

Documents tabled on 13 June 2007:

National Interest Analysis [2007] ATNIA 18

with attachment on consultation

**Agreement between the Government of Australia and the Government of
the Kingdom of the Netherlands in respect of the Netherlands Antilles for the
Exchange of Information with Respect to Taxes
(Canberra, 1 March 2007)
[2007] ATNIF 5**

Background information:

Country political brief

List of other treaties with the Netherlands Antilles

List of treaties of the same type with other countries

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of the Kingdom of the Netherlands in respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes (Canberra, 1 March 2007) [2007] ATNIF 5

Nature and timing of proposed treaty action

1. The Agreement will enter into force on the date of the last notification in writing through diplomatic channels by both Australia and the Netherlands Antilles that the constitutional and legal procedures for the entry into force of this Agreement have been completed, pursuant to Article 12.
2. The Agreement will then have effect from 1 January 2007 with respect to all tax matters covered by the Agreement, including criminal matters. The start date of 1 January 2007 will allow the Commissioner for Taxation to request information back to this date once the Agreement is in force.
3. Pursuant to Article 4(1)(b), the Agreement does not apply to any external territories except to the extent they are specifically listed in the Agreement.

Overview and national interest summary

4. The Netherlands Antilles consists of five Caribbean islands: Curaçao, Bonaire, Sint Maarten, Saba and Sint Eustatius. The economy of the Netherlands Antilles is heavily dependent on tourism, petroleum refining and offshore finance. The Netherlands Antilles has a low tax structure and a stable political and legal system based on the Dutch model, relatively well developed infrastructure and a high per capita income for the Caribbean region.
5. Information detailing the level and type of economic activity between Australia and the Netherlands Antilles is not available. However, as discussed in paragraph 12, there are significant income flows between Australia and the Netherlands Antilles.
6. The Agreement will help Australia protect its revenue base by allowing access to necessary offshore information and improving the integrity of the tax system by discouraging tax evasion by certain individuals and businesses. The Agreement provides for full exchange of information on criminal and civil tax matters between Australia and the Netherlands Antilles. It also incorporates a number of important safeguards to protect the legitimate interests of taxpayers.
7. This Agreement is the third of its kind for Australia; the first was signed with Bermuda on 10 November 2005 and the second was signed with Antigua and Barbuda on 30 January 2007. It is an important step towards entering into Tax Information Exchange Agreements (TIEAs) with other jurisdictions that have committed to work with OECD member countries under the auspices of the Global Forum on Taxation (Global Forum) to improve transparency and establish effective exchange of information for tax purposes.

Reasons for Australia to take the proposed treaty action

8. The Agreement seeks to implement the OECD's work on harmful tax practices, which has identified the lack of effective exchange of information between countries as a key contributing factor to international tax evasion and avoidance.

9. Australia has taken a leadership role in this work and hosted the Global Forum in Melbourne in 2005, which was attended by 55 OECD member countries and non-OECD jurisdictions.

10. Internationally, 33 low tax jurisdictions have publicly committed to the elimination of harmful tax practices. These jurisdictions (collectively referred to as participating partners), have worked together under the auspices of the OECD's Global Forum to develop international standards regarding transparency and effective exchange of information. The participating partners seek to ensure the information needed by tax authorities to determine a taxpayer's correct tax liability is available. TIEAs are the key bilateral means by which exchange of information can be facilitated.

11. On 18 April 2002, the OECD released a model TIEA to facilitate negotiations between OECD member countries and participating partners. The Treasurer approved a standard TIEA which, with minor variations, is closely aligned to the OECD model TIEA. This Agreement is consistent with the Australian standard TIEA with only minor variations.

12. While Australian Bureau of Statistics data on the level of investment between the two countries is not available for publication, data held by the Australian Transaction Reports and Analysis Centre indicates a relatively high flow of funds between Australia and the Netherlands Antilles.

13. It is estimated that \$5 billion is moved out of Australia each year to tax havens around the world. While most financial flows are legitimate, a tax haven's legal frameworks and communication systems can also be used in arrangements designed to avoid paying tax elsewhere. The Australian Taxation Office (ATO) commenced Operation Wickenby in 2004, which is a major investigation of the use of offshore tax havens for alleged money laundering and tax evasion in conjunction with the Australian Crime Commission and the Australian Federal Police. Entering into TIEAs with participating partners is useful in such instances as TIEAs create mechanisms through which information can be sought to establish the extent and nature of the tax evaded, supporting the objectives of Operation Wickenby.

14. This is the third TIEA Australia has signed with a participating partner and will help progress Australia's broader TIEA negotiation programme. It is in Australia's interest to develop a network of agreements with other participating partners to enhance transparency and information exchange to the benefit of Australia and participating partners.

15. This Agreement, along with future TIEAs, will make it harder for taxpayers to evade Australian tax. This will help Australia protect its revenue base and improve the integrity of the tax system while enhancing these jurisdictions as options for legitimate business activity.

