

Five tax agreements involving the Marshall Islands, Mauritius and Montserrat

Background

3.1 This Chapter reviews the following five bilateral tax related agreements:

- *the Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands on the Exchange of Information with Respect to Taxes, done at Majuro on 12 May 2010;*
- *the Agreement between the Government of Australia and the Government of the Republic of Mauritius on the Exchange of Information with Respect to Taxes (Port Louis, 8 December 2010);*
- *the 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);*
- *the Agreements between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments, done at Majuro on 12 May 2010; and*
- *the Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments (Port Louis, 8 December 2010)*

3.2 These agreements are being considered together because they are all part of Australia's implementation of the Organisation for Economic

Development and Cooperation (OECD) standards on the elimination of harmful tax practices.

OECD Standards on the Elimination of Harmful Tax Practices

3.3 Since 2000, the OECD has worked with non-OECD low tax countries to address harmful tax practices through the Global Forum on Transparency and Exchange of Information for Tax Purposes.¹ The OECD identifies the following as harmful tax practices:

- no or low taxation of income;
- a lack of transparency in relation to which persons or organisations are subject to the low tax regime and the amount of income concerned;
- little or no exchange of information with countries from which persons or organisations transfer income to the low tax economy; and
- a low or no tax regime that does not extend to persons or organisations within the low tax economy.²

3.4 The Global Forum established a set of standards on the elimination of harmful tax practices that provide the basis for the OECD's work with low tax countries. In summary, the standards require low tax countries which are members of the Global Forum to:

- refrain from adopting new measures that extend the scope of, or strengthen existing provisions that constitute harmful tax practices;
- review their existing measures for the purpose of identifying and removing legislation or administrative practices that could constitute harmful tax practices;
- remove features of their tax regime that have been identified by the OECD as harmful;
- ask other members of the Forum to review their tax provisions that could constitute a harmful tax practice;

1 Organisation for Economic Development and Cooperation (OECD), *Global Forum on Transparency and Exchange of Information for Tax Purposes Information Brief*, September 2011, <<http://www.oecd.org/dataoecd/32/45/43757434.pdf>>, viewed 18 September 2011.

2 OECD, *The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries*, 2006, p. 3.

- coordinate their national treaty responses to harmful tax practices adopted by other countries; and
 - encourage non members to associate themselves with these standards.³
- 3.5 More than 60 low tax countries have joined the Global Forum and committed to the implementation of OECD standards on the elimination of harmful tax practices. The OECD claims that every country identified as a low tax country when the Global Forum commenced its work in 2000 has now agreed to cooperate with the OECD to remove harmful tax practices.⁴

Tax Information Exchange Agreements

- 3.6 The principal mechanism developed by the OECD to combat harmful tax practices is the Tax Information Exchange Agreement (TIEA).
- 3.7 TIEAs establish a legal basis for the exchange of tax information relating to certain persons and other entities between jurisdictions. In effect, a TIEA will prevent a person or organisation in one jurisdiction from concealing their income by transferring it to the other jurisdiction.⁵
- 3.8 Over 500 TIEAs have been negotiated this year. Table 3.1 below shows that the number of agreements signed has increased dramatically since 2008.

3 OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998, p. 71.

4 OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Information Brief*, September 2011, < <http://www.oecd.org/dataoecd/32/45/43757434.pdf>>, viewed 18 September 2011.

5 *National Interest Analysis* [2011] ATNIA 16, *Agreements on the Exchange of Information with Respect to Taxes between Australia and: the Marshall Islands* [2010] ATNIF 34; *Mauritius* [2010] ATNIF 52; and *Montserrat* [2010] ATNIF 50, Para. 5. Hereafter referred to as the TIEA NIA.

Table 3.1: TIEAs signed annually

Year	Number of TIEAs signed
2000	1
2001	2
2002	8
2003	9
2004	9
2005	11
2006	11
2007	23
2008	50
2009	250
2010	459
2011 (to date)	500

Source OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes Information Brief, September 2011*, < <http://www.oecd.org/dataoecd/32/45/43757434.pdf>>, viewed 18 September 2011.

