

Documents tabled on 3 February 2009:

National Interest Analysis [2009] ATNIA 3

with attachment on consultation

**Agreement between the Government of Australia and the Government of
the British Virgin Islands for the Exchange of Information Relating to Taxes,
done at London on 27 October 2008 ([2008] ATNIF 18)**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes, done at London on 27 October 2008 ([2008] ATNIF 18)

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 the British Virgin Islands for the Exchange of Information Relating to Taxes (the Agreement) into force. Pursuant to Article 14.1, the Agreement will enter into force on the date of the latter notification in writing through the appropriate channel between Australia and the British Virgin Islands (BVI) giving notice that constitutional and legal procedures for the entry into force of this Agreement have been completed.
2. The Agreement will then have effect:
 - from that date with respect to criminal tax matters relating to taxable periods beginning on or after that date; and
 - from 1 January 2009 with respect to civil tax matters relating to taxable periods beginning on or after 1 January 2009.
3. In relation to Australia, the Agreement only applies to the external territories specifically listed in Article 4(1)(a).

Overview and national interest summary

4. The key objective of the Agreement is to establish a legal basis for the exchange of tax information between Australia and the BVI. The BVI is a self-governing crown colony of the United Kingdom located in the north-eastern Caribbean Sea. It has a low-tax structure and is known internationally as a centre for incorporating 'offshore companies'.
5. Information detailing the level and type of economic activity between Australia and the BVI is not available. However, as discussed in paragraph 12, a significant amount of funds flow between Australia and the BVI.
6. The Agreement, commonly referred to as a Tax Information Exchange Agreement (TIEA), will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in the BVI, and will help improve the integrity of the tax system by discouraging tax evasion by individuals and businesses. The Agreement provides for full exchange of information on criminal and civil tax matters between Australia and the BVI. It also incorporates a number of important safeguards to protect the legitimate interests of taxpayers.
7. This Agreement is the fourth of its kind for Australia; the first was signed with Bermuda on 10 November 2005, the second with Antigua and Barbuda on 30 January 2007 and the third with the Netherlands Antilles on 1 March 2007. It is an important step towards concluding TIEAs with other jurisdictions that have committed to work with Organisation for Economic Cooperation and Development (OECD) member countries under the auspices of the Global Forum on Taxation (Global Forum) to improve transparency and establish effective exchange of information for tax purposes.

Reasons for Australia to take the proposed treaty action

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

9. The Agreement is a part of Australia's ongoing commitment to implement OECD principles on eliminating harmful tax practices that contribute to international tax avoidance and evasion. Australia has taken a leadership role in this work and hosted the Global Forum in Melbourne in November 2005, which was attended by 55 OECD member countries and non-OECD jurisdictions.

10. Since 2002, 35 low-tax jurisdictions, including the BVI, have publicly committed to the elimination of harmful tax practices. These jurisdictions have worked together under the auspices of the Global Forum to develop international standards of transparency and effective exchange of information for tax purposes that, 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 participating partners. In October 2003, the then Treasurer approved an Australian model TIEA which is closely aligned to the OECD model. This Agreement with the BVI departs from the format of the Australian model TIEA, due to certain drafting preferences of the BVI, but its effect is consistent with the provisions of the Australian model TIEA.

12. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a relatively high flow of funds between Australia and the BVI. 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 held in overseas jurisdictions that are subject to Australian tax is of concern to Australia.

13. In 2006, the then government established Project Wickenby to investigate internationally promoted tax arrangements allegedly involving tax avoidance or evasion. Project Wickenby is a multi-agency taskforce comprising the Australian Taxation Office (ATO), the Australian Crime Commission, the Australian Federal Police, the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions, with the support of AUSTRAC, the Attorney General's Department, the Australian Government Solicitor and the NSW Crimes Commission. Concluding a TIEA with the BVI is consistent with the objectives of Project Wickenby, as it will establish a legal basis to obtain relevant information from the BVI to support investigations.

14. It is in Australia's interest to develop a network of agreements with low-tax jurisdictions to broaden the effectiveness of Australia's ability to administer and enforce its domestic tax laws. This Agreement, along with future TIEAs, will make it harder for taxpayers to avoid or evade Australian tax and discourage taxpayers from participating in abusive 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 the BVI's reputation as a location for legitimate business activity.

15. The BVI's commitment to implement effective exchange of information is a positive step in its relationship with Australia. It will also be seen by the international community as a positive step towards good governance. A media release issued by the OECD on 30 October 2008 describes the Agreement with the BVI (among others) as an important step forward in efforts to bring greater transparency to cross-border financial transactions.

Obligations

16. Article 1 of the Agreement requires the competent authorities of the Contracting Parties to provide assistance, through exchange of information, where the information 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. Article 5(1) requires Parties to provide such information when requested to do so in writing by the other Party. 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. There is no provision in the Agreement that authorises voluntary or unsolicited exchange of information between the two Parties.

