. 344). The term “carrying on business in Botswana” includes establishing or using a share transfer office or a share registration office in Botswana; or (ii) administering, managing, or dealing with property in Botswana as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner. Section 344 of the *Companies Act* provides that an external company does not carry on business in Botswana merely because it:

- is or becomes a party to a legal proceeding or settles a legal proceeding or claim or dispute;

- holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs in Botswana;
- maintains a bank account in Botswana;
- effects a sale of property through an independent contractor;
- solicits or procures an order for delivery in Botswana or elsewhere that becomes a binding contract only if the order is accepted outside Botswana;
- creates evidence of a debt or creates a charge on property;
- secures or collects any of its debts or enforces its rights in relation to securities relating to those debts;
- conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
- invests its funds or holds property in Botswana.

32. The registration requirements for an external company do not require that the company provide information concerning the identity of the company's shareholders or members. The external company must provide copies of its articles of incorporation or registration, its constitution, charter or articles, a list of its directors, and the name and address of a person resident in Botswana (other than an external company) who is appointed to have responsibility for the management of the company in Botswana, accept service of process and to be answerable for all matters required of the company under the *Companies Act*. The Registrar has the power to call for the production of or inspect any book required to be kept by the company (*Companies Act*, s. 14), however, it is unclear whether this includes the power to inspect documents required to be kept under the companies' law of incorporation. However, all companies limited by shares, including those formed under the *Companies Act* and those registered as external companies (*i.e.*, foreign companies doing business in Botswana) must file an annual return that includes the name and address of each shareholder (*Companies Act*, s. 217).

International Financial Services Centre Companies

33. No special regime applies to companies that are part of the Botswana IFSC. To become part of the IFSC, applicants must:

- Select and reserve three possible names for consideration by the Registrar of Companies.
- Sign the declaration of compliance of statutory requirements for incorporation before a commissioner for oaths.
- Return the complete statutory return to the Registrar of Companies about re-allotment, directors, auditors, company secretary, and registered officers.
- Register the company with the Registrar of Companies at the Ministry of Commerce and Industry.
- Advertise the intention of applying for a license in the official gazette.
- Obtain an approval of the working conditions after an inspection of company premises.
- Obtain an industrial license from the Industrial Affairs Department, Ministry of Commerce and Industry; or obtain a trading license from the local authority.
- Register for a Corporate Income Tax number with the Commissioner of Taxes and obtain the approval from the Commissioner of Taxes for the appointment of a public officer who is in charge of tax returns.
- Register for VAT with the Director of Customs & Excise.
- Register employees for work injury insurance.

34. Accordingly, the Botswana IFSC does not create a separate corporate formation regime or otherwise allow for the creation of entities that would be subject to a distinct set of rules than those that apply to companies generally. The *Income Tax Act* provides a separate tax regime that applies to IFSC certified companies; however the general requirement to register for tax purposes and provide annual returns continues to apply to such companies.

Bearer shares (ToR A.1.2)

35. There are no bearer shares in Botswana. While the issue of bearer shares is not dealt with explicitly in the *Companies Act*, the term “shareholder” is defined in section 90 to mean:

- a person whose name is entered in the share register as the holder for the time being of one or more shares in the company,
- until the person’s name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company, or
- until the person’s name is entered in the share register, a person who is entitled to have that person’s name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company.

36. While there is no explicit prohibition on bearer shares in the *Companies Act*, the rights attaching to the ownership of a share do not transfer until the transferee’s name is entered in the share register (apart from limited exceptions regarding initial formation of the company and amalgamation).

Nominees

37. Situations in which a nominee holds a share on behalf of another person are not adequately addressed in Botswana’s company law. The term “nominee” is defined in the *Companies Act* to mean a person who, in exercising a right in relation to a share, debenture or other property, is entitled to exercise that right only in accordance with instructions given by some other person either directly or through the agency of one or more persons. This definition has relevance for a number of aspects of the *Companies Act* (e.g. determining control of a company), but does not appear to have any impact on the application of the rules related to the maintenance of ownership information. For example, the definition of “shareholder”, as discussed above, appears to require that only the nominal shareholder is listed in the share register, regardless of whether that shareholder holds the share for the benefit of a third party.

Partnerships (ToR A.1.3)

38. There are no statutory provisions relating to the formation or governance of partnerships under Botswana’s laws. Partnerships are therefore

governed by the common law, which combines both English law and Roman-Dutch legal traditions. Generally, the criteria for formation of a partnership are similar to the English common law, namely a partnership consists of two or more persons working together with a view to profit.

39. Botswana's officials state that information concerning the identity of the partners must be kept by the precedent partner or an agent of the partnership, however, the legal basis for this has not been provided. These representatives must be resident individuals. This information includes the partnership agreement where one exists. There is no prescription of the manner in which this information is to be kept. However, the requirements imposed by Botswana's anti-money laundering laws and income tax laws, as discussed below, provide adequate assurance that identity information concerning the partners in partnerships is available.

Income Tax Law

40. Generally, any person earning taxable income in Botswana must file an annual return with the Botswana Unified Revenue Service (BURS) for tax purposes (*Income Tax Act*, s.65). Additionally, a partnership carrying on business in Botswana is required to be represented by a resident individual who is either the "precedent" partner or, if no partner is resident in Botswana, the agent of the partnership in Botswana (*Income Tax Act*, s. 136).

41. A partnership is not subject to tax in its own right (*Income Tax Act*, s. 21). Rather each partner is chargeable to tax in proportion to the partner's entitlement to the partnership's "chargeable income" for the year. Partnerships earning income chargeable to tax in Botswana are required to file a tax return with the BURS, and each partner must also file an individual return. The partnership return requires that the name and address of each partner be included.

