

National Interest Analysis [2012] ATNIA 2

with attachment on consultation

**Convention on Mutual Administrative Assistance in Tax Matters
done at Strasbourg on 25 January 1988**

**(Text amended by the provisions of the Protocol amending the Convention on Mutual
Administrative Assistance in Tax Matters, which entered into force on 1 June 2011)**

[2011] ATNIF 28

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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[2011] ATNIF 28

Nature and timing of proposed treaty action

1. The proposed treaty action is to ratify the *Convention on Mutual Administrative Assistance in Tax Matters*, done at Strasbourg on 25 January 1988 (text amended by the provisions of the *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters*) ('the Convention').
2. The 1988 *Convention on Mutual Administrative Assistance in Tax Matters* ('Original Convention') entered into force on 1 April 1995. It was amended by the 2010 *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters* ('Protocol'), which entered into force on 1 June 2011. The amendments brought the Convention into line with current international standards on transparency and exchange of tax information.
3. Australia signed the Convention on 3 November 2011. The Convention will enter into force in respect of Australia, pursuant to paragraph 3 of its Article 28, on the first day of the month following the expiration of a period of three months after the date of the deposit of Australia's instrument of ratification, acceptance or approval.
4. The provisions of the Convention will take effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention enters into force in respect of Australia, in accordance with paragraph 6 of its Article 28. Where there is no taxable period, the Convention shall have effect for administrative assistance related to the imposition of tax arising on or after 1 January of the year following the one in which the Convention enters into force for Australia. In relation to criminal tax matters, however, the Convention will take effect from the date of its entry into force for a Party (Article 28(7)).
5. The Convention is open for signature and ratification by the member States of the Council of Europe and member countries of the Organisation for Economic Cooperation and Development ('OECD'). In addition, other States (not being members of the Council of Europe or the OECD) may request to be invited to sign and ratify the Convention. All G-20 member countries have agreed to sign the Convention and, to date, thirty five countries have signed or ratified either the Original Convention or the Convention:
 - Argentina, Australia, Azerbaijan, Belgium, Brazil, Canada, Costa Rica, Denmark, Finland, France, Georgia, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea (Republic of), Mexico, Moldova, the Netherlands, Norway, Poland, Portugal, Russia, Slovenia, South Africa, Spain, Sweden, Turkey, Ukraine, the United Kingdom and the United States.

6. Signatories to the Convention may, pursuant to Article 30, declare a reservation at signature, ratification or at any later date. Australia did not declare a reservation at time of signature nor will a reservation be made at the time of ratification.

Overview and national interest summary

7. The key objective of the Convention is to promote international cooperation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. The Convention provides for the provision of administrative assistance in three areas:

- the exchange of taxpayer information;
- assistance in the recovery of tax debts; and
- assistance in the service of documents.

8. The Convention will help Australia protect its revenue base by providing a legal framework through which the Commissioner of Taxation can seek such administrative assistance from the revenue authorities of the other Parties. This will help improve the integrity of the tax system by discouraging tax avoidance and evasion by individuals and other entities. Conversely, the Convention will also provide reciprocal benefits to the other Parties.

Reasons for Australia to take the proposed treaty action

9. The Convention will complement Australia's network of comprehensive tax treaties and tax information exchange agreements by providing an additional tool for detecting and preventing tax evasion and recovering outstanding tax debts.

10. The 'exchange of information' rules contained in the Convention meet the internationally agreed standard developed by the OECD and endorsed by the G-20 and the United Nations Committee of Experts on International Cooperation in Tax Matters. This framework will support global action on improving information exchange and transparency. Australia, as Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes ('Global Forum'), is a strong proponent of improved global transparency and exchange of taxation information as a means of preventing tax avoidance and evasion.

11. While Australia has concluded bilateral tax treaties with several Parties to the Convention, the Convention will enhance the ability of the Commissioner of Taxation to seek assistance in respect of a broader range of taxes, namely all federal taxes administered by the Commissioner. In contrast, the scope of the 'exchange of information' provisions in Australia's bilateral tax treaties signed or amended before 2006 is generally limited to income tax. It will now be possible for the Commissioner to use the Convention to obtain information or seek assistance from a Party that he would be unable to obtain under Australia's bilateral tax treaty with that Party.

