

DOCUMENTS TO BE TABLED ON 29 MARCH 2010:

- **National Interest Analysis [2010] ATNIA 10**
with attachment on consultation

- **Agreement between the Government of Australia and the
Government of Gibraltar on the Exchange of Information with
Respect to Taxes,
done at London on 25 August 2009**
[2009] ATNIF 24

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of Gibraltar on the Exchange of Information with Respect to Taxes, done at London on 25 August 2009 [2009] ATNIF 24

Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *Agreement between the Government of Australia and the Government of Gibraltar on the Exchange of Information with Respect to Taxes* (the Agreement) into force. Pursuant to Article 13, the Agreement will enter into force on the date of the completion of an exchange of notifications between Australia and Gibraltar establishing that the necessary domestic procedures for entry into force have been completed.
2. The Agreement will then have effect:
 - a) from the date of entry into force, with respect to criminal tax matters; and
 - b) from the date of entry into force 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 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 between the Governments of Australia and Gibraltar.
4. Gibraltar is a British overseas territory, located at the southern end of the Iberian Peninsula at the entrance to the Mediterranean Sea, bordering the Strait of Gibraltar. It has a low-tax structure and is an internationally recognised offshore financial centre. Gibraltar has an entrustment from the United Kingdom to negotiate and sign a TIEA with Australia.
5. Detailed information on the level and type of economic activity between Australia and Gibraltar is not available. However, as discussed in paragraph 12, available data indicates a significant amount of funds flows between Australia and Gibraltar.
6. The Agreement will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in Gibraltar, and will help improve the integrity of the tax system by discouraging tax evasion by individuals and businesses. The Agreement also incorporates a number of important safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.
7. Australia has signed 13 TIEAs, five of which have entered into force (Antigua and Barbuda, Bermuda, Isle of Man, Jersey and Netherlands Antilles) and eight of which have yet to enter into force (Aruba, British Virgin Islands, the Cook Islands, Guernsey, Gibraltar, Samoa, San Marino and St Kitts and Nevis). The Agreement with Gibraltar is a part of Australia's efforts to conclude TIEAs with jurisdictions that have committed to work with Organisation for Economic Cooperation and Development (OECD) member countries to improve transparency and establish effective procedures for the exchange of tax information.

Reasons for Australia to take the proposed treaty action

8. The Agreement, alongside TIEAs with other countries, is an important tool in Australia's efforts to combat offshore tax evasion. The Agreement provides for the effective exchange of information between Australia and Gibraltar, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.

9. The 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 70 countries.

10. Since 2002, more than 40 low-tax jurisdictions, including Gibraltar, 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, 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.

11. 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 Agreement with Gibraltar essentially follows the format of the Australian model TIEA.

12. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a significant flow of funds between Australia and Gibraltar. 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.

13. It is in Australia's interest to develop a network of TIEAs with low-tax jurisdictions. The 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 Australia's tax system while enhancing Gibraltar's reputation as a location for legitimate business activity.

14. Gibraltar's commitment to implement the Agreement is a positive step in its relationship with Australia. The OECD has issued a progress report on the implementation of internationally agreed tax standards on the exchange of information, which identified Gibraltar as a jurisdiction that has substantially implemented these standards.

Obligations

15. Article 5(1) of the Agreement obliges the competent authorities of the Parties to provide, on request, information that is foreseeably relevant to the administration and enforcement of the Parties' domestic tax laws, including the collection of taxes and the investigation or prosecution of tax matters. A request for information must 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.

16. 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.
17. Article 5(4) obliges the Parties to ensure their competent authority has the authority to obtain and provide, upon request, 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 with the least possible delay.
19. Article 6 provides that a 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.
20. Article 7 provides various grounds for the refusal of requests, including where requests are not in conformity with the Agreement, if the disclosure of information would be contrary to public policy of the requested Party and where the requesting Party would be unable to obtain the requested information under its own laws.
21. Article 8 obliges the Parties to keep information received confidential. Such information may be disclosed only to persons or authorities concerned with the administration and enforcement of taxation covered by the Agreement and may only be used for this purpose, although this may include public court proceedings or 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.
22. Article 9 obliges the requested Party to bear ordinary costs associated with requests for information, while extraordinary costs are to be borne by the requesting Party, unless the Parties otherwise agree. Paragraphs 27 to 30 outline the financial impact of these obligations.
23. Article 11 obliges each Party to refrain from applying prejudicial or restrictive measures to 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.
24. Article 12 requires the Parties to jointly endeavour to resolve any difficulties or doubts arising as to the application or interpretation of the Agreement, and provides that the Parties may also agree on other forms of dispute resolution.

Implementation

25. Australia is able to fulfil its obligations under the Agreement under existing legislation, specifically section 23 of the *International Tax Agreements Act 1953*. No further legislation or regulation is required in order to implement the Agreement.

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

Costs

27. The Agreement will have a small administrative and financial impact on the Australian Taxation Office (ATO). As Gibraltar 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 Gibraltar in relation to its exchange of information procedures, if necessary.

28. The ATO and the Chief Secretary of Gibraltar will conclude 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:

- a) reasonable fees charged by third parties for carrying out research;
- b) reasonable fees charged by third parties for copying documents;
- c) reasonable costs of engaging experts, interpreters or translators;
- d) reasonable costs of conveying documents to Australia;
- e) reasonable litigation costs of Gibraltar; and
- f) reasonable costs of obtaining depositions or testimony.

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

30. Overall, it is estimated that the administrative and financial impact of the 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 Agreement is intended to help reduce tax avoidance and evasion by Australian taxpayers, its general impact could result in increased revenue collection by Australia.

Regulation Impact Statement

31. The Treasury has assessed the implementation of the 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 was consulted and confirmed that a Regulation Impact Statement was not required.

Future treaty action

32. The 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 Agreement by mutual consent at any time. Any future amendments would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any such amendments to the Agreement may be considered in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

33. Article 14 provides that the Agreement shall remain in force until terminated by either Party in writing. Termination would take effect on the first day of the month following the expiration of three 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 8. This ensures the continued protection of information exchanged under the Agreement between the Parties.

34. Termination by Australia would be subject to the normal treaty process, including tabling and consideration by JSCOT.

Contact details

International Tax and Treaties Division
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ATTACHMENT ON CONSULTATION

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CONSULTATION

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

36. The ATO was consulted in the development of the Australian model TIEA and ATO officials participated in the negotiation of the text of the Agreement with Gibraltar. The ATO will administer the Agreement once it is implemented.

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