

**SODA ASH BOTSWANA (PTY) LIMITED
TAX AGREEMENT (RATIFICATION) ACT, 1989**

No. 3



of 1989

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Ratification of Agreement

SCHEDULE

An Act to ratify a Tax Agreement entered into between the Government of the Republic of Botswana and Soda Ash Botswana (Pty) Limited.

Date of Assent: 14.4.89.

Date of Commencement: 21.4.89.

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Soda Ash Botswana (Pty) Limited Tax Agreement (Ratification) Act, 1989.

Short title

2. The Tax Agreement entered into between the Government of the Republic of Botswana and Soda Ash Botswana (Pty) Limited on the 21st day of November, 1988, and set out in the Schedule hereto, is hereby ratified.

Ratification
of
Agreement

SCHEDULE

TAX AGREEMENT IN TERMS OF SECTION 54 OF THE INCOME TAX ACT, (Cap. 52:01)

between

THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA
("BOTSWANA")

and

SODA ASH BOTSWANA (PTY) LTD
("SAB")

WHEREAS on the 21st day of November, 1988 Botswana and AECI Limited entered into an agreement known as the Co-operation Agreement ("Co-operation Agreement") for the purpose of extracting chemicals from the brine of Sua Pan in Botswana;

AND WHEREAS Botswana and AECI Limited intend to jointly operate a private company with limited liability and registered in Botswana known as Soda Ash Botswana (Pty) Ltd., ("SAB"), for the said purpose of extracting chemicals from the brine of Sua Pan;

AND WHEREAS in terms of clause 10 of the said Co-operation Agreement it is provided that Botswana and SAB shall enter into a tax agreement in terms of section 54 of the Income Tax Act (Cap. 52:01) ("the Act") to regulate the imposition of liability to tax on the income of SAB;

AND WHEREAS in terms of section 54 of the Act, the Minister of Finance and Development Planning is empowered on behalf of Botswana to enter into a tax agreement with any person who is or may become liable to tax under the Act:

NOW THEREFORE, the Parties hereto agree as follows:

1. INCOME TAX ON COMPANY

- 1.1. Botswana will forego permanently the payment of the income tax charged and assessed on SAB for every tax year up to and including the tax year in which Real Investment Recovery as defined in sub-paragraph 5.5 occurs for the first time.
- 1.2. Subject to clause 1.1, the rate of tax on the taxable income of SAB for every tax year falling within the period for the Mining Lease (as defined in the Co-operation Agreement) shall be 40% (forty per centum) and there shall be no further charge for any such tax year in respect of Branch Profits Tax, provided that:
 - 1.2.1 The said rate of tax shall be 50% (fifty per centum) for any tax year following that in which the Accumulated Value of Net Cash Receipts as defined in sub-paragraph 6.2 is positive at an accumulation rate of 15% (fifteen per centum) but negative at an accumulation rate of 17.5% (seventeen point five per centum);
 - 1.2.2 The said rate of tax shall be 60% (sixty per centum) for any tax year following

that in which the Accumulated Value of Net Cash Receipts as defined in sub-paragraph 6.2 is positive at an accumulation rate of 17.5% (seventeen point five per centum) but negative at an accumulation rate of 20% (twenty per centum); and

- 1.2.3 The said rate of tax shall be 70% (seventy per centum) for any tax year following that in which the Accumulated Value of Net Cash Receipts as defined in sub-paragraph 6.2 is positive at an accumulation rate of 20% (twenty per centum).

2. INCOME TAX ON DIVIDENDS PAID TO NON-RESIDENTS

- 2.1 Subject to sub-paragraph 2.2 the rate of tax chargeable on dividends paid by SAB to non-residents shall be 15% (fifteen per centum) for any dividend declared out of profits accrued during the period of the Mining Lease.
- 2.2 Dividends paid to non-residents in any tax year up to and including that in which Real Investment Recovery as defined in sub-paragraph 5.5 occurs for the first time shall be exempt from tax.
- 2.3 SAB shall be relieved of any duties, responsibilities or liabilities under the provisions of section 58 of and the Ninth Schedule to the Act in respect of any dividend referred to in sub-paragraph 2.2.

