

Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)

Introduction

- 4.1 On 7 February 2012, the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)* was tabled in the Commonwealth Parliament.
- 4.2 The proposed Protocol aligns the exchange of information (EOI) provisions with the internationally agreed standard on tax information exchange, which was developed by the Organisation for Economic Co-operation and Development (OECD). This standard was endorsed by G20 Finance Ministers at their Berlin meeting in 2004 and by the United Nations Committee of Experts on International Cooperation in Tax Matters at its October 2008 meeting.¹

¹ National Interest Analysis [2012] ATNIA 4, amending the *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the*

Overview and national interest summary

- 4.3 The key objectives of the proposed Protocol are to:
- promote closer economic cooperation between Australia and India by aligning the taxation of business profits and cross-border services with international taxation norms and by including rules to prevent tax discrimination; and
 - improve the integrity of the tax system by providing a framework through which the tax administrations of Australia and India can prevent international fiscal evasion.²
- 4.4 The proposed Protocol updates the current tax treaty arrangements between both countries by modernising the rules which determine when an enterprise of one country may be taxed on its activities in the other. It also provides that an enterprise will only be taxed on the profits attributable to its branch activities in the other country and will not, as is currently the case, also be taxed on activities not carried on through its branch but of a similar nature to the branch activities.^{3,4}
- 4.5 Businesses are likely to welcome the changes designed to protect nationals and businesses of one country from tax discrimination in the other.⁵
- 4.6 The proposed Protocol will amend the EOI provisions, enhancing the ability of both countries' tax authorities to exchange information on a wider range of taxes.⁶ The new provisions also clarify that neither tax administration can refuse to provide information solely because they do not have a domestic interest in such information, or because a bank or similar institution holds the information. The enhanced EOI provisions also maintain safeguards to protect taxpayers' legitimate interests.⁷

Prevention of Fiscal Evasion with Respect to Taxes on Income, done at New Delhi on 16 December 2011, [2011] ATNIF 30, (Hereafter referred to as 'NIA'), para 12.

2 NIA, para 4.

3 For example, an Australian company may have a branch in India manufacturing goods while a different part of the same company sells similar goods through independent agents located in India. Aggregating the profits on transactions conducted through independent agents with those of the branch can, in certain circumstances, interfere with ordinary commercial activities.

4 NIA, para 5.

5 NIA, para 6.

6 In the case of Australia, all Federal taxes.

7 NIA, para 7.

- 4.7 The integrity of both countries' tax systems will also be enhanced by mutual assistance provisions for the collection of tax debts (known as the 'AIC').⁸

Reasons for Australia to take proposed treaty action

- 4.8 It is in Australia's interest to utilise EOI treaty provisions that meet the internationally agreed standard to combat tax avoidance and evasion, and to continue the Australian Government's support of global action on improving information exchange and transparency.⁹
- 4.9 Australia enjoys a positive and constructive relationship with India, with a rapidly expanding bilateral commercial relationship. As a consequence, the proposed Protocol, in modernising the circumstances in which cross-border businesses come under the tax jurisdiction of the other country, will provide for certainty of treatment for businesses establishing themselves in the other country and will better reflect the state of the current trade and investment relationship.¹⁰
- 4.10 The non-discrimination rules will also provide certainty to businesses and individuals investing in the other country, as neither country will discriminate in their treatment of such businesses and individuals in the design of their future laws and processes.¹¹
- 4.11 The new integrity provisions (EOI and AIC) will be an important tool in Australia's efforts to combat offshore tax evasion. They will make it harder for taxpayers to evade Australian tax and will discourage taxpayers from participating in abusive tax arrangements by increasing the probability of detection. Accordingly, it will enhance Australia's ability to administer and enforce its domestic tax laws.¹²

Obligations

- 4.12 Article 2 introduces new rules into Article 5 setting out when a business will be taken to have a taxable presence in the other country.¹³

