

National Interest Analysis [2010] ATNIA 41

with attachment on consultation

**Agreement between
the Government of Australia and the Government of Samoa
on 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 Canberra on 16 December 2009**

[2009] ATNIF 33

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the Agreement between the *Government of Australia and the Government of Samoa 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* (the proposed Agreement) into force.
2. Pursuant to Article 10, the proposed Agreement will enter into force on the date of last notification through the diplomatic channel between Australia and Samoa establishing that their constitutional and legal procedures for entry into force have been completed.
3. The proposed Agreement will then have effect for any year of income beginning on or after 1 July in the calendar year following the date of entry into force, provided the *Agreement between the Government of Australia and the Government of Samoa on the Exchange of Information with Respect to Taxes* is in force. For example, if the proposed Agreement enters into force during 2010, it will have effect from 1 June 2011, subject to the condition mentioned in paragraph 2.

Overview and national interest summary

4. The proposed Agreement provides for the allocation of taxing rights between Australia and Samoa with respect to certain income of certain classes of individuals who are residents of Australia or Samoa. This helps to prevent double taxation of the same income. The proposed Agreement also establishes a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments made to taxpayers' income by the revenue authorities of Australia or Samoa. The proposed Agreement is consistent with provisions contained in Australia's comprehensive bilateral tax treaties.
5. The proposed Agreement is part of a package of benefits offered to Samoa as part of negotiations to conclude a Tax Information Exchange Agreement (TIEA) with Australia. That TIEA - the *Agreement between the Government of Australia and the Government of Samoa on the Exchange of Information with Respect to Taxes* - was signed simultaneously with the proposed Agreement on 16 December 2009.

Reasons for Australia to take the proposed treaty action

6. The proposed Agreement supports Australia's efforts to combat offshore tax evasion through the establishment of transparency measures and effective exchange of information arrangements with low-tax jurisdictions.

Obligations

7. Article 1 provides that the proposed Agreement applies only to persons who are residents (as defined in Article 4) of Australia and/or Samoa (the 'Contracting States'). This precludes persons who are not a resident of either Australia or Samoa from obtaining the benefits of the proposed Agreement. Pursuant to Article 4, a resident is a person who is resident in Australia or Samoa for taxation purposes. However, a person is not a resident of a Contracting State for the purposes of the proposed Agreement if they are only liable to tax in that Contracting State in respect of income from sources in that Contracting State.

8. Article 2 provides that for Australia, the proposed Agreement only applies to federal income tax and does not apply to State and Territory taxes.

9. Under Articles 5, 6 and 7 of the proposed Agreement, each Contracting State is obliged to forego its taxing rights over certain income derived by retirees, pensioners, government employees, students and business apprentices, where they are residents of the other Contracting State.

10. Article 5 obliges Australia not to tax Australian source pensions and retirement annuities paid to residents of Samoa, provided such income is subject to tax in Samoa. Article 5 permits Australia to tax Samoan source pensions and retirement annuities paid to Australian residents.

11. Article 6 obliges Australia not to tax the salaries of government employees of Samoa working in government service, for non-commercial purposes, in Australia. This would apply, for example, to Samoan residents who staff representative offices established in Australia to provide information on investment opportunities in Samoa. Reciprocal obligations apply in respect of Australian government employees working in Samoa. This approach provides Australia and Samoa with sole taxing rights over the salaries they pay to individuals undertaking governmental functions.

12. Article 7 obliges Australia not to tax maintenance, education or training payments received by students or business apprentices from Samoa who are temporarily studying in Australia, where those payments arise from sources outside Australia. Other income will remain liable to Australian tax as required under Australian law. Reciprocal obligations apply to payments received by Australian students or business apprentices temporarily studying in Samoa.

13. Article 8 establishes a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments made to taxpayers' income by the competent authorities of Australia or Samoa. Transfer pricing involves the sale or purchase of goods and/or services between related parties at non-market prices in order to diminish profits (through inflating costs and/or reducing receipts). The relevant competent authority 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 or non-arm's length prices on its cross-border related-party transactions (ie prices inconsistent with what

independent parties acting independently would charge each other). Article 8 permits taxpayers affected by the actions of one Contracting State to present a case to the competent authority of the other Contracting State and obliges Australia and Samoa to endeavour to resolve such disputes. Affected taxpayers must invoke this process within three years of the first notification of the relevant adjustment.

14. Article 9 obliges the Contracting States to exchange information that is foreseeably relevant for the purposes of carrying out the proposed Agreement. Article 9 specifies that information may be exchanged pursuant to the provisions of the *Agreement between the Government of Australia and the Government of Samoa on the Exchange of Information with Respect to Taxes*.

Implementation

15. Minor amendments to the *International Tax Agreements Act 1953* will be necessary to give effect to the proposed Agreement, including the insertion of the proposed Agreement as a Schedule to that Act. Legislation for this purpose is expected to be introduced into Parliament in 2010, pending approval by the Joint Standing Committee on Treaties (JSCOT) to bring the proposed Agreement into force.

16. The implementation of the proposed Agreement will not affect the existing roles of the Commonwealth or the States and Territories in tax matters.

Costs

17. The proposed Agreement will have a financial impact on the Australian Taxation Office (ATO), which will administer it. However, the small number of taxpayers likely to be affected by the proposed Agreement ensures that this impact will be minimal.

18. Affected Australian residents are unlikely to incur any significant compliance costs in relation to the proposed Agreement, which may provide them with benefits.

19. Overall, it is estimated that the administrative and financial impact of concluding the proposed Agreement will be minimal and can be absorbed into existing administrative arrangements relating to Australia's bilateral comprehensive tax treaties.

Regulation Impact Statement

20. The Treasury has assessed the implementation of the proposed Agreement against criteria in the *Best Practice Regulation Handbook* and has concluded that this regulatory option has no/low impact on businesses and individuals or on the economy. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

21. The proposed Agreement does not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Contracting States may amend the proposed Agreement by mutual consent at any time, pursuant to Article 39 of the *Vienna Convention on the Law of Treaties 1969*. Any such amendments would be subject to Australia's domestic treaty-making process, including tabling and consideration by the JSCOT. Any future amendments to the proposed Agreement may be considered in line with Australian policy for tax treaty negotiations current at that time.

Withdrawal or denunciation

22. Article 11(1) provides that the proposed Agreement shall remain in force indefinitely unless terminated by written notice of termination from either Contracting State.

23. Article 11(2) provides that such termination would take effect from 1 July in the calendar year following that in which the notice of termination is given.

24. Article 11(3) provides that the proposed Agreement will also terminate and cease to be effective six months after the written notice of termination from either Contracting State terminating the related *Agreement between the Government of Australia and the Government of Samoa on the Exchange of Information with Respect to Taxes*.

25. Termination of the proposed Agreement by Australia would be subject to Australia's domestic treaty-making process, including tabling and consideration by JSCOT.

Contact details

International Tax Framework Unit
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ATTACHMENT ON CONSULTATION

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CONSULTATION

26. The negotiations for the proposed Agreement with Samoa addressed principally administrative matters were not in the public domain and, consequently, the public was not consulted.
27. The Australian Taxation Office was involved in the negotiation of the proposed Agreement and will administer it.
28. In addition to the Assistant Treasurer, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister have agreed to this proposed treaty action.