Australian TIEAs

3.9 Australia has signed 31 TIEAs to date.⁶ The Committee has previously reviewed Australian TIEAs in Reports 73, 87, 99, 102, 107, 112 and 114.

3.10 The proposed TIEAs being considered in this Chapter involve the Marshall Islands, Mauritius, and Montserrat.⁷

3.11 According to the National Interest Analysis (NIA):

The proposed Agreements will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive tax and income related information held in the Marshall Islands, Mauritius or Montserrat, and will discourage tax evasion by individuals and other entities in Australia.⁸

3.12 In relation to the parties to the TIEA's being considered here, Australian Transaction Reports and Analysis Centre (AUSTRAC) data indicates that

⁶ Mr Gregory Wood, Manager, International Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury, *Committee Hansard*, 12 September 2011, p. 2.

⁷ TIEA NIA, para. 5.

⁸ TIEA NIA, para. 6.

the flow of funds is relatively small between Australia, the Marshall Islands, and Montserrat. On the other hand, a significant flow of funds does occur between Australia and Mauritius.⁹

- 3.13 While most funds flowing to and from low tax countries are legitimate, the legal frameworks and systems that make low tax countries attractive may also be used to evade paying tax.¹⁰
- 3.14 Montserrat is an internally self-governing overseas territory of the United Kingdom (UK). It requires UK Government approval before undertaking international commitments. The UK has authorised the proposed Agreement. Montserrat's nominated competent authority - the Comptroller of Inland Revenue - will be responsible for the exchange of tax information with Australia.¹¹ The Marshall Islands and Mauritius are both independent republics.
- 3.15 Australia will fulfil its obligations under the proposed agreements using existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953*. No further legislation or regulation is required in order to implement the proposed Agreements.¹²

Costs

- 3.16 The Australian Taxation Office (ATO) claims that the proposed agreements will have a small administrative and financial impact. As the Marshall Islands, Mauritius and Montserrat are unlikely to routinely need Australian information for their own tax purposes it is likely that most requests for information will originate from Australia.
- 3.17 As with previous TIEAs, some resources may need to be allocated by the ATO to both provide technical assistance to the Marshall Islands, Mauritius or Montserrat in relation to their exchange of information procedures, and to fund requests for information. The resources allocated to fund requests for information are called 'extraordinary costs'. Memoranda of Understanding with the three jurisdictions that define the 'extraordinary costs' have been agreed. 'Extraordinary costs' are defined as:
- fees charged by third parties for carrying out research;
 - fees charged by third parties for copying documents;

9 TIEA NIA, para. 13.

10 TIEA NIA, para. 13.

11 TIEA NIA, para. 8.

12 TIEA NIA, para. 27.

- costs of engaging experts, interpreters or translators;
 - costs of conveying documents to Australia;
 - litigation costs of the Requested State (or Party) in relation to a specific request for information; and
 - costs of obtaining depositions or testimony.¹³
- 3.18 In each case, the cost must be considered 'reasonable'. The precise meaning of 'reasonable' in this context is not defined.¹⁴ The Committee expects that the ATO will ensure that costs are kept to a minimum.

How the information is obtained

- 3.19 Parties to a TIEA must provide on request information relevant to the administration of the other party's tax laws.¹⁵
- 3.20 Where the requested information is not in possession of the party, it must use its information gathering powers to obtain the requested information. The information gathering powers must include the authority to obtain information held by financial institutions and any person acting in an agency or fiduciary capacity, as well as information concerning ownership of companies, partnerships, trusts, foundations, and other persons.¹⁶
- 3.21 The information must be provided as witnessed and authenticated copies of original records. Witnessed and authenticated copies will enable the requesting party to satisfy evidentiary requirements in domestic tax proceedings.¹⁷
- 3.22 In certain circumstances, the requesting party may be permitted to interview individuals and examine records in the jurisdiction of the party holding the information.¹⁸