16. This Agreement will also discourage those taxpayers who participate in abusive tax arrangements by increasing the chance that such arrangements will be discovered.

17. The Netherlands Antilles' tangible commitment to counter harmful tax practices is a positive step in its relationship with Australia. It will also be seen by the international community as a positive step towards good governance. A press release issued by the OECD notes the Agreement marks 'further progress in international efforts to implement the principles of

transparency and exchange of information for tax purposes developed by the OECD's Global Forum'.

Obligations

18. Article 1 of the Agreement requires the relevant authority in each Party to exchange information with the other, upon request, where the information is relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims or the investigation or prosecution of tax matters. Each Party must do so irrespective of whether the conduct being investigated is a crime under its domestic law (Article 5(1)). There is no provision in the Agreement for the routine or voluntary exchange of information between the two Parties.

19. If the Netherlands Antilles requests information, Australia is obliged to supply information on any federal taxes administered by the Commissioner of Taxation. Australia must also make reasonable endeavours to provide information in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under domestic law, if requested to do so (Article 5(3)). To enable this obligation to be fulfilled, Australia must ensure the Commissioner of Taxation has the necessary authority to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity, as well as information regarding the legal and beneficial ownership of companies, partnerships and other persons (Article 5(4)). All obligations apply similarly to the Netherlands Antilles in situations where Australia makes a request for information.

20. Australia must, pursuant to Article 5(5), provide certain details to the Netherlands Antilles when making a request for information to demonstrate the relevance of the information sought.

21. Where the information in the possession of the Commissioner of Taxation is insufficient to enable compliance with the request, Australia must, pursuant to Article 5(2), use all relevant information gathering methods to furnish the required detail to the Netherlands Antilles, even where it is not needed for domestic tax purposes. This is consistent with Article 26 of the *OECD Model Convention on Income and on Capital*, which was updated in 2005.

22. The information must be forwarded as soon as possible. Article 5(6) provides that when Australia receives a request for information, it must confirm receipt in writing and notify the Netherlands Antilles within 60 days if there is a deficiency in the request. If Australia is unable to provide the information within 90 days of the receipt of the request, it must inform the Netherlands Antilles of the difficulties involved or the reasons for refusing to provide the information. A request may be refused if it is not in conformity with the Agreement (Article 7).

23. Article 8 imposes an obligation on Australia and the Netherlands Antilles to treat information it receives confidentially. Such information may be revealed only to specified persons or authorities concerned with the taxation matters covered by the Agreement. These persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or judicial decisions. Generally, however, the express written consent of the Party that provided the information is required for any disclosure not covered by this Article. Both Parties will remain bound by the confidentiality provisions of the Agreement even after the termination of the Agreement pursuant to Article 13(3). This is an essential feature which ensures adequate protection is provided to information exchanged between the two Parties.

Implementation

24. The obligations under the Agreement are met by existing legislation. The legislative framework to give effect to Australia's obligation to provide information under the Agreement was achieved by appropriate amendments to the *International Tax Agreements Act 1953* in the *International Tax Agreement Amendment Act (No. 1) 2006*, which commenced on 14 September 2006.

Costs

25. The Agreement will have a financial impact on the ATO. It is likely that most requests for information will originate from Australia. Hence, costs are likely to be associated with the administration of those requests and the analysis of information by the ATO. Additional resources may be required to deal with the expected complexities of obtaining information from the Netherlands Antilles. Actual impacts are difficult to estimate and will depend on the development of effective administrative arrangements between the ATO and the relevant revenue authorities in the Netherlands Antilles.

26. The ATO and the Netherlands Antilles Ministry of Finance have entered into a Memorandum of Understanding under which certain costs may be payable by the ATO to the Netherlands Antilles' revenue authorities. Such costs are classified as extraordinary costs. Some examples are:

- reasonable costs of engaging experts, interpreters or translators;
- reasonable litigation costs in relation to a specific request for information; and
- reasonable costs for obtaining depositions or testimony.

27. The compliance costs to taxpayers in Australia are likely to be minimal. It is unlikely Australia will receive many requests from the Netherlands Antilles, therefore, it is unlikely the ATO would be required to collect information from Australian taxpayers.

28. Overall, it is estimated the whole of the TIEA programme will generate an additional full time equivalent requirement of one employee. The impact of the Agreement will be negligible and its administration will be absorbed into the ATO's existing exchange of information programme.

Regulation Impact Statement

29. The Office of Best Practice Regulation within the Productivity Commission was consulted and confirmed a Regulation Impact Statement is not required.

Future treaty action

30. The Agreement does not provide for the negotiation of future legally binding instruments, amendments or appendices to the existing Agreement. However, this does not preclude the two Parties from agreeing in the future to amend the existing Agreement. The Agreement does not have an amendment clause, but Article 39 of the *Vienna Convention on the Law of Treaties 1969* provides that a treaty may be amended by agreement between the Parties. Any such agreement would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any amendments to the Agreement may be considered in the future in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

31. Article 13(1) provides that the Agreement will continue to be in effect indefinitely unless either Party gives written notice of termination to the other Party through the diplomatic channel.

