

National Interest Analysis [2014] ATNIA 1

with attachment on consultation

Agreement between

the Government of Australia

and

the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam

on the

Exchange of Information with respect to Taxes

(Bandar Seri Begawan, 6 August 2013)

[2013] ATNIF 22

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between
the Government of Australia and the Government of His Majesty the Sultan and Yang
Di-Pertuan of Brunei Darussalam
on the Exchange of Information with respect to Taxes
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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 Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on the Exchange of Information with respect to Taxes* (the proposed Agreement) into force.
2. Pursuant to its Article 12, the proposed Agreement will enter into force when Australia and Brunei Darussalam notify each other through the diplomatic channel that their respective procedures for entry into force have been completed. The proposed Agreement will then have effect:
 - for criminal tax matters, from the first fiscal period (financial year) beginning or after 1 January 2012, or where no financial year exists, for tax charges arising on or after the date; and
 - for all other tax matters, from 1 January 2012 but only relating to financial years beginning on or after that date or, where there is no financial year, charges to tax arising on or after that date. For Australia, the proposed Agreement will have effect from 1 July 2012.

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 Brunei Darussalam.
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 Brunei Darussalam. This 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 of information and legal privilege.
5. The proposed Agreement is one of 36 TIEAs signed by Australia, primarily with low-tax jurisdictions, 33 of which have entered into force. The proposed Agreement with Brunei Darussalam 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.

Reasons for Australia to take the proposed treaty action

6. The proposed Agreement, alongside TIEAs with other jurisdictions, is an important tool in Australia's efforts to combat offshore tax evasion. It will provide for the effective exchange of information between Australia and Brunei Darussalam, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.
7. 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 evasion. Australia has taken a leadership role in this work and was the Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes until the role was assumed by South Africa in early 2013. The Global Forum has a membership of 121 jurisdictions.
8. Since 2002, more than 100 jurisdictions, including Brunei Darussalam, 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 a key bilateral means that facilitate the provision of such information.
9. 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.
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 proposed Agreement with Brunei Darussalam essentially follows the format of the Australian model TIEA.
11. It is in Australia's interest to develop a network of TIEAs, and other international agreements, to promote the effective exchange of information. Concluding TIEAs with both low-tax and other jurisdictions makes it more difficult for taxpayers to avoid or evade Australian tax and discourages the use of 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 Brunei Darussalam's reputation as a location for legitimate business activity.
12. Brunei Darussalam's commitment to implement the proposed Agreement is a positive step in its relationship with Australia. In May 2012 the OECD identified Brunei Darussalam as a jurisdiction that had substantially implemented the internationally agreed tax standard for the exchange of information.

Obligations

13. Article 3 of the proposed Agreement lists the taxes subject to the obligations below, which in Australia are taxes of every kind and description imposed under federal laws administered by the Commissioner of Taxation. It also includes identical or substantially similar taxes imposed after the date of signature of the proposed Agreement, and such other taxes as may be agreed in an exchange of letters between the Contracting States. The Contracting States must notify each other of substantial changes to the taxation and related information gathering measures covered by the proposed Agreement.
14. Article 5(1) of the proposed Agreement obliges the competent authorities of the Contracting States to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other State's 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 State if it occurred in the territory of that State.

15. Article 5(2) provides that where the information in the possession of the Requested State is insufficient to enable compliance with a request, the Requested State must use its information gathering powers to obtain and provide the information, even if it is not needed for the Requested State's domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the OECD *Model Tax Convention 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 State. This is intended to assist the Applicant State to satisfy evidentiary requirements in domestic tax proceedings.

17. Article 5(4) obliges each Contracting State 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 ownership of companies, partnerships, trusts, foundations, 'Anstalten' (institutions similar to a trust or foundation) and other persons. Under Section 23 of the *International Tax Agreements Act 1953* 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 Contracting State to provide requested information as promptly as possible. To ensure a prompt response, the Requested State must acknowledge receipt of requests for information and if the Requested State is unable to obtain and provide the information within 60 days of the receipt of request, the Requested State shall inform the Applicant State as to the reason why.

19. Article 6 provides that one Contracting State may, on request, permit interviews with individuals and the examination of records within its jurisdiction by officials of the other Contracting State, provided that the prior written consent of the person(s) being interviewed has been obtained.

20. Article 7 provides various grounds for the refusal of requests, including: where requests are not in conformity with the proposed Agreement; if the Applicant State would be unable to obtain the requested information under its own laws; or if the supply of information would disclose any trade, business, industrial, commercial or professional secret or trade process.

21. Article 8 obliges the Contracting States 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 State is required for the disclosure of the requested information to any other person, entity, authority or jurisdiction.

22. Article 9 obliges the Requested State to bear ordinary costs associated with responding to requests for information, while extraordinary costs are to be borne by the Applicant State, unless the Contracting States otherwise agree.

23. Article 11 requires the Contracting States to jointly endeavour to resolve difficulties or doubts concerning the interpretation or application of the proposed Agreement. Article 11 also provides that the competent authorities of the Contracting States may agree upon other forms of dispute resolution.

Implementation

24. 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 10 requires Contracting States to implement any legislation necessary to give effect to the proposed Agreement, no further legislation or regulation is required in order to implement the proposed Agreement in Australia.

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

Costs

26. The proposed Agreement will have a small administrative and financial impact on the Australian Taxation Office (ATO). The ATO may be required to provide technical assistance to Brunei Darussalam in relation to its exchange of information procedures but such assistance could be provided within existing resource limits.

27. The ATO and the relevant Competent Authority of Brunei Darussalam expect to 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 the Applicant State;
- reasonable litigation costs of the Requested State in relation to a specific request for information; and
- reasonable costs of obtaining depositions or testimony.

28. 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 (tax information exchange agreements and double-taxation agreements) with more than 70 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

29. 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

30. The proposed Agreement does not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Contracting States 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 normal 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

31. Article 13 provides that the proposed Agreement shall remain in force indefinitely, but either of the Contracting States may terminate the proposed Agreement after a period of three years from its entry into force, by providing 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 Contracting State. However, both Contracting States would remain bound by the confidentiality obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Agreement between the two Contracting States.

32. 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

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

34. The ATO was involved in the negotiation of the proposed Agreement and will administer it following its entry into force. 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.

35. In addition the former Assistant Treasurer, the former Minister for Foreign Affairs, the former Minister for Trade and the former Prime Minister approved the proposed treaty action.