

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA

AGREEMENT

BETWEEN

THE GOVERNMENT OF AUSTRALIA

AND

THE GOVERNMENT OF MONTSERRAT (AS AUTHORISED BY THE GOVERNMENT
OF

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND)

ON

THE EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

(London, 23 November 2010)

Not yet in force
[2010] ATNIF 50

Whereas the Government of Australia and the Government of Montserrat ("the Contracting Parties") recognise that present legislation already provides for cooperation and the exchange of information in criminal tax matters;

Whereas it is acknowledged that the Government of Montserrat under the terms of its Entrustment from the United Kingdom has the right to negotiate, conclude and perform, subject to the terms of this Agreement, a tax information exchange agreement with the Government of Australia;

Whereas the Government of Australia welcomes the conclusion of this Agreement with the Government of Montserrat, which represents an important step in delivering the commitment the Government of Montserrat made to the OECD on the 27th February 2002 to respect the principles of transparency and exchange of information.

Whereas the Contracting Parties wish to enhance and facilitate the terms and conditions governing the exchange of information with respect to taxes;

Now, therefore, the Contracting Parties have agreed to conclude the following Agreement which contains obligations on the part of the Contracting Parties only:

ARTICLE 1

OBJECT AND SCOPE OF THE AGREEMENT

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning the taxes and the tax matters covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, verification, enforcement, recovery or collection of tax claims with respect to persons subject to such taxes, or the investigation or prosecution of tax matters in relation to such persons. Information shall be exchanged in accordance

with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8.

ARTICLE 2

JURISDICTION

A Requested State is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

ARTICLE 3

TAXES COVERED

- 1 The existing taxes which are the subject of this Agreement are:
 - a) in Australia, taxes of every kind and description imposed under federal laws administered by the Commissioner of Taxation; and
 - b) in Montserrat, direct taxes of every kind and description.

- 2 This Agreement shall also apply to any identical or substantially similar taxes imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The Agreement shall also apply to such other taxes as may be agreed in an exchange of letters between the Contracting Parties. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by this Agreement.

- 3 This Agreement shall not apply to taxes imposed by states, municipalities, or other political subdivisions, or possessions of a Contracting Party.

ARTICLE 4

DEFINITIONS

- 1 For the purposes of this Agreement, unless otherwise defined:
- a) the term "Australia", when used in a geographical sense, excludes all external territories other than:
 - (i) the Territory of Norfolk Island;
 - (ii) the Territory of Christmas Island;
 - (iii) the Territory of Cocos (Keeling) Islands;
 - (iv) the Territory of Ashmore and Cartier Islands;
 - (v) the Territory of Heard Island and McDonald Islands; and
 - (vi) the Coral Sea Islands Territory,and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone or the seabed and subsoil of the continental shelf;
 - b) the term " Montserrat" means the United Kingdom Overseas Territory of Montserrat;
 - c) the term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or

other interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

- d) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- e) the term "competent authority" means in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner and, in the case of Montserrat, the Comptroller of Inland Revenue;
- f) the term "Contracting Party" means the Government of Australia or the Government of Montserrat as the context requires;
- g) the term "criminal laws" means all criminal laws designated as such under domestic law irrespective of whether they are contained in the tax laws, the criminal code or other statutes;
- h) the term "criminal tax matters" means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the Requesting Party;
- i) the term "information" means any fact, statement, document or record in whatever form;
- j) the term "information gathering measures" means judicial, regulatory or administrative laws and procedures enabling a Contracting Party to obtain and provide the information requested;
- k) the term "person" means a natural person, a company or any entity that is treated as a body corporate for tax purposes, or any other body or group of persons;

- l) the term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;
- m) the term "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;
- n) the term "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties;
- o) the term "Requesting Party" means the Party to this Agreement submitting a request for or having received information from the Requested Party;
- p) the term "Requested Party" means the Party to this Agreement which is requested to provide or has provided information in response to a request; and
- q) the term "tax" means any tax covered by this Agreement.

2 As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

ARTICLE 5

EXCHANGE OF INFORMATION UPON REQUEST

1 The competent authority of a Requested Party shall provide upon request in writing information for the purposes specified in Article 1 of this Agreement. Such

information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if it occurred in the territory of the Requested Party.

2 If the information in possession of the competent authority of the Requested Party is not sufficient to enable it to comply with the request for the information, the Requested Party shall use all relevant information gathering measures to provide the Requesting Party with the information requested, notwithstanding that the Requested Party may not need such information for its own tax purposes.

3 If specifically requested by the competent authority of the Requesting Party, the competent authority of the Requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4 Each Contracting Party shall ensure that its competent authority, for the purposes specified in Article 1 of this Agreement, has the authority to obtain and provide upon request:

- a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;
- b) information regarding the legal and beneficial ownership of companies, partnerships, trusts, foundations and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees, beneficiaries and protectors; and in the case of foundations, information on founders, members of the foundation council and beneficiaries.

5 This Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

6 The competent authority of the Requesting Party shall provide the following information to the competent authority of the Requested Party when making a request for information under this Agreement in order to demonstrate the foreseeable relevance of the information to the request:

- a) the identity of the person under examination or investigation;
- b) a statement of the information sought including its nature and the form in which the Applicant State wishes to receive the information from the Requested State;
- c) the tax purpose for which the information is sought;
- d) reasonable grounds for believing that the information requested is present in the territory of the Requested Party or is in the possession or control of a person subject to the jurisdiction of the Requested Party;
- e) to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- f) a statement that the request is in conformity with this Agreement and the laws and administrative practices of the Requesting Party, and that if the requested information were within the jurisdiction of the Requesting Party then the competent authority of the Requesting Party would be able to obtain the information under the laws of the Requesting Party or in the normal course of administrative practice; and
- g) a statement that the Requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

7 Notwithstanding the provisions of Article 10 in particular, the competent authority of the Requested Party shall forward the requested information as promptly as possible to the Requesting Party. To ensure a prompt response, the competent authority of the Requested Party shall:

- a) confirm the receipt of a request in writing to the competent authority of the Requesting Party and shall notify the competent authority of the Requesting Party of any deficiencies in the request within 60 days of receipt of the request; and
- b) if the competent authority of the Requested Party has been unable to obtain and provide the information requested within 90 days of receipt of the request, including if obstacles are encountered in furnishing the information, or if the competent authority of the Requested Party refuses to provide the information, it shall immediately inform the competent authority of the Requesting Party to explain the reasons for its inability or the obstacles for its refusal.