42. Botswana operates a territorial tax system and "gross income" is income from a source in Botswana (or deemed to be from a source in Botswana) (*Income Tax Act*, s.9). Accordingly, a partnership that does not earn income from a source in Botswana should not be subject to the reporting requirements in the *Income Tax Act*. However, certain income is deemed to have accrued from a source situated in Botswana (*Income Tax Act*, s. 11) and includes in paragraph (i) "any investment made outside Botswana or any business carried on outside Botswana by a resident of Botswana". The rule relating to foreign investment does not apply to non-citizens resident in Botswana. It is unclear under what conditions a partnership is "resident" for these purposes, or whether the rule only applies to the resident partners.

Anti-money Laundering Law

43. One of the main components of Botswana’s anti-money laundering laws is the *Proceeds of Serious Crime Act* (Ch. 08:03). The act requires certain “designated bodies” to carry out customer due diligence (*Proceeds of Serious Crime Act*, s. 17). These “designated bodies” are:

- a bank licensed under the *Banking Act*;
- a building society registered under the *Building Society Act*;
- a collective investment undertaking established under the *Collective Investment Undertakings Act*;
- Botswana Savings Bank established under the *Botswana Savings Bank Act*;
- a post office designated under the *Post Office Act*;
- a licensed stockbroker in terms of the *Botswana Stock Exchange Act*;
- a long term insurance business specified under the *Insurance Industry Act*;
- a person who transacts foreign exchange business licensed under the *Bank of Botswana Act*;
- an international financial services centre certification committee constituted under the *Income Tax Act*;
- any other person or body as may by order be prescribed by the Minister under section 23.

44. Neither trust or company service providers nor lawyers are included in the definition of designated bodies. The designated bodies are required to ascertain the identity of customers with whom they enter into certain business relationships defined in a schedule to the act. These business relationships are:

- Lending
- Financial leasing

- Money transmission services
- Issuing and administering means of payment (*e.g.* credit cards, travellers' cheques and bankers' drafts)
- Guarantees and commitments
- Trading for own account or for account of customers in:
 1. money market instruments;
 2. foreign exchange;
 3. financial futures and options;
 4. exchange and interest rate instruments;
 5. transferrable securities
- Participation in share issues and the provision of services related to such issues;
- Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings;
- Money broking;
- Portfolio management and advice;
- Safekeeping and administration of securities;
- Safe custody services, including:
 - consumer credit;
 - mortgage credit;
 - factoring, with or without recourse;
 - financing of commercial transactions (including forfeiting);
- All types of direct life assurance (including annuities, supplementary insurance carried on by life assurance undertakings, permanent health

insurance, capital redemption, operations management of group pension funds, marriage assurance, birth assurance);

- Any other activity which may be prescribed.

45. The business relationships covered do not include acting as a professional trustee or company services provider (*e.g.* company formation, director services). In addition, there is no guidance given to indicate what information the designated body is required to obtain or what steps they must take to verify the information.

46. The customer due diligence requirements apply where the transaction (or series of transactions) relate to an amount greater than a *de minimis* amount (though the assessment team has not been provided with information about the exact monetary amount involved) or where on reasonable grounds, the designated body suspects that the business relationship, transaction or service is connected to the commission of a serious offence as defined under the act. A serious offence is one which is punishable by death or for which the penalty is no less than 2 years in prison.

47. Botswana’s officials indicate that lawyers as well as other financial service providers, are identified as “reporting entities” under the *Financial Intelligence Act, 2009*.

48. Overall, it appears that the AML rules do not systematically cover lawyers, accountants, or other financial service providers, and the due diligence requirements only apply where the value exceeds a threshold or involves a serious offence. Even where the rules do apply, it is not clear what information must be maintained. Consequently, these rules do not appear to provide any guarantee that service providers will be under an obligation to maintain identity information in any particular case, or even with respect to a general class of entities or transactions.

Trusts (ToR A.1.4)

49. There are no statutory provisions relating to the creation or governance of trusts under Botswana’s laws. Trusts are therefore governed by the common law, which combines both English law and Roman-Dutch legal traditions. Generally, the criteria for the creation of a trust are similar to the English common law, namely a trust is created where assets are transferred by a person (the settlor) to a trustee for the benefit of another person. Botswana officials have not provided information concerning the general law requirements for maintenance of identity information concerning beneficiaries and settlors.

50. In certain circumstances the tax law requires that information concerning trusts is maintained by the BURS. The trustee of a trust is taxable on Botswana-source income of the trust (*Income Tax Act*, s. 19). The term “trustee” is defined very broadly to include (*Income Tax Act*, s. 2):

- an executor, administrator, tutor or curator;
- a liquidator or judicial manager;
- any person having or taking upon himself or herself the administration or control of any property subject to a trust;
- any person acting in any fiduciary capacity; and
- any person having the possession, control or management of the property of a person under any legal or other disability;

51. As Botswana operates a territorial tax system, the requirements for registration and the filing of annual returns only applies where the trust earns Botswana-source income. As discussed above in paragraph 42, income from investments made outside of Botswana by a resident citizen of Botswana is deemed to be from a source situated in Botswana. Therefore, a Botswana resident trustee holding foreign assets in trust is liable to tax on the income in Botswana and is required to register with the BURS. When filing a trust tax return no information is required that identifies the settlor or beneficiary of the trust, nor is this required when registering for tax purposes.

52. Trusts created under foreign laws will have to register for tax purposes and complete an annual tax return only where the trust earns Botswana-source income in the year. This will generally be the case where the trustee is resident in Botswana. This will also be the case where the trustee is resident outside Botswana, but the trust assets are administered in Botswana, given the broad definition of trustee.

Foundations (ToR A.1.5)

53. Botswana’s laws do not provide for the establishment of foundations.

Enforcement provisions to ensure availability of information (ToR A.1.6.)

54. Companies as well as their directors are subject to fines under the *Companies Act* for failure to maintain documentation required by the Act. A

failure to maintain the share register carries a BWP 10 000 fine (approximately EUR 1 100)² under sections 83, 492 and 493. Section 186 imposes a BWP 20 000 fine on the company and its directors for failure to maintain its company records (including the share register) at its registered office. Where the board of directors fails to maintain accounting records in accordance with the Act, section 189 provides that each director is liable to a BWP 20 000 fine.

