

National Interest Analysis [2010] ATNIA 48

with attachment on consultation

**Agreement between
the Government of Australia and the Kingdom of the Netherlands, in respect of Aruba,
on the Exchange of Information with Respect to Taxes,
done at Canberra on 16 December 2009**

[2009] ATNIF 34

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *Agreement between the Government of Australia and the Kingdom of the Netherlands in respect of Aruba on the Exchange of Information with Respect to Taxes* (the proposed Agreement) into force.
2. Pursuant to Article 14, the proposed Agreement will enter into force on the date of the last notification between Australia and the Kingdom of the Netherlands, in respect of Aruba, establishing that the necessary domestic procedures for entry into force have been completed. The proposed Agreement will then have effect:
 - from that date with respect to criminal tax matters; and
 - from that date with respect to civil tax matters, but only relating to taxable periods beginning on or after that date or, where there is no taxable period, charges to tax arising on or after that date.

Overview and national interest summary

3. The key objective of the proposed Agreement, commonly referred to as a Tax Information Exchange Agreement (TIEA), is to establish a legal basis for the exchange of tax information relating to certain persons and other entities between the Governments of Australia and the Kingdom of the Netherlands in respect of Aruba.
4. The proposed Agreement will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in Aruba and will help improve the integrity of the tax system by discouraging tax evasion by individuals and other entities. The proposed Agreement also incorporates a number of important safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.
5. The proposed Agreement is one of 25 TIEAs signed by Australia with low-tax jurisdictions, six of which have entered into force. The proposed Agreement with the Kingdom of the Netherlands, in respect of Aruba, is a part of Australia's efforts to conclude TIEAs with jurisdictions that have committed to work with member countries of the Organisation for Economic Cooperation and Development (OECD) to improve transparency and establish effective procedures for the exchange of tax information.
6. Aruba is an autonomous state within the Kingdom of the Netherlands. While Aruba is responsible for its domestic affairs (such as taxation), the Kingdom of the Netherlands retains responsibility for Aruba's foreign affairs. In practice, Aruba's nominated competent authority - the Aruban Minister of Finance and Economic Affairs - will be responsible for facilitating the exchange of tax information with Australia. Article 1(2) makes it clear that as regards the Netherlands, this proposed Agreement shall only apply to Aruba.

Reasons for Australia to take the proposed treaty action

7. The proposed Agreement, alongside TIEAs with other countries, is an important tool in Australia's efforts to combat offshore tax evasion. The proposed Agreement provides for the effective exchange of information between Australia and Aruba, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.
8. The proposed Agreement is part of Australia's ongoing commitment to the OECD's work on eliminating harmful tax practices that contribute to international tax avoidance and evasion. Australia has taken a leadership role in this work and is currently the Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which has a membership of more than 90 countries.
9. Since 2002, more than 40 low-tax jurisdictions, including Aruba, have publicly committed to the implementation of OECD standards of transparency and information exchange for tax purposes, which have been endorsed by both the United Nations and the G-20. These standards, when implemented, help to ensure the availability of information needed by tax authorities to determine a taxpayer's correct tax liability. TIEAs are the key bilateral means that facilitate the provision of such information by low-tax jurisdictions.
10. In April 2002, the OECD released a model TIEA to facilitate negotiations between OECD member countries and committed jurisdictions. In October 2003, the then Australian Treasurer approved an Australian model TIEA which is closely aligned to the OECD model. The Australian model TIEA was subsequently approved by the current Australian Government. The proposed Agreement with the Kingdom of the Netherlands, in respect of Aruba, essentially follows the format of the Australian model TIEA.
11. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a minor flow of funds between Australia and Aruba. While most financial flows to and from low-tax jurisdictions are legitimate, the legal frameworks and systems that make low-tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere. In particular, the use of secrecy laws to conceal assets and income that are subject to Australian tax is of concern to Australia.
12. It is in Australia's interest to develop a network of TIEAs with low-tax jurisdictions. The proposed Agreement, along with existing and future TIEAs, will make it harder for taxpayers to avoid or evade Australian tax and discourage those taxpayers from participating in illegitimate tax arrangements by increasing the probability of detection. This will help Australia protect its revenue base and improve the integrity of the tax system while enhancing Aruba's reputation as a location for legitimate business activity.
13. Aruba's commitment to implement the proposed Agreement is a positive step in its relationship with Australia. The OECD has identified Aruba as a jurisdiction that has committed to and substantially implemented the internationally agreed standard for the exchange of information relating to tax.

Obligations

14. Article 5(1) of the proposed Agreement obliges the competent authorities of the Parties to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other Party's domestic tax laws, including the collection of taxes and the investigation or prosecution of tax matters. A request for information must be in writing and contain the details required by Article 5(5). This obligation applies irrespective of whether the conduct being investigated would constitute a crime under the domestic law of the Requested Party if it occurred in the territory of that Party.