13 TIEA NIA, para. 30.

14 TIEA NIA, para. 30.

15 TIEA NIA, para. 16.

16 TIEA NIA, para. 16.

17 TIEA NIA, para. 18.

18 TIEA NIA, para. 18.

Privacy safeguards

- 3.23 The proposed agreements incorporate two mechanisms for protecting the private information of individuals or organisations subject to a request for information.
- 3.24 Firstly, a party may refuse a request if the request is not in conformity with the proposed agreement or if the requesting party would be unable to obtain the requested information under its own laws.¹⁹
- 3.25 Secondly, in instances where information is provided by one party to the other, the information provided is to be considered confidential. Confidential information may be disclosed only to persons or authorities concerned with the administration or enforcement of taxation covered by the proposed agreement, although this may include public court proceedings or in judicial decisions.²⁰

Allocation of taxing rights and transfer pricing adjustments agreements

- 3.26 The agreements relating to the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments are part of suite of benefits Australia offers to low tax countries to encourage agreement on a TIEA.²¹
- 3.27 Of the three low tax countries involved in the TIEAs considered in this Chapter, the Marshall Islands and Mauritius have availed themselves of the opportunity to negotiate such agreements.
- 3.28 The other benefits Australia offers to low tax countries include:
- public recognition – Australia will no longer refer to the jurisdiction as a ‘tax haven’ in any official publication;
 - technical assistance; and

19 TIEA NIA, para. 22.

20 TIEA NIA, para. 23.

21 *National Interest Analysis [2011] ATNIA 17, Agreements for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments between Australia and the Marshall Islands ([2010] ATNIF 36) and Mauritius ([2010] ATNIF 53), para. 8. Hereafter called the Allocation of Taxing Rights NIA.*

- listing of the jurisdiction's stock exchange in Australia's regulations, which provides certain benefits.²²
- 3.29 In order to implement the agreements, it will be necessary to make minor amendments to the *International Tax Agreements Act 1953*. The amendments will involve the insertion of each proposed agreement as a Schedule to that Act. Legislation for this purpose is expected to be introduced into Parliament in 2011.²³
- 3.30 The proposed agreements will have a financial impact on the ATO, which will administer the Agreements. However, the small number of taxpayers likely to be affected by the proposed agreements ensures that this impact will be minimal.²⁴

Allocation of taxing rights

- 3.31 The proposed agreements provide for the allocation of taxing rights between Australia and the Marshall Islands and between Australia and Mauritius with respect to the specified income of specified classes of individuals who are residents of Australia, the Marshall Islands, or Mauritius. The Agreements are intended to prevent double taxation, as well as assist to combat offshore tax evasion.²⁵
- 3.32 Under the agreements, Australia will not tax Australian sourced pensions and retirement annuities paid to residents of the Marshall Islands or Mauritius, provided the income is taxed in the Marshall Islands or in Mauritius. Conversely, Australia can tax pensions and retirement annuities paid from the Marshall Islands and Mauritius to Australian residents, where the income is not taxed in the Marshall Islands or Mauritius.²⁶
- 3.33 In addition, Australia will not tax the salaries of government employees of the Marshall Islands or of Mauritius working for non-commercial purposes in Australia. Reciprocal obligations apply in respect of Australian government employees working in the Marshall Islands or in Mauritius.²⁷

22 Mrs Deborah Anne Robinson, TIEA Project Leader, Internationals, Large Business and Internationals, Australian Taxation Office, *Committee Hansard*, 12 September 2011, p. 4.