55. For partnerships and trusts subject to tax reporting obligations, interest is charged at the rate of 2 per cent per month on the amount of tax due and a penalty not to exceed the amount of tax due (*Income Tax Act*, s. 117). There are also penalties for failure to comply with the Act generally, including failure to furnish any return or document (including a tax registration form), and provides for a fine of BWP 1 000 and imprisonment for one year (*Income Tax Act*, s. 122).

56. In addition, the Commissioner General has powers to enter premises and seize documents where necessary in relation to the liability of any person to tax (*Income Tax Act*, s. 70).

57. The effectiveness of these measures will be evaluated in the course of Botswana's Phase 2 review.

Other relevant entities and arrangements

58. Botswana law allows for the creation of "societies". These entities include any club, company, partnership or association of 10 or more persons, whatever its nature or objects, but does not include (*Societies Act*, section 2):

- any company as defined by the *Companies Act*, or any company to which Part VII of that Act applies which has complied with the requirements of section 285 of that Act;
- any company or association constituted under any written law for the time being in force in Botswana;
- any trade union, federation of trade unions or employers' organization registered under the *Trade Unions and Employers' Organizations Act*;
- company, association or partnership consisting of not more than 20 persons, formed for the sole purpose of carrying on any lawful business;

² 1 BWP = 0.109242 EUR as at May 2010

- any co-operative society, registered under the *Co-operative Societies Act*;
- any board of governors, local education authority, school committee or similar organisation established under the *Education Act*;
- any building society registered under the *Building Societies Act*;
- any political party listed in the Schedule; or
- any society or class of society which may be declared not to be a society for the purposes of this Act.

59. The registration rules (see *Societies Act Subsidiary Legislation – Registration of Societies Regulations*) applicable to societies require the provision of identity information concerning the name and address of the officers of the society, but there are no rules requiring that a register of each member of the society must be maintained. However, a list of members can be compelled at any time. (See access to information concerning societies at paragraph 74, below).

Determination and factors underlying recommendations

| Determination | |
|---|---|
| The element is in place, but certain aspects of the legal implementation of the element need improvement. | |
| Factors underlying recommendations | Recommendations |
| There are no provisions made for nominee shareholders. | An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person. |
| Societies are not required to maintain information on their members. | Societies should be required to maintain a register of members. |
| While trusts with resident trustees (as broadly defined under the <i>Income Tax Act</i>) are required to register and file returns for tax purposes, there is no specific requirement that information concerning the settlor, trustees and beneficiaries of trusts be maintained. | An obligation should be established for trustees resident in Botswana to maintain information on the settlors, trustees and beneficiaries of their trusts. |

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

General requirements (ToR A.2.1)

60. Companies limited by shares must keep accounting records (*Companies Act*, s. 189) that:

- correctly record and explain the transactions of the company;
- shall at any time enable the financial position of the company to be determined with reasonable accuracy;
- shall enable the directors to prepare financial statements that comply with this Act; and
- shall enable the financial statements of the company to be readily and properly audited.

61. These requirements include an obligation to maintain records containing entries of money received and spent each day and the matters to which it relates and, where the business relates to the provision of services, a record of services provided and the relevant invoices (*Companies Act*, subsection 189(2)).

62. Private companies and companies limited by guarantee are subject by reference to these same rules. Close companies are subject to similar accounting rules as other companies, including the obligation to maintain records containing entries from day to day of all cash received and paid out as well as identifying the parties to the transactions (*Companies Act*, s. 270).

63. The *Income Tax Act* requires that every person carrying on a business must maintain “such records or books of account as the Commissioner General considers reasonable to reflect the true and full nature of the transactions of the business, regard being had to the nature of the activities concerned and the scale on which they are carried on” (*Income Tax Act*, s. 26). It is unclear whether a trust or partnership is required by this section to maintain records where the partnership or trust merely holds passive investments. The term “business” is defined to mean, “any business, trade, adventure or concern in the nature of trade, profession or vocation” (*Income Tax Act*, s. 2). The partnership and trust tax return requires the partnership or trust to attach copies of the trading, profit and loss and appropriation accounts with the balance sheet for all activities of the trust or partnership in the accounting period. It is unclear whether the accounts provided under this requirement meet the international standards.

64. In respect of societies registered under the *Societies Act*, there do not appear to be any requirements to maintain accounting records, however, the Registrar may at his or her discretion require the production of accounts (see paragraph 74, below).

Underlying documentation (ToR A.2.2)

65. There does not appear to be a commercial law requirement for companies to maintain underlying documentation (such as invoices, contracts, *etc.*) in support of the accounting records, however, subsection 89(2) of the *Companies Act* specifies that the records must contain entries of money received and spent each day and the matters to which it relates. As well, there is a specific requirement that, in the case of the provision of services, a record of the services provided and the relevant invoices must be maintained. For income tax purposes, every person (including a partnership or trust) carrying on a business is required to maintain and preserve in Botswana all books of account and other documents which are essential to

the explanation of any entry in such books of account relating to that business for a period of eight years after the end of the tax year or accounting period to which such books of account or documents relate (*Income Tax Act*, section 26, 144). Botswana’s officials indicate that this provision is interpreted to require the maintenance of such items as invoices, vouchers and receipts.

5-year record retention standard (ToR A.2.3)

66. Companies must maintain accounting records for the current accounting period and the last seven completed accounting periods must be maintained at its registered office (*Companies Act*, s. 186). For tax purposes this period is eight years (*Income Tax Act*, s. 144). For partnerships and trusts that are carrying on a business, accounting information must be maintained for eight years.

Determination and factors underlying recommendations

| Determination | |
|--|---|
| The element is in place, but certain aspects of the legal implementation of the element need improvement. | |
| Factors underlying recommendations | Recommendations |
| There is no obligation for any entity to maintain underlying documentation unless they are carrying on a business. | The requirements to maintain accounting records should include an obligation to maintain underlying documentation. |
| The requirements to maintain accounting records for trusts and partnerships only apply where the trust or partnership is carrying on a business in Botswana. | Trusts and partnerships required to register for tax purposes should be required to maintain accounting records to the international standards. |
| Societies are not required to maintain accounting records. | Societies should be required to maintain accounting records to international standards. |

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1.)