8 NIA, para 8.

9 NIA, para 12.

10 NIA, para 9.

11 NIA, para 10.

12 NIA, para 11.

13 NIA, para 13.

- 4.13 Article 3 amends Article 7 of the Agreement and obliges each country to only tax business activities carried out by an enterprise of the other country in its country where those activities are carried out by a branch of the enterprise ('permanent establishment'), as defined in the amended Article 5 of the Agreement.¹⁴
- 4.14 Article 4 inserts a new Article 24A into the Agreement and introduces a general non-discrimination principle, requiring each country to treat nationals of the other country no less favourably than it treats its own nationals regarding taxation and any connected requirements.¹⁵
- 4.15 Article 5 creates a new Article 26 which provides obligations for the exchange of information between both countries, including a specific obligation to gather and provide information upon request. The new Article 26(2) imposes a correlative obligation on the country receiving any such information to treat it as secret in the same manner as information obtained under its domestic laws. The new Article 26(3) allows either country to decline to supply information in certain circumstances. Specifically, a request may be denied where:
- (i) it would require implementation of administrative measures at variance with either country's domestic laws or administrative practice;
 - (ii) the information requested is not obtainable under the laws or in the normal course of administration of either country; or
 - (iii) it would involve disclosure of a trade or business secret or would be contrary to public policy. These circumstances, which act as a safeguard to protect Australia's interests and taxpayers' rights, accord with the *OECD Model Tax Convention on Income and on Capital*.¹⁶
- 4.16 Article 6 inserts a new Article 26A into the Agreement which provides an obligation for the revenue authorities of each country to use their collection mechanisms to collect debts owing in the other country.¹⁷
- 4.17 Representatives of the Treasury noted that:
- These provisions will create an important tool to combat tax evasion by increasing the ability to collect the outstanding tax debts of Australian and foreign taxpayers, including those of taxpayers who have departed Australia. An amending protocol

14 NIA, para 14.

15 NIA, para 15.

16 NIA, para 16.

17 NIA, para 17.

was pursued in the first instance to allow aspects of the existing treaty to be updated quickly in areas where both Australia and India's tax treaty policy align, leaving a more comprehensive update to be pursued in further negotiations.¹⁸

Implementation

- 4.18 The implementation of the proposed Protocol will require amendment to the *International Tax Agreements Act 1953* to give it the force of law in Australia. The amendment will be effected prior to the proposed Protocol entering into force in Australia.¹⁹
- 4.19 The legislative framework required for Australia to fulfil its obligations under the EOI provisions in the proposed Protocol is contained in section 23 of the *International Tax Agreements Act 1953*.²⁰
- 4.20 The implementation of the proposed Protocol will not affect the existing roles of the Commonwealth, or the States and Territories, in tax matters.²¹

Accuracy of revenue and taxation information

- 4.21 The Committee noted that it was reported in December 2011 that India was ranked 95th in the transparency international corruption index having fallen eleven places from the previous year.²² The Treasury responded that the treaty “does not really have any anti-corruption components to it” and that Australia would accept on face value the information on company earnings that the Indian revenue authorities would provide.²³

Costs

- 4.22 Treasury have been unable to estimate the revenue impact of the proposed Protocol. However, since the proposed Protocol seeks to expand the scope of taxpayer information available to the Australian Taxation Office (ATO)

18 Mr Paul Higinbotham, Policy Analyst, International Tax and Treaties Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 19 March 2012.

19 NIA, para 18.

20 NIA, para 19.

21 NIA, para 20.

22 ‘Transparency International corruption index: India drops to 95th position’, <http://articles.economictimes.indiatimes.com/2011-12-02/news/30467987_1_corrupt-country-australia-shares-cases> accessed 20 March 2012.

23 Mr Greg Wood, Manager, International Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury, *Committee Hansard*, 19 March 2012.

and provides for assistance in collection of tax debts, the proposed Protocol is expected to increase taxpayer compliance and therefore tax revenue.²⁴

- 4.23 There would be a small, unquantifiable cost in administering the changes made by the proposed Protocol, including minor implementation costs to the ATO in educating the taxpaying public and ATO staff concerning the new arrangements. There are also 'maintenance' costs to the ATO and the Treasury in terms of dealing with inquiries, rulings and other interpretative decisions and mutual agreement procedures.²⁵ However, these costs will continue to be managed within existing agency resources.²⁶

Conclusion

- 4.24 Having a better set of structures and mechanisms through which Australia can constructively interact with the burgeoning Indian economy is in Australia's long term interests.
- 4.25 Also, any international agreements that strengthen the internationally agreed standards to combat tax avoidance and evasion are in Australia's interest. The Australian Government's continued support of global action on improving information exchange and transparency will contribute positively to international efforts to curtail tax evasion, transnational crime and corruption.
- 4.26 The Committee concludes that these amendments should be supported with binding treaty action.

Recommendation 3

The Committee supports the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (New Delhi, 16 December 2010)* and recommends that binding treaty action be taken.

24 NIA, para 21.

25 Including advance pricing arrangements, whereby the prices of goods and services transferred between related business entities are agreed by those entities with the tax authorities in the countries in which the related entities operate.

26 NIA, para 22.