12. Furthermore, the Convention will explicitly enable the Australian Taxation Office (ATO) to conduct simultaneous tax examinations of taxpayers' affairs with tax officials from the other Parties.

13. The cross-border recovery of tax debts has become progressively more common internationally. The 'assistance in recovery' rules contained in the Convention are consistent with similar rules contained in Australia's recent tax treaties with Finland, France, New

Zealand, Norway and South Africa and will discourage taxpayers from concealing assets in foreign jurisdictions in order to avoid settling their Australian tax debts. This mechanism for cross-border assistance in recovery of tax debts will:

- support taxation principles of integrity and fairness;
- help meet the tax collection challenges presented by globalisation; and
- complement the framework of existing international tax legislation, which deals with international transactions and taxation issues of non-residents.

Obligations

14. Article 1 of the Convention sets out the general obligation of Parties to provide administrative assistance to each other in tax matters (comprising exchange of information, assistance in recovery and service of documents). Article 1 also prescribes that such assistance is required regardless of the country of residence of the taxpayer. Article 2 prescribes, in general terms, the taxes covered by the Convention.

15. Articles 4-17 of the Convention provide details of the Parties' obligations in respect of the three broad forms of assistance identified in Article 1.

Exchange of information

16. Article 4 of the Convention obliges the Parties to exchange information that is foreseeably relevant to the administration or enforcement of the taxes covered by the Convention. Information exchange can take three forms: on-request (Article 5); automatic (Article 6) and spontaneous (Article 7). This is consistent with Australia's exchange of information practice under its bilateral tax treaties.

17. Article 8 authorises the Parties to consult to determine cases and procedures for simultaneous tax examinations (joint investigations) in relation to the tax affairs of persons or entities in which they have a common or related interest.

18. Article 9 authorises tax examinations abroad, whereby tax officials from one Party may visit another Party for the purpose of participating in an investigation of mutual interest.

19. Article 10 requires Parties to notify each other when information received under the Convention conflicts with information in their possession.

Assistance in recovery of tax debts

20. The broad obligation to provide assistance in the recovery of cross-border tax debts, and the terms under which Parties are required to do so, are set out in Articles 11 to 16.

21. Article 11 requires each Party to assist other Parties in the recovery of unpaid tax claims upon request. A Party providing assistance should take the necessary steps to recover debts as if the debts were its own outstanding tax claims. In providing such assistance, Article 12 requires the Parties to take measures of conservancy (for example, the seizure or freezing of a taxpayer's assets before final judgement) in relation to other Parties' tax claims if requested, even if the claim is contested or not yet the subject of an instrument permitting

enforcement. Article 13 requires the applicant State to provide appropriate documentation supporting the existence of the relevant tax claim.

22. Article 14 sets out the rules concerning the time limits that apply to the provision of assistance in the recovery of tax debts. The laws of the applicant State apply with regard to the period beyond which a tax claim cannot be enforced. This period can be interrupted or suspended in the applicant State if any acts of recovery carried out by the requested State would interrupt or suspend such periods in the requested State. In any case, assistance is not obligatory in cases where the debt is outstanding for fifteen years or more (from the date of the original instrument permitting its enforcement).

23. Article 15 ensures that requests for assistance in debt recovery do not take priority over domestic debt recovery actions in the requested State. The requested State may also allow deferral of payment or accept payment by instalments if its own laws and administrative practices would permit such actions in relation to its own debts (Article 16).

Service of documents

24. Article 17 obliges a Party to provide assistance in the service of tax-related documents, including those relating to judicial decisions, to taxpayers residing in the requested jurisdiction at the request of another Party. Service shall be effected either by a method prescribed by the laws of the requested State or, to the extent possible, by a particular method stipulated by the applicant State.