67. Every bank in Botswana must keep records that exhibit clearly and accurately the state of its affairs and to explain its transactions and financial position so as to enable the Central Bank to determine whether the

bank concerned has complied with the provisions of the Act (*Banking Act*, s. 18). Banks are also required to establish the identity of the account-holder, and must maintain any records in this regard for five years (*Banking Act*, s.44).

Determination and factors underlying recommendations

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|---------------------------------|
| Determination |
| The element is in place. |

B. Access to Information

Overview

68. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Botswana’s legal and regulatory framework gives to the authorities access powers that cover the relevant types of persons and information and whether rights and safeguards would be compatible with effective exchange of information.

69. While some information is either publicly available or held by the governmental authorities, Botswana’s legal and regulatory framework only allows access to bank information for tax purposes where this is required for a court proceeding in Botswana.

B.1. Competent Authority’s ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

70. The Commissioner General of the BURS has broad powers to obtain information, “for the purpose of obtaining full information in respect of the chargeable income of any person” (*Income Tax Act*, section 69(1)). For this purpose the Commissioner General can require any person to furnish returns, statements of assets or other information

as may be required, to produce any books or records for inspection, or attend for the purposes of examination. However, this language may be limited to Botswana's domestic tax purposes, given that the provision refers specifically to "chargeable income". Sub-section 69(3) contains a broader rule that permits the Commissioner General to "by notice in writing, require any person to furnish annually, or at such intervals as the Commissioner General may determine, any information that the Commissioner General considers necessary to enable him or her to fulfil his or her duties under this Act."

71. The Minister of Finance may "enter into an agreement with the government of any other country with a view to the prevention, mitigation or discontinuance of double taxation, the levying of tax under this Act and the income tax laws of that other country, or to the rendering of reciprocal assistance in the administration of and in the collection of tax under this Act and such income tax laws" (*Income Tax Act*, s. 53). However, section 53 is silent about the effect that such an agreement would have on the tax authorities' powers to obtain information for the purposes of the agreement. Moreover, Botswana's officials indicate that the terms of an international agreement do not prevail over domestic law. Nevertheless, there is no apparent conflict between an exchange of information provision and section 53 refers specifically to the rendering of "reciprocal assistance in the administration" of each state's tax laws. Therefore, it is reasonable to read this as establishing a duty of the Commissioner General to render such assistance under an applicable agreement.

72. While this power in s. 69(3) is quite broad, it does not appear to be coupled with the same compulsory powers as the general powers contained in s. 69(1), as s. 70 refers to search and seizure for the purposes of obtaining information necessary to the determination of a liability to tax. On the other hand, a person who fails to supply any information as requested under the Act is guilty of an offence and liable to a fine or imprisonment for 1 year (*Income Tax Act*, s. 122).

73. Aside from the power of the Commissioner General under the *Income Tax Act*, IFSC companies are also subject to the supervision of the Bank of Botswana and the Non-Bank Financial Institutions Regulatory Authority. The Bank of Botswana has a power of inspection in respect of any IFSC company (*Income Tax Act*, s. 138, *Bank of Botswana Act*, s. 48). While these powers of inspection are quite broad, it is not clear that they can be invoked in response to a request for information in tax matters.

74. For societies, section 16 of the *Societies Act* gives the Registrar of Societies the power to call for:

- a true and complete copy of the constitution and rules of any society in force at the date of such order;
- a true and complete list of office-bearers and members of any such society residing or present in Botswana at the date of such order;
- a true and complete return of the number of meetings held by such society in Botswana within the period of six months immediately preceding such order, stating the place or places at which such meetings were held; and
- such accounts, returns and other information as may be prescribed.

Ownership and identity information (ToR B.1.1)

75. For companies, sub-section 218(1) (c) of the *Companies Act* provides that the share register must be available for public inspection. Trusts and partnerships that are required to register with the BURS must provide identity information to the tax authorities. For partnerships this information includes the identity of each partner, however for trusts there is no requirement to provide the identity of the settlors, any other trustees or the beneficiaries. In these cases, the tax authorities would have to obtain the information using their access powers.

Accounting records (ToR B.1.2)

76. Accounting records are not public or otherwise maintained by the governmental authorities, and in these cases, the tax authorities would have to obtain the information using their access powers.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

77. Tax authorities in Botswana have a broad power to obtain information necessary for the Commissioner-General to fulfil his or her duties under the *Income Tax Act*, which include the provision of reciprocal assistance in the administration of the tax laws of a foreign country.

Compulsory powers (ToR B.1.4)

78. Section 70 of the *Income Tax Act* provides the Commissioner General with powers of search and seizure “for the purposes of obtaining information which he or she considers necessary in relation to the liability of any person to tax”. The term “tax” means tax payable under the *Income Tax Act*. To the extent that the exercise of a power under s. 69(3) does not relate to the determination of a liability for tax in Botswana, the power to access information does not appear to be supported by search and seizure powers in the event that the person concerned does not comply with the request. However, a person who fails to supply any information as requested is guilty of an offence and liable to a fine of BWP 1 000 and imprisonment for 1 year (*Income Tax Act*, s. 122).

Secrecy provisions (ToR B.1.5)

79. There are no provisions under Botswana law relating to the secrecy of ownership, identity or accounting information. The *Banking Act* provides that information maintained by banks concerning any customer's deposits, borrowings or transactions, or other personal, financial or business affairs, without the written and freely given permission of the customer concerned may not be disclosed. Where the customer does not consent to the disclosure of this information, access by tax authorities is restricted to the circumstances set out in section 43(5), which states:

(5)(a) Where a police officer, other than an officer of the Directorate on Corruption and Economic Crime acting in accordance with the provisions of subsection (2)(g) or a duly authorized representative of the Commissioner of Taxes requires any information from a bank relating to the transactions and accounts of any person, he may apply to a court of competent jurisdiction for an order of disclosure of such transactions and accounts or such part thereof as may be necessary.