3. TAX ON LOAN INTEREST PAID TO NON-RESIDENTS

- 3.1 Any interest paid by SAB to a non-resident shall be exempt from tax if the Commissioner of Taxes of Botswana is satisfied that either:
 - 3.1.1 The non-resident is not entitled to a tax credit and/or a tax exemption in any other jurisdiction in respect of the Botswana tax that would otherwise be payable on such interest; or
 - 3.1.2 The non-resident is so tax entitled, but is unable to utilize such tax credit and/or tax exemption in such other jurisdiction in respect of a corresponding tax year.
- 3.2 Nothing in sub-paragraph 3.1, other than written direction from the said Commissioner of Taxes, shall absolve SAB from liability under section 58 of and the Ninth Schedule to the Act in respect of any amount of interest paid to a non-resident.
- 3.3 A certificate issued by the tax authorities having jurisdiction over the non-resident to the effect that the non-resident is unable to utilize the tax credit and/or tax exemption as envisaged in sub-paragraph 3.1 will be sufficient for the purposes of the said Commissioner of Taxes in granting written direction in terms of sub-paragraph 3.2.

4. TAX ON MANAGEMENT, LICENSING OR CONSULTANCY FEES OR COMMERCIAL ROYALTIES PAID TO NON-RESIDENTS

- 4.1 Where any amount paid by SAB as management or consultancy fee or commercial royalty is not exempt from tax in Botswana under an agreement referred to in section 53 of the Act, such amount shall be exempt from tax if the said Commissioner of Taxes is satisfied that either:
 - 4.1.1 The non-resident is not entitled to a tax credit and/or a tax exemption in any other jurisdiction in respect of Botswana tax that would otherwise be payable on the same amount; or
 - 4.1.2 The non-resident is so entitled, but is unable to utilize such tax credit and/or tax exemption in such other jurisdiction in respect of a corresponding tax year.

- 4.2 Nothing in sub-paragraph 4.1, other than written direction from the said Commissioner of Taxes, shall absolve SAB from liability under section 58 of and the Ninth Schedule to the Act in respect of any amount paid as management or consultancy fee or commercial royalty to a non-resident.
- 4.3 A certificate issued by the tax authorities having jurisdiction over the non-resident to the effect that the non-resident is unable to utilize the credit as envisaged in sub-paragraph 4.1 will be sufficient for the purposes of the Commissioner of Taxes in granting written direction in terms of sub-paragraph 4.2.

5. REAL INVESTMENT RECOVERY PERIOD

- 5.1 For the purpose of this clause, "Capital Expenditure" means any expenditure in respect of which an allowance may be granted under the Third Schedule to the Act, the cost of the road referred to in clause 12 of the Co-operation Agreement, SAB's contribution to the cost of the railway referred to in clause 1.0 of Annex G of the Co-operation Agreement, the cost of the shares in and claims against SAB, amounts payable to Kerr-McGee or to any other supplier of know-how the liability for which is incurred before the Commissioning Date of the plant as defined in clause 1.5 of the Co-operation Agreement.
- 5.2 Cumulative Real Investment means the accumulated value of all Capital Expenditure at the end of any tax year during the Real Investment Recovery Period. The accumulated value shall be calculated in accordance with the following formula:

$$A = \frac{(B \times C) + E}{D}$$

where

- A = Cumulative Real Investment up to the end of the Tax year for which the calculation is being made.
- B = Cumulative Real Investment up to the end of the Tax year immediately preceding the Tax year for which the calculation is being made.
- C = The value of the Botswana National Cost of Living Index as published by the Central Statistics Office for the last month of the Tax year for which the calculation is being made.
- D = The value of the Botswana National Cost of Living Index as published by the Central Statistics Office for the last month of the tax year immediately preceding the tax year for which the calculation is being made.
- E = Payments made for capital expenditure in the tax year for which the calculation is being made.
- 5.3 Annual Recovery means the amount equating to the chargeable income of SAB for any tax year falling within the Real Investment Recovery Period, without taking into account:
- 5.3.1 amounts of interest accrued to or incurred by SAB in respect of that tax year;
- 5.3.2 allowances under the Third Schedule to the Act granted to SAB for that tax year; and
- 5.3.3 one-half of the deduction allowed to SAB under section 41 of the Act for that tax year.
- 5.4 Cumulative Real Recovery means the accumulated value of the Annual Recoveries during the Real Investment Recovery period. The accumulated

value shall be calculated in accordance with the following formula:

$$F = \frac{(G \times C) + H}{D}$$

where

F = Cumulative Real Recovery up to the end of the Tax year for which the calculation is being made.

