

## Two Tax Information Exchange Agreements

### Introduction

- 6.1 This chapter considers two Tax Information Exchange Agreements:
- the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* (the Guatemala Tax Information Exchange Agreement); and
  - 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 Brunei Tax Information Exchange Agreement).
- 6.2 These Agreements are being considered together because they are, in all material respects, the same.

### Background

- 6.3 Tax Information Exchange Agreements like the proposed Guatemala<sup>1</sup> and Brunei<sup>2</sup> Tax Information Exchange Agreements are bilateral Agreements

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1 National Interest Analysis [2014] ATNIA 2 with attachment on consultation *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* (Mexico City, 26 September 2013) [2013] ATNIF 24 (hereafter referred to as 'the Guatemala NIA'), para 1.

2 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 (hereafter referred to as 'the Brunei NIA'), para 1.

that establish a legal basis for the exchange of tax information relating to persons and entities between the signatories.

- 6.4 These Agreements are the result of an initiative by the Organisation for Economic Cooperation and Development (OECD) to improve the transparency of financial flows between countries.<sup>3</sup>
- 6.5 The Guatemalan Agreement National Interest Analysis (NIA) indicates that:
- While most financial flows to and from low-tax jurisdictions are legitimate, the legal framework 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.<sup>4</sup>
- 6.6 In 2002, the OECD released a model Tax Information Exchange Agreement to facilitate negotiations between OECD members and low tax jurisdictions. In 2003, Australia adopted its own model Tax Information Exchange Agreement based on the OECD model Agreement.<sup>5</sup>
- 6.7 Since the development of the OECD model Agreement, 100 jurisdictions, including Brunei and Guatemala, have committed to eliminating harmful tax practices.<sup>6</sup>
- 6.8 Implemented Agreements support tax authorities by ensuring those authorities have all the available information to determine a taxpayer's correct liability.<sup>7</sup>
- 6.9 The proposed Brunei and Guatemala Tax Information Exchange Agreements are two of 36 bilateral Tax Information Exchange Agreements signed by Australia,<sup>8</sup> of which 33, according to the Guatemala NIA, have entered into force.<sup>9</sup> The Committee has previously reviewed Australian Tax Information Exchange Agreements in Reports 73, 87, 99, 102, 107, 112, 114, 120, 123 and 129.<sup>10</sup>

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3 Brunei NIA, para 5.

4 Guatemala NIA, para 9.

5 Brunei NIA, para 10.

6 Guatemala NIA, para 8.

7 NIA, para 8.

8 Mr Gregory Wood, Manager, Tax Treaties Unit, Tax System Division, Treasury, *Committee Hansard*, Canberra, 10 February 2014, p. 15.

9 Guatemala NIA, para 5.

10 Joint Standing Committee on Treaties, *Report 129*, Tabled 10 September 2012, p. 17.

## Overview and national interest summary

- 6.10 The proposed Brunei and Guatemala Tax Information Exchange Agreements follow the format of the Australian standard Tax Information Exchange Agreement.<sup>11</sup>
- 6.11 The Brunei and Guatemalan NIAs claim that the proposed Agreements will help improve the integrity of Australia's tax system by discouraging tax evasion.<sup>12</sup>
- 6.12 The proposed Agreements will allow the Australian Commissioner for Taxation to request and receive certain information held by Brunei and Guatemala.<sup>13</sup>
- 6.13 The proposed Agreements contain a number of privacy safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.<sup>14</sup>
- 6.14 According to the Guatemalan NIA, data from the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates that there are relatively small flows of money between Australia and Guatemala.<sup>15</sup>
- 6.15 Mr Grant Goodwin, Executive Director, Exchange of Information, Australian Taxation Office (ATO) advised the Committee that in the 2012/13 financial year, AUSTRAC was provided with 1 336 reports of financial transfers between Australia and Guatemala totalling nearly AU\$19m.<sup>16</sup> A similar analysis of financial transfers between Australia and Uruguay disclosed 9 801 reports of financial transfers totalling nearly AU\$95m.<sup>17</sup>
- 6.16 In relation to Brunei, Mr Goodwin advised that:
- ... there were 10,353 reports. Out of that we are able to identify 1,681 unique entities or persons for a total of a little bit short of \$900 million. Reasons for Australia to take the proposed treaty action.<sup>18</sup>

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11 Brunei NIA, para 10; and Guatemala NIA , para 10.