(b) The court shall not make an order of disclosure under this subsection unless it is satisfied that the applicant is acting in the discharge of his duties, that the information is material to any civil or criminal proceedings, whether pending or contemplated in Botswana, and that the disclosure is necessary, in all the circumstances.

(6) Notice of an application to the court made under subsection (5) shall be served on both the bank and the person in question.

80. The requirement that a court order can be granted only in connection with a civil or criminal proceeding that is pending or contemplated in Botswana would, in many cases, prevent access to bank information by the tax authorities upon request under an exchange of information agreement.

81. The law governing non-bank financial institutions (*Non-Bank Financial Institutions Regulatory Authority Act* (Ch. 46:08) provides that officers of the Regulatory Authority are bound by secrecy regarding any information obtained in the course of his or her duties. However, disclosure of such information to the Commissioner General of Taxes is specifically authorized (section 38(3)(e)).

Determination and factors underlying recommendations

| Determination | |
|---|---|
| The element is not in place. | |
| Factors underlying recommendations | Recommendations |
| Bank information can only be obtained with a court order in connection with a proceeding in Botswana. | Bank secrecy should be eliminated in connection with a request for information under an international agreement that provides for the exchange of information in tax matters. |

B.2. Notification requirements and rights and safeguards

The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

Not unduly prevent or delay exchange of information (ToR B.2.1.)

82. The *Income Tax Act* is silent on the need to inform a taxpayer when information is exchanged. This is therefore interpreted as not requiring the Revenue Service to inform the taxpayer when fulfilling such an exchange.

Determination and factors underlying recommendations

| Determination |
|--------------------------|
| The element is in place. |

C. Exchanging Information

Overview

83. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. The legal authority to exchange information may be derived from bilateral or multilateral mechanisms (e.g. double tax conventions, tax information exchange agreements, the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters) or arise from domestic law. Within particular regional groupings information exchange may take place pursuant to exchange instruments applicable to that grouping (e.g. within the EU, the directives and regulations on mutual assistance).

84. Botswana has signed agreements that provide for the exchange of information with 13 jurisdictions, and 11 of these are in force. Only one agreement – with the United Kingdom – includes the current version of article 26 of the *OECD Model Tax Convention*, including the requirement that a party cannot refuse to provide information solely because it is held by a bank. While Botswana's other agreements do provide for exchange of information for the purposes of the administration and enforcement of the tax laws of the contracting states, these agreements do not provide for the exchange of bank, ownership and fiduciary information despite the application of domestic secrecy provisions. As Botswana's domestic law contains a bank secrecy requirement that cannot be lifted for exchange purposes, these treaties cannot provide for effective exchange of information. Botswana's officials indicate that they have approached each of these jurisdictions to enter into tax information exchange agreements or to enter into protocols to amend the exchange of information provisions. To date, Botswana reports having received positive responses from Barbados, Mauritius, Sweden, India and France and has concluded negotiations on a protocol to its treaty with South Africa. However, it is unclear whether the terms of a tax treaty will prevail over Botswana's domestic secrecy provisions, whether or not the agreement contains a specific requirement to exchange bank information. In the course of the discussion of this report before the Peer Review Group both Botswana and the United Kingdom expressed the view that they expected that the terms of their agreement would be respected. Nevertheless there is uncertainty as to how a request for bank information under such an agreement would be dealt with in practice, and this will have to be closely evaluated in the context of Botswana's phase 2 review.

85. As Botswana has only one agreement that appears to meet the internationally agreed tax standard, it does not meet the requirement that its agreements provide for effective exchange of information. Botswana must at a minimum have full, effective exchange with its existing treaty partners. Moreover, given Botswana's aim of establishing itself as an international hub for investment into Africa, effective exchange of information should be available for all jurisdictions from which investment flows originate and to which the capital is destined to be invested.

86. Botswana's rules regarding the confidentiality of information received are too lenient, as they allow disclosure in circumstances not contemplated by the standards, for example, to a variety of government authorities without qualification as to the use the information will be put, and "to any person being a consultant to or an officer employed by the Government who is approved by the Minister to receive such confidential information".

87. Botswana's treaties are based on either the UN or OECD Model Tax Conventions, and protect the disclosure of information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy

88. As regards the timeliness of responses to requests for information, the assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

Foreseeably relevant standard (ToR C.1.1)

89. Botswana has agreements in force with 11 jurisdictions that provide for exchange of information in tax matters. These jurisdictions are: Barbados; France; India; Mauritius; Namibia; Russia; Seychelles; South Africa; Sweden; United Kingdom; and Zimbabwe. Except for Botswana's agreement with the United Kingdom, each of these agreements provides for the exchange of information that is "necessary" for carrying out the domestic laws of the Contracting States concerning taxes covered by the agreements. Botswana's agreement

with the United Kingdom uses the term “foreseeably relevant” in place of “necessary”. All of the agreements meet the “foreseeably relevant” standard, as the term “necessary” is recognised in the commentary to Article 26 (Exchange of Information) of the *OECD Model Tax Convention* to allow for the same scope of exchange as does the term “foreseeably relevant”.

In respect of all persons (ToR C.1.2)

90. None of Botswana’s agreements are restricted to certain persons such as those considered resident in one of the states, or precludes the application of the exchange of information provisions in respect of certain types of entities.

Exchange information held by financial institutions, nominees, agents and ownership and identity information (ToR C.1.3)

91. Botswana’s agreement with the United Kingdom includes Article 26(5) of the OECD Model Tax Convention, which provides that a contracting state may not decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Botswana’s other agreements do not contain this language, and therefore the restrictions in Botswana’s laws regarding access to bank information prevents the exchange of bank information.

Absence of domestic tax interest (ToR C.1.4)

92. As Botswana’s agreements follow the OECD and UN Model Tax Conventions they do not restrict the exchange of information to information that is relevant for the determination of tax in the requested state. Botswana’s agreement with the United Kingdom includes Article 26(4) of the *OECD Model Tax Convention*, which provides that a contracting state may not decline to supply information solely because it has no interest in obtaining the information for its own tax purposes.