ARTICLE 6

TAX EXAMINATIONS (OR INVESTIGATIONS) ABROAD

1 The Requested Party may allow representatives of the competent authority of the Requesting Party to enter the territory of the Requested Party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the Requesting Party shall notify the competent authority of the Requested Party of the time and place of the intended meeting with the persons concerned.

2 At the request of the competent authority of the Requesting Party, the competent authority of the Requested Party may permit representatives of the competent authority of the Requesting Party to be present at the appropriate part of a tax examination in the territory of the Requested Party.

3 If the request referred to in paragraph 2 is granted, the competent authority of the Requested Party conducting the examination shall, as soon as possible, notify the competent authority of the Requesting Party of the time and place of the examination, the

authority or person authorised to carry out the examination and the procedures and conditions required by the Requested Party for the conduct of the examination. All decisions regarding the conduct of the examination shall be made by the Requested Party conducting the examination.

ARTICLE 7

POSSIBILITY OF DECLINING A REQUEST

1 The Requested Party shall not be required to obtain or provide information that the Requesting Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the Requested Party may decline to assist where the request is not made in conformity with this Agreement.

2 The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in paragraph 4 of Article 5 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3 The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

- a) produced for the purposes of seeking or providing legal advice; or
- b) produced for the purposes of use in existing or contemplated legal proceedings;

4 The Requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).

5 A request for information shall not be refused on the ground that the tax liability giving rise to the request is disputed by the taxpayer.

6 The Requested Party may decline a request for information if the information is requested by the Requesting Party to administer or enforce a provision of the tax law of the Requesting Party, or any requirement connected therewith, which discriminates against a national of the Requested Party as compared with a national of the Requesting Party in the same circumstances.

ARTICLE 8

CONFIDENTIALITY

1 All information provided and received by the competent authorities of the Contracting Parties shall be kept confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2 The information may not be disclosed to any other person or entity or authority without the express written consent of the competent authority of the Requested Party.

3 Information provided to a Requesting Party shall not be disclosed to any other jurisdiction.

ARTICLE 9

SAFEGUARDS

The rights and safeguards secured to persons by the laws or administrative practices of the Requested Party remain applicable. The requested State will use its best endeavours to ensure that any such rights and safeguards are not applied in a manner that unduly prevents or delays effective exchange of information.

ARTICLE 10

COSTS

Incidence of costs incurred in providing assistance (including reasonable costs of third parties and external advisors in connection with litigation or otherwise) shall be agreed by the competent authorities of the Contracting Parties.

ARTICLE 11

IMPLEMENTING LEGISLATION

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of this Agreement.

ARTICLE 12

NO PREJUDICIAL OR RESTRICTIVE MEASURES

1 Neither of the Contracting Parties shall apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either Contracting Party so long as this Agreement is in force and effective.

2 A "prejudicial or restrictive measure based on harmful tax practices" is a measure applied by one Contracting Party to residents or nationals of either Contracting Party on the basis that the other Contracting 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, or on the basis of no or nominal taxes and one of the preceding criteria.

3 Without limiting the generality of paragraph 2 the term "prejudicial or restrictive measure" includes the denial of a deduction, credit or exemption, the imposition of a tax, charge or levy, or special reporting requirements.

4 A "prejudicial or restrictive measure" does not include generally applicable measures, applied by either Contracting Party, such as controlled foreign companies, foreign investment funds, transferor trusts, Transfer Pricing, Thin Capitalisation, operation of relief from double taxation provisions or general information reporting rules that relate to the disclosure of information from other countries or jurisdictions, or transactions with such countries or jurisdictions, such as record keeping requirements imposed on foreign owned subsidiaries to ensure access to information concerning parent companies.

ARTICLE 13

MUTUAL AGREEMENT PROCEDURE

1 Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of this Agreement, the competent authorities shall use their best endeavours to resolve the matter by mutual agreement.

2 In addition to the endeavours referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually determine the procedures to be used under Articles 5 and 6.

3 The competent authorities of the Contracting Parties may communicate with each other directly for the purposes of this Agreement.

4 The Contracting Parties may also agree on other forms of dispute resolution.

ARTICLE 14

ENTRY INTO FORCE

The Contracting Parties shall notify each other in writing through the diplomatic channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force and shall thereupon have effect:

- a) for criminal tax matters from 1 July 2010; and
- b) for all other matters covered in Article 1 from 1 July 2010, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

ARTICLE 15

TERMINATION

1 This Agreement shall continue in effect indefinitely, but either Contracting Party may terminate the Agreement by serving a notice of termination in writing through diplomatic channels to the competent authority of the other Contracting Party.

2 Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.

3 A Contracting Party shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

IN WITNESS WHEREOF the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

DONE at London, this 23rd day of November 2010, in duplicate.

FOR THE GOVERNMENT OF
AUSTRALIA:

HE John Cecil Dauth LVO
High Commissioner

FOR THE GOVERNMENT OF
MONTserrat:

the Hon. Rueben Meade
Chief Minister