

**National Interest Analysis [2010] ATNIA 23**

**with attachment on consultation**

**Third Protocol amending the Agreement between the Government of Australia and the  
Government of Malaysia for the Avoidance of Double Taxation and the Prevention of  
Fiscal Evasion with Respect to Taxes on Income,  
as amended by the First Protocol of 2 August 1999 and the Second Protocol of 28 July  
2002,  
Canberra, 24 February 2010**

**[2010] ATNIF 6**



## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

**Third Protocol amending the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, as amended by the First Protocol of 2 August 1999 and the Second Protocol of 28 July 2002, done at Canberra on 24 February 2010  
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#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is to bring into force the *Third Protocol amending the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (the Agreement), done at Canberra on 20 August 1980, as amended by the First Protocol signed on 2 August 1999 and the Second Protocol signed on 28 July 2002 (the proposed protocol).

2. The proposed protocol was signed on 24 February 2010. Article 2 provides for entry into force on the last of the dates on which the Contracting States exchange diplomatic notes notifying each other domestic requirements necessary to give the proposed protocol the force of law have been completed.

#### **Overview and national interest summary**

3. The proposed protocol will update the Exchange of Information (EOI) provisions (Article 25) in the *Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* signed at Canberra on 20 August 1980 ([1981] ATS 15), as amended by the First Protocol signed at Sydney on 2 August 1999 ([2000] ATS 25) and the Second Protocol signed at Genting Highlands on 28 July 2002 ([2004] ATS 1) (the existing Agreement). This will align the EOI provisions in the existing Agreement with the internationally agreed standard on tax information exchange developed by the Organisation for Economic Cooperation and Development (OECD).

4. The new EOI provisions will enhance the ability of the tax authorities of Australia and Malaysia to exchange tax information. In particular, the new provisions provide that neither tax authorities can refuse to provide the information solely because they do not have a domestic interest in such information, or because a bank or similar financial institution holds the information. The new provisions also expand the taxes in respect of which information may be exchanged to include all federal taxes, rather than just income taxes covered under the existing Agreement. They also provide that information received by a tax authority may be used for other purposes when the laws of both countries permit this and the tax authority supplying the information authorises such use. At the same time, the enhanced EOI provisions maintain important safeguards to protect the legitimate interests of taxpayers.

5. Australia enjoys a positive and constructive relationship with Malaysia, with a growing bilateral commercial relationship. The proposed protocol will help protect Australia's revenue base by expanding the scope of taxpayer information available to the Australian Taxation Office (ATO). This is expected to improve the integrity of the tax system by increasing taxpayer compliance and tax revenue.

### **Reasons for Australia to take the proposed treaty action**

6. The enhanced EOI provisions in the proposed protocol 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. The provisions will improve the ability of the ATO to exchange tax information by:

- expanding the taxes in respect of which information may be exchanged to all federal taxes, rather than just the income taxes covered under the existing Agreement; and
- ensuring that neither Malaysia nor Australia's tax administration can refuse to provide the information solely because they do not have a domestic interest in such information, or because a bank or similar financial institution holds the information.

Accordingly the proposed protocol will enhance Australia's ability to administer and enforce its domestic tax laws.

7. The proposed protocol aligns the EOI provisions with the internationally agreed standard on tax information exchange, which was developed by the 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. 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 Government's support of global action to improve information exchange and transparency.

### **Obligations**

8. Article 1 of the proposed protocol provides for the replacement of Article 25 of the existing Agreement with new text. Article 25(1) will create reciprocal obligations for the exchange of information that is foreseeably relevant for carrying out the provisions of the Agreement or to the administration and enforcement of domestic law concerning all taxes of the Contracting States imposed consistently with the existing Agreement (in Australia's case, all federal taxes).

9. Article 25(2) will oblige the Contracting States to treat information received through exchange as secret in the same manner as information obtained under their domestic laws. This is an essential feature which ensures that adequate protection is provided to information exchanged between the two countries. The respect for confidentiality of information is necessary to protect the legitimate interests of taxpayers.

10. Either Contracting State may decline to supply information in certain circumstances. Specifically, Article 25(3) will provide that a request may be denied where: (a) it would require implementation of administrative measures at variance with the Contracting State's domestic laws or administrative practice; (b) the information requested is not obtainable under the laws or in the normal course of administration of the Contracting State; or (c) it would involve disclosure of a trade or business secret or would be contrary to public policy (for example, if it would breach human rights obligations). 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.

11. These obligations are generally equivalent to Australia's current obligations under Article 25 of the Agreement. However, Article 1 of the proposed protocol expands on the requirements of the existing Article 25 by specifically providing that neither Contracting State may decline to provide requested information solely on the grounds that the information is not required for its domestic law purposes or because the information is held by a bank or financial institution.

### **Implementation**

12. 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.

13. The legislative framework required for Australia to fulfil its obligations under the enhanced EOI provisions in the proposed protocol is contained in section 23 of the *International Tax Agreements Act 1953*.

14. The implementation of the proposed protocol will not affect the existing roles of the Commonwealth or the States and Territories with respect to tax matters.

### **Costs**

15. Treasury has estimated the revenue impact of the updated EOI provisions in the proposed protocol as unquantifiable. However, since the proposed protocol seeks to expand the scope of taxpayer information available to the ATO, the proposal is expected to increase taxpayer compliance and therefore tax revenue.

16. The section of the ATO dealing with international issues already has an Exchange of Information Unit which handles EOI requests with Australia's tax treaty partners, including Malaysia. It is envisaged that there will only be minimal increases in administrative costs to the ATO as a result of the enhanced information exchange between Australia and Malaysia flowing from the proposed protocol.

17. There is expected to be little or no change in ongoing compliance costs for Australian taxpayers from the proposed protocol.

### **Regulation Impact Statement**

18. The Office of Best Practice Regulation in the Department of Finance and Deregulation has been consulted and confirms that a Regulation Impact Statement is not required.

### **Future treaty action**

19. The proposed protocol does not provide for the negotiation of future legally binding instruments. Neither the proposed protocol nor the existing Agreement contain formal amendment procedures. However, Article 39 of the *Vienna Convention on the Law of Treaties* provides that a treaty may be amended by agreement between the parties. Any such amendment to the existing Agreement would constitute a treaty action and would therefore be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties.

### **Withdrawal or denunciation**

20. Article 2 of the proposed protocol provides that this proposed protocol shall form an integral part of the existing Agreement and that it shall remain in force as long as the existing Agreement remains in force and shall apply as long as the Agreement itself is applicable. The Agreement may be terminated by either Contracting State by written notice (Article 29).

### **Contact details**

Tax Treaties Unit  
International Tax and Treaties Division  
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## ATTACHMENT ON CONSULTATION

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### CONSULTATION

21. The proposed protocol addresses only administrative matters, namely facilitating the full exchange of information between tax authorities. Accordingly, the public consultation has not been required.

22. The ATO was consulted about the proposed protocol and will administer the Exchange of Information provisions. Given that the proposed protocol upgrades those provisions to align with the international standard on tax information exchange and with Australia's recent bilateral tax treaty practice, the ATO were supportive of the proposed action to update the existing Australia-Malaysia Agreement.

23. The proposed protocol was proposed by Malaysia soon after it endorsed the Organisation for Economic Cooperation and Development's (OECD) 2008 standard for the effective exchange of information in March 2009. As the proposed treaty text was able to be agreed quickly, the proposed treaty action has not appeared on the schedules of treaties to State and Territory representatives, which is updated six-monthly.

24. In addition to the Assistant Treasurer, the Minister for Foreign Affairs and the Minister for Trade approved the treaty action.