Absence of dual criminality principles (ToR C.1.5)

93. There are no dual criminality provisions in Botswana’s agreements for the exchange of information in tax purposes.

***Exchange of information in both civil and criminal tax matters
(ToR C.1.6)***

94. All of Botswana's agreements for the exchange of information provide for exchange of information in all tax matters.

Provide information in specific form requested (ToR C.1.7)

95. There are no restrictions in the exchange of information provisions that would prevent Botswana from providing information in a specific form so long as this is consistent with its own administrative practices.

In force (ToR C.1.8)

96. Botswana signed agreements with Swaziland and Lesotho in April 2010 but these agreements do not contain the equivalent of the current version of Article 26 of the OECD or UN Model Tax Conventions and are not yet in force. Botswana has suggested to both jurisdictions that the agreement should be amended prior to its ratification.

Be given effect through domestic law (ToR C.1.9)

97. Botswana's agreement with the United Kingdom requires the exchange of information regardless of whether Botswana's tax authorities require the information for their own tax purposes and for the exchange of bank information regardless of the application of bank secrecy rules in Botswana. However, it is unclear whether the terms of a tax treaty will prevail over Botswana's domestic secrecy provisions, whether or not the agreement contains a specific requirement to exchange bank information. In the course of the discussion of this report before the Peer Review Group both Botswana and the United Kingdom expressed the view that they expected that the terms of their agreement would be respected. Nevertheless there is uncertainty as to how a request for bank information under such an agreement would be dealt with in practice, and this will have to be closely evaluated in the context of Botswana's Phase 2 review.

98. The confidentiality rules that apply to information held by the tax authorities contains a specific carve-out where the information is disclosed "to any authorized officer of the Government of a country with which an agreement for the avoidance of double taxation exists, for the purposes of that agreement" (*Income Tax Act*, s. 5(3)(f)). As this

only applies to agreements for the avoidance of double taxation, it does not appear that Botswana would be in a position to exchange information pursuant to a tax information exchange agreement or other form of information exchange arrangement.

Determination and factors underlying recommendations

| Determination | |
|--|--|
| The element is not in place. | |
| Factors underlying recommendations | Recommendations |
| Botswana has bank secrecy provisions that prevent the effective exchange of information and it is unclear whether a specific provision in a treaty requiring the exchange of bank information would take precedence. | Botswana should amend its law such that the provisions for the exchange of information in its existing treaties can be given effect, particularly as regards the exchange of bank information. |
| Botswana's tax law only allows exchange of information with a foreign government for the purposes of an agreement for the avoidance of double taxation. | Botswana should amend its law to allow for exchange of information pursuant to any form of information exchange arrangement. |

C.2. Exchange-of-information mechanisms with all relevant partners

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

99. Only one of Botswana's agreements appears to provide for effective exchange of information in tax matters. Much of Botswana's trade is with South Africa and Zimbabwe, and while Botswana has double taxation conventions with these jurisdictions, they do not meet the standard.

100. Given Botswana's aim of establishing itself as an international hub for investment into Africa, effective exchange of information should be available for all jurisdictions from which investment flows originate and to which the capital is destined to be invested. The Botswana IFSC website advertises access to Botswana's expanding network of tax treaties as benefit of being part of the IFSC. Botswana's officials report that agreements with Angola, Belgium, China, Israel, Japan, Kenya, Lesotho, Luxembourg, Malawi, Nigeria, Portugal, Swaziland, Tanzania, Uganda, United Arab Emirates, and

Zambia are being negotiated. Agreements with Swaziland and Lesotho have been signed, but these do not include the current wording of Article 26 and Botswana has suggested that these agreements be amended prior to their ratification. This group of jurisdictions covers a number of key regional partners as well as major sources of foreign investment.

Determination and factors underlying recommendations

| Determination | |
|--|---|
| The element is not in place. | |
| Factors underlying recommendations | Recommendations |
| Botswana has only one agreement that appears to provide for effective exchange of information. | Botswana should pursue its schedule of negotiations and ensure that new treaties include the current wording of Article 26 of the OECD Model Tax Convention, and enter into agreements with all relevant information exchange partners. Botswana should also be prepared to enter into other arrangements that provide for effective exchange of information. |

C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use, and safeguards (ToR C.3.1)

101. The *Income Tax Act* provides in section 5 that:

every person appointed under, or employed in carrying out the provisions of, this Act shall regard and deal with all documents and information relating to any person, and all confidential instructions in respect of the administration or management of this Act, which may come into his or her possession or to his or her knowledge in the course of his or her duties, as secret and shall not disclose the contents of any such document or communicate any such information or instruction to any other person, other than the person to whom the document or information or instruction relates or his or her lawful representative, except as required in the performance of his or her functions under this Act or by order of a court.

102. The above provision does not apply to prevent the disclosure of any information:

- to the Attorney-General;
- to the Governor of the Bank of Botswana or his or her lawful representative;
- to the Minister, or any other person, where such disclosure is necessary for the purposes of this Act;
- to the Director or Deputy Director of the Directorate on Corruption and Economic Crime, or to the authorized representative of the Director, to the Director of Public Prosecutions, or to the authorized representative of the Director, or to the commissioner of Police or his or her authorized representative for the purposes of an investigation into corruption or economic crime, including any offence against any fiscal law, or other criminal offence, and a prosecution in respect of such crime, or to any other person for the purposes of a prosecution under this Act;
- to any person being a consultant to or an officer employed by the Government who is approved by the Minister to receive such confidential information; or
- to any authorized officer of the Government of a country with which an agreement for the avoidance of double taxation exists, for the purposes of that agreement.

103. The standards of confidentiality require that information obtained in connection with a request for exchange of information not be disclosed except for the purposes specified. A number of the exceptions to confidentiality are contrary to this obligation. As it is unclear whether Botswana's treaties override domestic law, Botswana's domestic law provisions should be consistent with its treaty obligations.