23 Allocation of Taxing Rights NIA, para. 18.

24 Allocation of Taxing Rights NIA, para. 22.

25 Allocation of Taxing Rights NIA, para. 7.

26 Allocation of Taxing Rights NIA, para. 13.

27 Allocation of Taxing Rights NIA, para. 14.

- 3.34 Finally, Australia will not tax maintenance, education or training payments received by students or business apprentices from both countries who are temporarily studying in Australia, if those payments are from sources outside Australia. Reciprocal obligations apply to payments received by Australian students or business apprentices temporarily studying in both countries.²⁸
- 3.35 Other income will remain liable to Australian tax as required under Australian law. The arrangements only apply to residents of either contracting parties.²⁹ In Australia, the agreements apply only to federal income tax. Other federal, state and territory taxes are not subject to these agreements.³⁰

Transfer pricing

- 3.36 Transfer pricing determinations relate to the taxable profits that an enterprise realises from transactions with related enterprises. This includes transactions between offices of the same organisation located in different countries, or transactions between organisations in different countries that are owned by a single parent organisation.³¹
- 3.37 The OECD indicates that the international consensus is for transfer pricing profits to be comparable to the profits that would have been realised in comparable transactions between independent enterprises.³²
- 3.38 Each agreement contains a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments made to taxpayers' income by Australia and the Marshall Islands or Mauritius.³³
- 3.39 The relevant authority in one party may make a transfer pricing adjustment where it considers that the taxable profits in its own jurisdiction have been underestimated or artificially reduced by a taxpayer charging unreasonable prices on transactions with related entities in the other signatory party.³⁴

28 Allocation of Taxing Rights NIA, para. 15.

29 Allocation of Taxing Rights NIA, para. 10.

30 Allocation of Taxing Rights NIA, para. 11.

31 OECD, *About Transfer Pricing*, <<http://www.oecd.org/ctp/tp>> viewed 18 September 2011.

32 OECD, *About Transfer Pricing*, <<http://www.oecd.org/ctp/tp>> viewed 18 September 2011.

33 Allocation of Taxing Rights NIA, para. 16.

34 Allocation of Taxing Rights NIA, para. 16.

- 3.40 The agreements permit taxpayers affected by one party to present a case to the competent authority of the other party and obliges all parties to endeavour to resolve such disputes.³⁵

Conclusion

- 3.41 As indicated above, Australia has now signed 30 TIEAs with low tax countries. In the last couple of inquiries into TIEAs, the Committee has expressed some interest in whether the agreements were producing measurable results. The Committee is gratified to note that results are starting to be measured.
- 3.42 The ATO advised the Committee that 27 requests for information from countries with which Australia has signed a TIEA have been made.³⁶ In addition, the ATO has observed a significant decline in fund flows from Australia to low tax countries, including a decline of 80 per cent of fund flows to Liechtenstein, 50 per cent to Vanuatu, and 22 per cent to Switzerland.³⁷ It is gratifying to note that the decline in fund flows to Vanuatu preceded the ratification of the relevant TIEA.³⁸ In other words, the prospect of such an agreement coming into effect is enough to significantly reduce fund flows.
- 3.43 The Committee hopes the present set of agreements have a similar effect.

Recommendation 4

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands on the Exchange of Information with Respect to Taxes* and recommends that binding treaty action be taken.

35 Allocation of Taxing Rights NIA, para. 16.

36 Mrs Deborah Anne Robinson, TIEA Project Leader, Internationals, Large Business and Internationals, Australian Taxation Office, *Committee Hansard*, 12 September 2011, p. 3.

37 Australian Taxation Office, *Compliance Program 2011-12*, p. 25.

38 Mr Gregory Wood, Manager, International Tax Treaties Unit, International Tax and Treaties Division, Department of the Treasury, *Committee Hansard*, 12 September 2011, p. 4.

Recommendation 5

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Mauritius on the Exchange of Information with Respect to Taxes* and recommends that binding treaty action be taken.

Recommendation 6

The Committee supports the *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* and recommends that binding treaty action be taken.

Recommendation 7

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* and recommends that binding treaty action be taken.

Recommendation 8

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* and recommends that binding treaty action be taken.