17. In response to a valid written request from the BVI, Australia will be obliged to obtain and supply information that is held by the Commissioner of Taxation, as the Australian competent authority, or is obtainable under the Commissioner's access and information gathering powers, as provided in domestic law. If requested to do so, Australia must also provide information in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under domestic law (Article 5(3)). Article 5(4) requires 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, partnerships and other persons in an ownership chain. The Commissioner of Taxation already has the necessary authority to meet the obligations of Article 5(4). All obligations apply similarly to the BVI in situations where Australia makes a request for information.

18. Pursuant to Article 5(5), Australia must provide certain details to the BVI when making a request for information, in order to demonstrate that the request falls within the scope of the Agreement.

19. Where the information in the possession of the Commissioner of Taxation is insufficient to enable compliance with the request, Australia must, pursuant to Article 5(2), use all relevant information gathering measures to provide the requested information to the BVI, even if it is not needed for domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the *OECD Model Convention on Income and on Capital*, which has been incorporated into Australian tax treaty policy.

20. Article 5(6) requires that the information requested must be provided as promptly as possible. When Australia receives a request for information, it must confirm receipt in writing and notify the BVI within 60 days of any deficiency in the request. If Australia is unable to provide the information within 90 days of the receipt of the request, it must inform the BVI of the reasons for its inability or refusal to provide the information. A request may be refused if it is not in conformity with the Agreement, or if a condition exists that lifts the

obligation to provide information (Article 7). For example, Australia could refuse to provide information that the BVI would be unable to obtain in similar circumstances.

21. Article 8 imposes an obligation on Australia and the BVI to keep information provided and received confidential. Such information may be revealed only to persons or authorities officially concerned with the taxation matters covered by the Agreement. These persons or authorities shall use the information only for such purposes, or for oversight purposes, including in public court or judicial proceedings. The express written consent of the competent authority of the Party that provided the information is required for any disclosure to a person or authority not authorised by this Article. Both Parties will remain bound by the confidentiality provisions of the Agreement even after its termination (Article 15(3)). This ensures the permanent protection of information exchanged between the two Parties.

22. Article 11 imposes an obligation on Australia and the BVI to not apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either Australia or the BVI as long as the Agreement is in force and effective. A prejudicial or restrictive measure is defined as a measure applied by one of the Parties to residents or nationals of either of the Parties on the basis that the other Party to the Agreement does not engage in the effective exchange of information and/or because the operation of its laws, regulations or administrative practices lack transparency, or on the basis of no or nominal taxes and one of the preceding criteria.

Implementation

23. Australia's obligations under the Agreement are met by 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.

Costs

24. The Agreement will have a small administrative and financial impact on the ATO. As the BVI does not have a comparable income tax system and is unlikely to 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 to deal with the anticipated complexities of obtaining information from the BVI. That is, the ATO may need to provide technical assistance to the BVI in relation to operational exchange of information procedures, given the BVI's relative inexperience in this area. Actual impacts are difficult to estimate, however, and will depend on the development of effective administrative arrangements between the ATO and the revenue authorities in the BVI.

25. The ATO and the BVI Ministry of Finance 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:

- 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 Australia;
- reasonable litigation costs of the British Virgin Islands; and

- reasonable costs of obtaining depositions or testimony.

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

27. Overall, it is estimated that the administrative and financial impact of concluding this 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 be revenue positive for Australia.

Regulation Impact Statement

28. The Treasury has assessed the implementation of the treaty against criteria in the Best Practice Regulation Handbook. This regulatory option has no/low impact on businesses and individuals or on the economy and a Regulation Impact Statement is not required.

Future treaty action

29. The Agreement does not provide for the negotiation of future legally binding instruments, amendments or appendices to the existing Agreement. However, this does not preclude the two Parties from agreeing in the future to amend the existing Agreement. The Agreement does not have an amendment clause, but Article 39 of the *Vienna Convention on the Law of Treaties 1969* provides that a treaty may be amended by agreement between the Parties. Any such agreement would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any amendments to the Agreement may be considered in the future in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

30. Article 15(1) provides that the Agreement shall remain in force until terminated by either Party.

31. Article 15(2) provides that either Party may terminate the Agreement by giving written notice of termination. Such 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.

32. 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

33. The negotiation of this Agreement with the BVI was not conducted in the public domain and, consequently, no public consultation was undertaken.

34. The ATO was consulted in the development of the Australian model TIEA and ATO officials negotiated the text of this Agreement with the BVI. The ATO will administer the Agreement once it is implemented.

35. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of this treaty has been included in the six-monthly schedules of treaties to State and Territory representatives.

36. In addition to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister agreed to this treaty.