All other information exchanged (ToR C.3.2)

104. Sub-Section 5(4) of the *Income Tax Act* provides that:

...any information obtained by the Commissioner General in the performance of his or her duties under this Act, or any other Act administered by him or her, may be used by him or her, or disclosed by him or her to any other public officer, for the purposes

of any fiscal law administered by him or by such other public officer.

105. The disclosure of information is authorised in connection with the administration of any fiscal law, and so, where the exchange of information in an international agreement is for the purposes of the administration and enforcement of specific taxes sub-section 5(4) would authorise a wider disclosure than prescribed by the agreement.

Determination and factors underlying recommendations

| Determination | |
|---|--|
| The element is not in place. | |
| Factors underlying recommendations | Recommendations |
| Botswana's tax law authorises the disclosure of information obtained from another tax authority for purposes other than the administration of its tax laws. | Botswana's tax laws should restrict the disclosure of information received from a foreign tax authority to the purposes and persons specified in the agreement, consistent with the internationally agreed standard. |
| Information received in connection with a request for information from Botswana's tax authorities may be disclosed for the purposes of the administration of any fiscal law, and is not restricted to the taxes covered by its agreement with the foreign jurisdiction. | The disclosure of information received in connection with a request for information should be restricted as described above. |

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information (ToR C.4.1)

106. Each of Botswana's exchange of information mechanisms ensure that the parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy.

Determination and factors underlying recommendations

| Determination |
|--------------------------|
| The element is in place. |

C.5. Timeliness of responses to requests for information

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| The jurisdiction should provide information under its network of agreements in a timely manner. |
|---|

Responses within 90 days (ToR C.5.1)

107. In order for exchange of information to be effective it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.

108. There are no specific legal or regulatory requirements in place which would prevent Botswana responding to a request for information by providing the information requested or providing a status update within 90 days of receipt of the request.

Organisational process and resources (ToR C.5.2)

109. A review of Botswana's organisational process and resources will be conducted in the context of its Phase 2 review.

Absence of restrictive conditions on exchange of information (ToR C.5.3)

110. There were no aspects of Botswana's laws that appeared to impose restrictive conditions on exchange of information.

Determination and factors underlying recommendations

| Determination |
|---|
| The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review. |

Summary of Determinations and Factors Underlying Recommendations

| Determination | Factors underlying recommendations | Recommendations |
|---|---|---|
| Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. (ToR A.1) | | |
| The element is in place, but certain aspects of the legal implementation of the element need improvement. | There are no provisions made for nominee shareholders. | An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person. |
| | Societies are not required to maintain information on their members. | Societies should be required to maintain a register of members. |
| | While trusts with resident trustees (as broadly defined under the <i>Income Tax Act</i>) are required to register and file returns for tax purposes, there is no specific requirement that information concerning the settlor, trustees and beneficiaries of trusts be maintained. | An obligation should be established for trustees resident in Botswana to maintain information on the settlor, trustees and beneficiaries of their trusts. |
| Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. (ToR A.2) | | |
| The element is in place, but certain aspects of the legal implementation of the element need improvement. | There is no obligation for any entity to maintain underlying documentation unless they are carrying on a business. | The requirements to maintain accounting records should include an obligation to maintain underlying documentation. |
| | The requirements to maintain accounting records for trusts and partnerships only apply where the trust or partnership is carrying on a business in Botswana. | Trusts and partnerships required to register for tax purposes should be required to maintain accounting records to the international standards. |
| | Societies are not required to maintain accounting records. | Societies should be required to maintain accounting records to international standards. |

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| Banking information should be available for all account-holders. (ToR A.3) | | |
| The element is in place. | | |
| Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). (Tor B.1.) | | |
| The element is not in place. | Bank information can only be obtained with a court order in connection with a proceeding in Botswana. | Bank secrecy should be eliminated in connection with a request for information under an international agreement that provides for the exchange of information in tax matters. |
| The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. (ToR B.2) | | |
| The element is in place. | | |
| Exchange of information mechanisms should allow for effective exchange of information. (ToR C.1) | | |
| The element is not in place. | Botswana has bank secrecy provisions that prevent the effective exchange of information and it is unclear whether a specific provision in a treaty requiring the exchange of bank information would take precedence. | Botswana should amend its law such that the provisions for the exchange of information in its existing treaties can be given effect, particularly as regards the exchange of bank information. |
| | Botswana's tax law only allows exchange of information with a foreign government for the purposes of an agreement for the avoidance of double taxation. | Botswana should amend its law to allow for exchange of information pursuant to any form of information exchange arrangement. |
| The jurisdictions' network of information exchange mechanisms should cover all relevant partners. (ToR C.2) | | |

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| <p>The element is not in place.</p> | <p>Botswana has only one agreement that appears to provide for effective exchange of information.</p> | <p>Botswana should pursue its schedule of negotiations and ensure that new treaties include the current wording of article 26 of the <i>OECD Model Tax Convention</i> and enter into agreements with all relevant information exchange partners. Botswana should also be prepared to enter into other arrangements that provide for effective exchange of information.</p> |
| <p>The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. (ToR C.3)</p> | | |
| <p>The element is not in place.</p> | <p>Botswana's tax law authorises the disclosure of information obtained from another tax authority for purposes other than the administration of its tax laws.</p> | <p>Botswana's tax laws should restrict the disclosure of information received from a foreign tax authority to the purposes and persons specified in the agreement, consistent with the internationally agreed standard.</p> |
| | <p>Information received in connection with a request for information from Botswana's tax authorities may be disclosed for the purposes of the administration of any fiscal law, and is not restricted to the taxes covered by its agreement with the foreign jurisdiction.</p> | <p>The disclosure of information received in connection with a request for information should be restricted as described above.</p> |
| <p>The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. (ToR C.4)</p> | | |
| <p>The element is in place.</p> | | |
| <p>The jurisdiction should provide information under its network of agreements in a timely manner. (ToR C.5)</p> | | |
| <p>The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.</p> | | |

Annex 1: Jurisdiction’s response to the review report*

Income tax was introduced in 1973 through the Income Tax Act, of 1973. Not having previously had income tax legislation was a major transition from the other taxes that had been in force during the colonial period. Since 1973, the income tax has evolved and has over the years introduced provisions that during their time were seen as relevant to the circumstances prevailing. Such provisions included the legislation enabling the Minister responsible for finance to enter into agreements for the avoidance of double taxation. Other major reforms undertaken on the Act include the simplification of the Act. In fact, Botswana is currently undertaking a comprehensive reform in consultation with the International Monetary Fund (IMF) that seeks to make the Act simpler while at the same time improving compliance.

