Statutory Instrument No. 82 of 2002

INCOME TAX ACT
(No. 12 of 1995)

INCOME TAX (TAX AGREEMENT) ORDER, 2002

(*Published on 29th November, 2002*)

WHEREAS in exercise of the powers conferred on him by section 53(1) of the Income Tax Act (No. 12 of 1995) the Minister of Finance and Development Planning has, on behalf of Government, entered into a Tax Agreement with Botswana Ash (Pty) Limited ("Botash");

AND WHEREAS in accordance with the provisions of section 53(2)(*a*) of the Income Tax Act the said Agreement shall be laid before the National Assembly, and shall not take effect unless approved by resolution of the National Assembly;

NOW THEREFORE, pursuant to the provisions of the said section 53(2)(*a*), this Order is presented to the National Assembly for approval by resolution.

1. This Order may be cited as the Income Tax (Tax Agreement) Order, 2002. Citation

2. The Tax Agreement set out in the Schedule hereto between the Government of the Republic of Botswana and Botash is approved and shall take effect from the date specified in the Agreement. Approval and effective date of commencement

SCHEULE

WHEREAS

(*a*) Botswana Ash (Pty) Limited is the holder of Mining lease ML95/1 ("The Mining Lease") in terms of which it carries on the business of producing soda ash and salt at Sua Pan in the Central District of the Republic of Botswana;

(*b*) A Shareholders' Agreement was entered into on September 16th 1996 for the purpose, inter alia, of regulating in detail the future management of Botash, the relationship amongst its Shareholders and their own and their Associates' dealings with Botash;

(*c*) The parties to the said Shareholders' Agreement are:

Botswana Ash (Pty) Limited
Anglo American Corporation of South Africa Limited
AECI Limited
De Beers Holdings (Pty) Limited
The Government of the Republic of Botswana
First National Bank of Southern Africa Limited
The Standard Bank of South Africa Limited
UAL Merchant Bank Limited

(*d*) In terms of the said Shareholders' Agreement, Botswana is the holder of "A" shares in Botash;

(*e*) In terms of the Articles of Association of Botash —

3.1 The profits of Botash available for dividend and recommended by the Board to be distributed shall be applied in the payment of dividends to the members in accordance with their respective rights and priorities; and

3.2 The issued A shares in the capital of Botash from time to time shall confer upon the holders thereof the right to receive in aggregate, 75% of any dividend declared and/or paid by Botash;

(*f*) In terms of clause 15.9 of the said Shareholders' Agreement it is provided that Botash shall be subject to the usual taxation regime applicable to companies carrying on the same business as Botash in Botswana provided that the liability of Botash to pay any income taxes or withholding tax on dividends or any other Botswana tax on corporate income or dividends which shall have accrued from time to time shall be offset against any sums received by Botswana by way of dividend or distribution in respect of its shares in Botash and no such liability of Botash to pay income taxes or withholding tax on dividends as may have accrued from time to time shall become payable unless and until any payment by way of dividend has been approved by the Board of Botash and then only to the extent of the proportion of such dividend which is payable to Botswana. Nothing (in the said Clause 15.9) shall relieve Botash of its liability to render statutory tax returns and to comply with all other obligations under the tax laws of Botswana;

(*g*) In terms of section 53 of the Income Tax Act (No. 12 of 1995) ("the Act") the Minister is empowered on behalf of Botswana to enter into a tax agreement with any person who is or may be liable to tax under the Act;

NOW THEREFORE the parties hereto agree as follows —

1. Botash shall submit to the Commissioner of Taxes duly completed tax returns as required under the Act.

2. At the time of submitting its tax return, Botash shall advise the Commissioner whether, and in what amount, it has, in respect of the tax year in question, made a distribution of dividend in favour of Botswana.

3. In any tax year when Botash makes no distribution by way of dividends to all its shareholders, Botswana will forego permanently any income tax which, but for this agreement, would otherwise be payable by Botash in respect of such year.

4. In any tax year when Botash makes a distribution of dividends to its shareholders, 75% of such distribution (to which Botswana is entitled in terms of the Shareholders' Agreement and the Articles of Association) shall be deemed to include;

   (*a*) any income tax which would otherwise be payable by Botash in respect of such year;
   (*b*) any withholding tax on any dividend paid by Botash in such year; and
   (*c*) any other Botswana tax on corporate income or dividends which shall have accrued from time to time and which would otherwise be payable in such year;

   notwithstanding that the aggregate sum of such taxes may exceed the amount of dividend paid to Botswana.

5. The Commissioner of Taxes shall issue the appropriate certificate, in respect of each tax year, confirming that the obligation for Botash to pay all taxes referred to herein has been discharged in terms of this Agreement.

6. This Agreement shall endure for as long as the Mining Lease shall endure and accordingly shall have effect as from 1st September, 1995.

Thus done and signed at (Gaborone) on this 10th day of October, 2002.

For the Government of the Republic of Botswana.

HON. BALEDZI GAOLATHE,
Minister of Finance and
Development Planning.

As witnesses
1. S. Tumelo
2. F. Modise

For Botswana Ash (Pty) Limited

ROB BURNHAM,
for Chairman.

As witnesses
1.
2.

MADE this 19th day of November, 2002.

B. GAOLATHE,
Minister of Finance and
Development Planning.