32. Article 13(2) provides that in the event of termination, the Agreement will cease to have effect in both Parties on the first day of the month following the expiration of six months after the date the other Party received the notice terminating the Agreement. However, both Parties remain bound by the obligations of confidentiality contained in Article 8 with respect to any information obtained under the Agreement (Article 13(3)).

33. Withdrawal by Australia would be subject to the normal treaty process, including tabling and consideration by JSCOT.

Contact details

International Tax and Treaties Division
Department of the Treasury.

**Agreement between the Government of Australia and the Government of
the Kingdom of the Netherlands in respect of the Netherlands Antilles
for the Exchange of Information with Respect to Taxes
(Canberra, 1 March 2007) [2007] ATNIF 5**

CONSULTATION

1. The Taxation Information Exchange Agreement negotiations with the Netherlands Antilles were not in the public domain, consequently, the public was not consulted.
2. However, the Australian Taxation Office (ATO) was consulted in the development of the Australian Model Agreement, as the responsibility for administration of the Agreement rests with the ATO, and it conducted negotiations with the Netherlands Antilles on the development of this Agreement.
3. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of this treaty has been included in the six-monthly schedules of treaties to State and Territory representatives since August 2005.
4. In addition to the Minister for Revenue and Assistant Treasurer, the Minister for Foreign Affairs and the Minister for Trade agreed to this treaty, and the Prime Minister was informed.

Political Brief on the Netherlands Antilles

Political Overview

1. The Netherlands Antilles (population of approximately 183,000) consists of five islands in the Lesser Antilles chain. Curaçao and Bonaire are located at the southern tip of the chain close to Venezuela, and Sint Maarten, Sint Eustatius and Saba are found at the very northern tip of the chain between Anguilla and Saint Kitts and Nevis. Sint Maarten shares its territory with the French territory of St Martin, which occupies the northern half of the island. Aruba, now an autonomous state within the Kingdom of the Netherlands, was part of the Netherlands Antilles until 1986.

2. Between 2000 and 2005, referendums were held on each of the islands of the Netherlands Antilles to determine their future status. After protracted negotiations on future arrangements, the Dutch Government and the Antilles islands reached agreement in February 2007. By December 2008, Curaçao and Sint Maarten will join Aruba as autonomous states within the Kingdom of the Netherlands. Like Aruba, Curaçao and Sint Maarten will have parliaments with responsibility for all local government while operating under Dutch Government suzerainty (the Netherlands will retain control of foreign and defence policy and some judicial functions). In December 2008, the islands of Bonaire, Sint Eustatius and Saba will become special municipalities of the Kingdom of the Netherlands and function in the same manner as other municipalities in Holland. The Dutch Government also agreed to provide a grant of one billion guilders to the Netherlands Antilles for debt-repayment.

3. The Netherlands Antilles is currently governed by a 22 seat unicameral parliament based in the Curaçao capital of Willemstad. Members of parliament elect a prime minister for a six-year term. The Head of State is the ruling monarch of the Netherlands, and is represented in the Netherlands Antilles by a Governor. Regional administrations exist on each of the five islands. The Netherlands Antilles parliament operates under Dutch suzerainty and has autonomy in all domestic matters.

Economic Overview

4. The Netherlands Antilles GDP was USD3.3 billion in 2005, with a per capita GDP of USD\$17,800. Tourism, oil transshipment (from both Bonaire and Curaçao) and oil refining and offshore banking in Curaçao have been the key drivers of the islands' economies. Services account for around 84 per cent of GDP, industry (light manufacturing) 15 per cent and agriculture 1 per cent.

5. The main trading partners of the Netherlands Antilles are the United States (32 per cent of exports) and Panama (10 per cent of exports). Venezuela is the source of around 50 per cent of all imports (consumer and capital goods).

Bilateral Relations

6. Australia has no substantive bilateral links with the Netherlands Antilles. The Australian High Commission in the Port of Spain has consular responsibilities for the Netherlands Antilles.

June 2007.

List of other treaties with the Netherlands Antilles

There are no other bilateral treaties between Australia and the Netherlands Antilles.

June 2007.

List of treaties on Tax Information Exchange with other countries

There are two similar treaties between Australia and a bilateral treaty partner; neither treaty is yet in force.

- Agreement between the Government of Australia and the Government of Bermuda [as authorised by] the Government of the United Kingdom of Great Britain and Northern Ireland on the Exchange of Information with Respect to Taxes
(Washington, 10 November 2005)
[2005] ANTIF 27.
- Agreement between the Government of Australia and the Government of Antigua and Barbuda on the Exchange of Information with Respect to Taxes
(Saint John's, Antigua, 30 January 2007)
[2007] ANTIF 2.

June 2007.