12 See for example Brunei NIA, para 4.

13 The Guatemala Agreement, Article 5; and the Brunei Agreement, Article 5.

14 Guatemala Agreement, Article 8.

15 Guatemala NIA, para 12.

16 Mr Grant Goodwin, Executive Director, Exchange of Information, Australian Taxation Office (ATO), *Committee Hansard*, Canberra, 17 March 2014, p. 9.

17 Joint Standing Committee on Treaties, *Report 138*, p. 32.

18 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 17 March 2014, p. 10.

- 6.17 The NIAs state that the proposed Tax Information Exchange Agreements combine with Australia's other bilateral Tax Information Exchange Agreements to form an important tool to combat offshore tax evasion.<sup>19</sup>
- 6.18 Experience has shown Australia's Tax Information Exchange Agreements to be effective. The ATO provided some tangible examples to the Committee at a public hearing in 2012:
- Our main tax information exchange agreement partners are the British Virgin Islands, Bermuda, the Isle of Man and Jersey. As of this month ... thirty-eight requests ... have been finalised; and, on the basis of those cases, we have issued six amended assessments to the value of \$52 million. Our auditors have also identified a further \$127 million as potential omitted income via request[s] made under the tax information exchange agreements.<sup>20</sup>
- 6.19 In addition, the ATO provided evidence that Tax Information Exchange Agreements were deterring Australian tax payers from using low tax jurisdictions:
- Since the financial year 2007–2008 there has been a \$12 billion reduction in fund flows to thirteen high-risk secrecy jurisdictions and fund flows returning to Australia from the same secrecy jurisdictions have increased by seven per cent, or around \$5 billion in the 2010–11 financial year as compared to 2007–08.<sup>21</sup>

## Obligations

- 6.20 The proposed Tax Information Exchange Agreements will apply to all Australian taxes imposed under federal laws and administered by the Commissioner for Taxation. **Article 3** of the Agreements, which deals with these taxes, will also apply to any similar future taxes imposed after the signing of the Agreements.<sup>22</sup>
- 6.21 **Article 5** of the proposed Agreements obliges the competent authorities in Australia, and Brunei and Guatemala to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other Party's domestic tax laws. This obligation applies irrespective of

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19 Brunei NIA, para 6.

20 Joint Standing Committee on Treaties, *Report 138*, p. 32.

21 Joint Standing Committee on Treaties, *Report 138*, p. 32.

22 See for example the Guatemala Agreement, Article 3.

- whether the conduct being investigated would constitute a crime under the laws of the requested Party.<sup>23</sup>
- 6.22 A request for information must contain a standard set of information, including:
- the identity of the person under investigation;
  - a statement of the information sought;
  - the tax purposes for which the information is sought;
  - the grounds for believing the requested country can provide the requested information;
  - to the extent known, the name and address of any persons who may be in possession of the requested information;
  - a statement that the request for information is in conformity with the laws of the requesting Party; and
  - a statement that the requesting Party has pursued all known avenues for obtaining the requested information in its own territory.<sup>24</sup>
- 6.23 Requests may also be made to interview individuals or examine records within the jurisdiction of the requested Party. Interviews can only take place if the individual concerned provides written consent.<sup>25</sup>
- 6.24 Information obtained through a request must be kept confidential, and can only be disclosed to people involved in the administration or enforcement of taxes covered by the proposed Agreements. The only exception to this requirement is in the case of relevant public court proceedings and decisions.<sup>26</sup>
- 6.25 A Party may refuse a request if it does not conform to the proposed Agreement, if the laws of the requested Party will not allow the information to be obtained, or if the information may reveal trade or professional secrets.<sup>27</sup>

## Implementation

- 6.26 No legislative change will be required to implement the proposed Guatemala and Brunei Tax Information Exchange Agreements. The NIAs indicates that Australia will be able to fulfil its obligations under the

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23 See for example the Brunei Agreement, Article 5.

24 See for example the Guatemala Agreement, Article 5.

25 See for example the Brunei Agreement, Article 6.

26 See for example the Guatemala Agreement, Article 8.

27 See for example the Brunei Agreement, Article 7.

proposed Agreement with existing legislation, specifically, the *International Tax Agreements Act 1953*.<sup>28</sup>

- 6.27 The proposed Agreement will not change the existing roles of the Commonwealth, or the States or Territories, in tax matters.<sup>29</sup>

## Costs

- 6.28 The requested Party is to bear the ordinary costs of requests under the proposed Tax Information Exchange Agreements, but the requesting Party must bear any extraordinary costs unless both Parties agree otherwise.<sup>30</sup>