15. Article 5(2) provides that where the information in the possession of the Requested Party is insufficient to enable compliance with a request, the Requested Party must use its information gathering powers to obtain and provide the information, even if it is not needed for the Requested Party's domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the *OECD Model Convention with Respect to Taxes on Income and on Capital*, which has been incorporated into Australia's tax treaty policy.
16. Article 5(3) requires the provision of information in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under the laws of the Requested Party. This is intended to assist the Applicant Party to satisfy evidentiary requirements in domestic tax proceedings.
17. Article 5(4) obliges each Party to ensure its competent authority has the authority to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity, as well as information regarding the legal and beneficial ownership of companies and partnerships and certain persons involved with trusts and foundations. The Commissioner of Taxation currently has the necessary legal authority to meet Australia's obligations under Article 5(4).
18. Article 5(6) obliges the Parties to acknowledge receipt of requests for information and to provide the requested information as promptly as possible.
19. Article 6 provides that the Parties may forward to each other, without prior request, information of which they have knowledge.
20. Article 7 provides that one Party may, on request, permit interviews with individuals and the examination of records within its jurisdiction by officials of the other Party, with the written consent of the persons concerned.
21. Article 8 provides various grounds for the refusal of requests, including where requests are not in conformity with the proposed Agreement or if the Applicant Party would be unable to obtain the requested information under its own laws.
22. Article 9 obliges the Parties to keep information received under the proposed Agreement confidential. Such information may be disclosed only to persons or authorities concerned with the administration or enforcement of taxation covered by the proposed Agreement and may only be used for such purposes, although this may include public court proceedings or in judicial decisions. The express written consent of the competent authority of the Requested Party is required for the disclosure of the requested information to any other person, entity, authority or jurisdiction.
23. Article 10 provides that the Requested Party will bear ordinary costs associated with responding to requests for information, while extraordinary costs are to be borne by the Applicant Party, unless the Parties otherwise agree. As discussed in paragraph 29 below, the Parties are negotiating standing arrangements for costs.
24. Article 12 obliges each Party to refrain from imposing prejudicial or restrictive measures on residents or nationals of the other Party on the basis that the other Party does not engage in effective exchange of information and/or because it lacks transparency in the operation of its laws, regulations or administrative practices. A prejudicial or restrictive measure includes the denial of a deduction, credit or exemption, the imposition of a tax, or special reporting requirements.
25. Article 13 requires the Parties to jointly endeavour to resolve difficulties or doubts concerning the interpretation or application of the proposed Agreement and provides that they may also decide upon other forms of dispute resolution.

Implementation

26. Australia is able to fulfil its obligations under the proposed Agreement under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953*. While Article 11 requires Parties to implement legislation necessary to give effect to the proposed Agreement, no further legislation or regulation is required in order to implement the proposed Agreement.

27. The implementation of the proposed Agreement will not affect the existing roles of the Commonwealth or the States and Territories in tax matters.

Costs

28. The proposed Agreement will have a small administrative and financial impact on the Australian Taxation Office (ATO). As Aruba is unlikely to routinely need Australian information for its own tax purposes, it is likely that most requests for information will originate from Australia. Some additional resources may be required so that the ATO may provide technical assistance to Aruba in relation to its exchange of information procedures, if necessary.

29. The ATO and the relevant competent authority of Aruba are currently negotiating a Memorandum of Understanding, under which certain costs associated with Australian requests for information will be borne by the ATO. Examples of such costs, classified as extraordinary costs, include:

- reasonable fees charged by third parties for carrying out research;
- reasonable fees charged by third parties for copying documents;
- reasonable costs of engaging experts, interpreters or translators;
- reasonable costs of conveying documents to the Applicant Party;
- reasonable litigation costs of the Requested Party in relation to a specific request for information; and
- reasonable costs of obtaining depositions or testimony.

30. Australian residents are unlikely to incur significant compliance costs in relation to the proposed Agreement. It is unlikely Australia will receive many requests for information from Aruba and therefore be required to collect information from Australian residents.

31. Overall, it is estimated that the administrative and financial impact of the proposed Agreement will be absorbed by the ATO's existing exchange of information programme, which currently administers similar arrangements with more than 40 countries. On a broader level, as the proposed Agreement is intended to help reduce tax avoidance and evasion by Australian taxpayers, it could result in the generation of additional revenue for Australia.

Regulation Impact Statement

32. The Treasury has assessed the implementation of the proposed Agreement against criteria in the *Best Practice Regulation Handbook* and concluded that this regulatory option has no/low impact on businesses and individuals or on the economy. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

33. The proposed Agreement does not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Parties may amend the proposed Agreement by mutual consent at any time, pursuant to Article 39 of the *Vienna Convention on the Law of Treaties 1969*. Any future amendments would be subject to Australia's

domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any such amendments to the proposed Agreement may be considered in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

34. Article 15 provides that the proposed Agreement shall remain in force indefinitely, but either of the Parties may, after the expiration of three years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Party. However, both Parties would remain bound by the confidentiality obligations contained in Article 9. This ensures the continued protection of information exchanged under the proposed Agreement between the two Parties.

35. Termination of the proposed Agreement by Australia would be subject to Australia's domestic treaty-making process, including tabling and consideration by JSCOT.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

36. The proposed Agreement addresses only administrative matters, namely facilitating the full exchange of information between tax authorities. Accordingly, the public was not consulted.

37. The ATO was involved in the negotiation of the proposed Agreement and will administer it. Given that the proposed Agreement aligns with the international standard on tax information exchange and with Australia's recent bilateral tax treaty practice, the ATO was supportive of the proposed treaty action.

38. In addition to the Assistant Treasurer, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister have approved the proposed treaty action.