25. Article 18 stipulates the information to be provided by an applicant State in relation to all forms of assistance. This information includes details of: the initiating authority or agency; the identity and address of the person(s) who are the subject of the request; the form in which the applicant State requires the information (in the case of exchange of information); the tax claim and the assets from which the claim may be recovered (in the case of recovery of tax claims); the nature and the subject of the document to be served (in the case of service of documents); and whether the request is in conformity with the laws and administrative practices of the applicant State.

26. Articles 20-23 provide other rules relating to all forms of assistance, including rules limiting obligations set out elsewhere in the Convention.

27. Article 21 allows a Party to decline to provide requested assistance on limited grounds, including where to do so would be contrary to the laws or administrative practices of either Party or public policy, or would involve the disclosure of trade or commercial secrets. The provision of assistance may also be declined where: the request relates to taxation contrary to generally accepted taxation principles or provisions contained in bilateral tax treaties; the underlying taxation law discriminates on the basis of nationality; the applicant State has not exhausted all reasonable measures under its own laws and administrative practices; and the provision of assistance by the requested State would be clearly disproportionate to the benefit derived by the applicant State.

28. Article 22 obliges Parties to treat information obtained under the Convention as secret and protected in the same manner as information obtained under its domestic laws. Such information may only be disclosed to persons involved in tax administration or enforcement, including courts and administrative or supervisory bodies. Parties may, however, agree that

information may be disclosed to other law enforcement agencies in appropriate circumstances.

Implementation

29. No new legislation is required to implement the obligations that will be imposed on Australia by the proposed treaty action. Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953* in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the *Taxation Administration Act 1953* applies to any agreement in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts.

30. No action is required by the States or Territories. There will be no change to the existing roles of the Commonwealth, or the States and Territories, in tax matters as a consequence of implementing the Convention.

Costs

31. Treasury has estimated the revenue impact of the Convention as unquantifiable. However, since the Convention is intended to reduce international fiscal evasion by Australian taxpayers, the proposal is expected to increase taxpayer compliance and therefore tax revenue.

32. There would be a small, unquantifiable cost in administering the changes made by the Convention in dealing with incoming requests for assistance from other countries. However, these costs are expected to be minimal and will continue to be managed within existing agency resources.

33. Article 26 of the Convention sets out that, unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance will be borne by the requested Party. Extraordinary costs incurred in providing assistance will be borne by the applicant Party.

34. There are no other foreseeable financial costs to Australia for compliance with the proposed treaty action.

Regulation Impact Statement

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

Future treaty action

36. The Convention does not provide for the negotiation of future legally binding instruments.

37. The Convention does not contain specific amendment procedures. However, pursuant to its Article 24(3), a co-ordinating body composed of representatives of the competent authorities of the Parties may recommend revisions or amendments to the Convention. Australia will be entitled to become a member of the co-ordinating body on ratification of the Convention. Currently, Australia is entitled to act as an observer. Any future revisions or amendments to the Convention would be subject to Australia's domestic treaty-making process.

Withdrawal or denunciation

38. Article 31 provides that a Party may, at any time, denounce the Convention by means of a notification addressed to one of the Depositaries (the Secretary General of the Council of Europe or the Secretary General of the OECD). Denunciation by Australia would be subject to Australia's domestic treaty-making process. Denunciation would become effective from the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Depositary.

39. Article 31(3) provides that any Party which denounces the Convention shall remain bound by the provisions of Article 22 (secrecy provisions) for as long as it retains in its possession any documents or information obtained under the Convention.

Contact details

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40. The Convention addresses only administrative assistance in tax matters with other Parties to the Convention. Accordingly, the public was not consulted.

41. The ATO has been made aware of the negotiation of the Convention and endorses Australia becoming a Party to the Convention. Given that the Convention aligns with the international standard on exchange of information for tax purposes, the ATO is supportive of Australia becoming a Party to the Convention.

42. In addition to the Assistant Treasurer, the Prime Minister, the Minister for Foreign Affairs and the Minister for Trade have approved the proposed treaty action.