- 6.29 However, because Brunei and Guatemala are unlikely to routinely need Australian information for their own tax purposes, it is likely that most requests made under the proposed Agreements will come from Australia.<sup>31</sup>

- 6.30 The ATO and the competent authorities in Brunei and Guatemala are in the process of negotiating Memoranda of Understanding to enable Australia to contribute to the cost of requests made by Australia.<sup>32</sup>

- 6.31 Mr Greg Wood, Manager, Tax Treaties Unit, Tax System Division, Treasury, explained that:

It is really just a capacity issue – if the other country does not have similar capacity to deal with these requests ... we are not necessarily just asking for information that the other country has at its fingertips. There is an obligation to actually go out and get the information and perhaps to spend quite a bit of money obtaining information.<sup>33</sup>

- 6.32 The estimated cost of the proposed Agreements is expected to be absorbed into the ATO's existing exchange of information program. In addition, the NIAs point out that in the long run, the costs of the proposed Agreements should be recouped through the reduction in avoidance and evasion by Australian tax payers.<sup>34</sup>

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28 See for example the Brunei NIA, para 24.

29 See for example the Guatemala NIA, para 25.

30 See for example the Brunei Agreement, Article 9.

31 See for example the Brunei NIA, para 26.

32 See for example the Guatemala NIA, para 27.

33 Mr Wood, Treasury, *Committee Hansard*, Canberra, 17 March 2014, p. 11.

34 See for example the Brunei NIA, para 28.

## Convention on Mutual Administrative Assistance in Tax Matters

- 6.33 At the Committee's hearing into the *Agreement between the Government of Australia and the Government of the Oriental Republic of Uruguay on the Exchange of Information with Respect to Taxes* on 10 February 2014, the Committee was advised that the process of negotiating Tax Information Exchange Agreements has been superseded by the wide acceptance in the international community of the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (the Convention), to which Australia is a Party.<sup>35</sup>
- 6.34 The OECD states:
- Since 2009 the G20 has consistently encouraged countries to sign the Convention ... Currently over 60 countries have signed the Convention and it has been extended to over 10 jurisdictions. This represents a wide range of countries including all G20 countries, all BRIICS,<sup>36</sup> almost all OECD countries, major financial centres and a growing number of developing countries.<sup>37</sup>
- 6.35 According to the OECD, with a view to combating tax avoidance and evasion, the Convention provides for all forms of cooperation between states in the assessment and collection of taxes. This cooperation ranges from exchange of information to the recovery of foreign tax claims.<sup>38</sup>
- 6.36 Mr Wood outlined the advantages of the Convention over bilateral Tax Information Exchange Agreements:
- One of the benefits of that particular convention is that it provides for more expansive exchange of information; it provides for information on request, as well as automatic exchange of information. It also provides for assistance in the collection of outstanding tax debts and in relation to the service of documents. So it has a broader scope than our bilateral agreements. One of the other benefits is that it cuts down on negotiation time and costs in

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35 Mr Goodwin, ATO, *Committee Hansard*, Canberra, 10 February 2014, p. 14.

36 As defined by the OECD, BRIICS refers to: Brazil, Russia, India, Indonesia, China and South Africa.

37 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, < <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> >, accessed 7 March 2014.

38 OECD, *Exchange of Information: Convention on Mutual Administrative Assistance in Tax Matters*, < <http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> >, accessed 7 March 2014.

that the text of that particular agreement is settled and countries can either sign up to it or not. There are no actual negotiation costs.<sup>39</sup>

## Conclusion

- 6.37 With the impending change to the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, rather than bilateral Tax Information Exchange Agreements as a means of exchanging tax related information, the Committee expects that the Guatemala and Brunei Tax Information Exchange Agreements will be amongst the last to be considered by the Committee.
- 6.38 As stated earlier in this Chapter, the Committee has a long history examining bilateral Tax Information Exchange Agreements. Over this time, the Committee has been impressed by the reduction in tax avoidance achieved through these Agreements. The Committee would like to take this opportunity to commend for their good work the staff of the ATO and Treasury involved in negotiating and administering these Agreements.
- 6.39 The Committee supports Australia's ratification of the proposed Agreements and recommends that binding treaty action be taken.

### Recommendation 5

**The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Guatemala for the Exchange of Information Relating to Tax Matters* and 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*, and recommends that binding treaty action be taken.**

Mr Wyatt Roy MP  
Chair

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<sup>39</sup> Mr Wood, Treasury, *Committee Hansard*, Canberra, 17 March 2014, p. 11.