While comprehensive reforms have been undertaken over the years, the Act has also introduced legislation specific to certain sectors. Most notable is legislation specific for companies operating under the Botswana International Financial Services Centre (IFSC). As the Minister of Finance and Development Planning said in his speech at the launch of the IFSC in 1998, the intention of the Centre is for Botswana to serve as an entry point for capital investment in Africa. However, this Centre has been unfairly viewed by Botswana’s neighbours and others as a conduit for effective tax planning. These observations and international best practice have therefore created the need for Botswana to introspect with a view to ensuring that there is transparency in the operations and implementation of the income tax system. To this end, Botswana agreed to be peer reviewed, with the primary intention of gauging herself against international best practice but also to receive assistance (wherever she fails) in improving the tax regulatory environment within which taxes operate. The following regulatory improvements are under consideration:

- * This Annex presents the Jurisdiction’s response to the review report and shall not be deemed to represent the Global Forum’s views.

Companies Act

We agree that maybe it was an omission for the Act not to expressly state, as one of the requirements for an external company to register in Botswana, that a list of shareholders (or the share register) should be filed with the application for registration. It may not be enough that external companies are required by section 217 to file annual returns which information will include the name and address of each shareholder of the company. In looking to close the grey areas which have appeared in the implementation of the Act, this will definitely be one of the areas for which amendment will be necessary.

We agree that the provisions of section 218 (1)(c) as crafted leaves a lot of undesirable loopholes to be exploited by unscrupulous people, This is also one area where amendment of the Act will be necessary to aid the smooth implementation of the Act, while also making for easy access to company records at the Registrar’s office which is easy to locate than that of a company secretary of an individual companies

Income Tax Act

It is true that neither the registration form nor the trust tax return requires the identity of the settler or beneficiary to be stated. Botswana will consider re-designing the tax return form to make it mandatory to provide the identity of settlers and beneficiaries of trusts.

Income earned by a partnership resident in Botswana from income sourced outside Botswana is deemed (under section 11 of the Income Tax Act) to be income from sources in Botswana and the partnership is subjected to reporting requirements under the Income Tax Act. A partnership is resident in Botswana if it is managed in Botswana. This is an administrative process only. Botswana will consider amending her laws to include “partnership” in the definition of “resident”.

Our view is that section 26 of the Income Tax Act covers the keeping of records. The law states that the Commissioner General of the Botswana Unified Revenue Service may direct the method of accounting or the manner in which payments should be made or commercial transactions should be recorded. Botswana considers it to be logical to harmonise the VAT and Income Tax Act to fall in line with the VAT which specifically states that original invoices, credit notes and debit notes be maintained

Botswana will consider amending both the Income Tax Act and the Banking Act to give the Commissioner General power to obtain information and to provide information requested by foreign tax authorities; not only where the bank information is required for tax purposes in cases where the court proceedings are in Botswana.

Treaties

Botswana continues to pursue her schedule of negotiations and has amended her Model to ensure that any new treaties she negotiates shall have the current wording of Article 26 of the OECD Model Tax Convention. Botswana also continues to pursue her treaty partners to amend the DTAAAs that are in force that do not meet the international standard.

Conclusion

Botswana is committed to implementing the agreed international standards on transparency and effective exchange of information and also to working with other members of the Global Forum to ensure as wide and complete an implementation of the standards as possible. Botswana willingly cooperates in the peer review process of her legal and regulatory framework and exchange of information and considers this process to be very valuable in assist to ensure that Botswana meets the highest international standards.

Annex 2: List of all exchange-of-information mechanisms in Force

| | Jurisdiction | Type of Eol Arrangement | Date Signed | Date Entered Into Force |
|----|----------------|----------------------------------|-------------|-------------------------|
| 1 | Barbados | Double Taxation Convention (DTC) | 23.02.2005 | 25.08.2005 |
| 2 | France | DTC | 15.04.1999 | 01.06.2003 |
| 3 | India | DTC | 08.12.2006 | 30.01.2008 |
| 4 | Mauritius | DTC | 26.09.1995 | 13.03.1996 |
| 5 | Namibia | DTC | 16.06.2004 | 01.07.2005 |
| 6 | Russia | DTC | 08.12.2003 | 23.12.2009 |
| 7 | Seychelles | DTC | 26.09.2004 | 22.06.2005 |
| 8 | South Africa | DTC | 07.08.2003 | 20.04.2004 |
| 9 | Sweden | DTC | 19.10.1992 | 18.12.1992 |
| 10 | United Kingdom | DTC | 09.09.2005 | 04.09.2006 |
| 11 | Zimbabwe | DTC | 16.06.2004 | 25.02.2008 |

Annex 3: List of all laws, regulations and other material received

Fiscal Legislation and Regulations

Income Tax Act Chapter 52-01

Commercial laws dealing with registration of entities and retention of information

Companies Act Chapter 42-01

Societies Act Chapter 18-01

Registration of Business Names Act Chapter 42-05.

Legislation and regulations for financial services and anti-money laundering/anti-terrorist financing measures

Banking Act Chapter 46-04

Bank of Botswana Act Chapter 55-01

Non-Bank Financial Regulatory Authority Act Chapter 46-08

Other Legislation

Constitution of Botswana

Proceeds of Serious Crime Act Chapter 08-03

Penal Code Chapter 08-01

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