G = Cumulative Real Recovery up to the end of the Tax year immediately preceding the Tax year for which the calculation is being made.

C & D = Shall have the values defined in sub-paragraph 5.2 above; and

H = Annual recovery in the Tax year for which the calculation is being made.

5.5 Real Investment Recovery occurs in the Tax year at the end of which the Cumulative Real Recovery equals or exceeds Cumulative Real Investment.

5.6 Real Investment Recovery Period means the period terminating at the end of the Tax year in which Real Investment Recovery occurs.

5.7 For the Tax year immediately following the Real Investment Recovery Period, any unallowed balance of Capital Expenditure (as defined in sub-paragraph 5.1 and incurred during the Real Investment Recovery Period) shall be deemed to be zero.

6. ACCUMULATED VALUE OF NET CASH RECEIPTS

6.1 Net Cash Receipts for any tax year means:

The Net Profit or Loss for that tax year as shown by the audited annual financial statements before taxation and appropriations (but after royalties payable to Botswana).

PLUS for the same year:

Depreciation Debited in Profit and Loss Account and Interest Debited in the Profit and Loss Account

Loan draw-downs received and interest received (excluding those from shareholders' or related companies' loans)

The excess, if any, of the Net Debit value of the balances at the beginning of the year of the accounts specified below over the Net Debit value of the balances of the same accounts at the end of the year.

MINUS for the same year:

Company income tax paid

Interest payments and loan repayments made (excluding those on shareholders' or related companies' loans)

Capital expenditure incurred.

Interest credited in the Profit and Loss Accounts.

The excess, if any, of the Net Debit value of the balances at the end of the year of the accounts specified below over the Net Debit value of the balances of the same accounts at the beginning of the year.

The accounts specified for this purpose are:

- (i) Trade Debtors, prepayments and other receivables (excluding interest)
- (ii) Stocks on hand
- (iii) Provisions (other than for Divdends, Taxation and accrued interest) and

- (iv) Trade Creditors
- (v) Creditors for capital expenditure

6.2 Accumulated Value of Net Cash Receipts means the accumulated value of the Net Cash Receipts calculated in accordance with the following formula:

$$K = \left(\frac{L \times 100 + R \times C}{100} \right) + \frac{M}{D}$$

where

K = Accumulated value of Net Cash Receipts at the end of the Tax year for which the calculation is being made;

L = Accumulated value of Net Cash Receipts at the end of the Tax year immediately preceding the Tax year for which the calculation is being made;

R = The percentage accumulation rate specified in clauses 1.2.1, 1.2.2 and 1.2.3 hereof;

M = Net Cash Receipts for the Tax year for which the calculation is being made;

C & D = Shall have the values defined in sub-paragraph 5.2 above.

6.3 "Related company" means any company in which any shareholder of SAB owns more than 10% (ten per centum) of the equity share capital.

7. "Tax Year" for the purposes of this Agreement means the period of 12 (twelve) months to which SAB keeps its accounts or where at the commencement or cessation of the project accounts are kept for a period greater or less than 12 (twelve) months, such period.

This agreement shall endure as long as the Mining lease endures.

Thus done and signed at GABORONE on this the 21st day of NOVEMBER, 1988.

As witnesses:

- 1. L.O. de SILVA
- 2. M.C. TIBONE

For the Government of the Republic of Botswana

P.S. MMUSI

Thus done and signed at GABORONE on this the 21st day of NOVEMBER, 1988.

As witnesses:

- 1. N.C. AXELSON
- 2. P.H. CALICHIO

For Soda Ash Botswana (Pty) Limited

A.B. NIEWOUDI

PASSED by the National Assembly this 5th day of April, 1989.

C.G. MOKOBI,
Clerk of the National Assembly.