

National Interest Analysis [2011] ATNIA 29

with attachment on consultation

Agreements between

**the Government of Australia and the Government of the Principality of Liechtenstein
on the Exchange of Information on Taxes
done at Vaduz on 21 June 2011
[2011] ATNIF 10**

**the Government of Australia and the Government of Costa Rica
on the Exchange of Information with Respect to Taxes
done at Mexico City on 1 July 2011
[2011] ATNIF 14**

**the Government of Australia and the Government of the Macao Special Administrative
Region of the People's Republic of China
for the Exchange of Information Relating to Taxes
done at Macao on 12 July 2011
[2011] ATNIF 11**

**the Government of Australia and the Government of Liberia
on the Exchange of Information with Respect to Taxes
done at Monrovia on 11 August 2011
[2011] ATNIF 15**

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 into force the *Agreement between the Government of Australia and the Government of the Principality of Liechtenstein on the Exchange of Information on Taxes* (the proposed Liechtenstein Agreement), the *Agreement between the Government of Australia and the Government of Costa Rica on the Exchange of Information with Respect to Taxes* (the proposed Costa Rica Agreement), the *Agreement between the Government of Australia and the Government of the Macao Special Administrative Region of the People's Republic of China for the Exchange of Information Relating to Taxes* (the proposed Macao Agreement) and the *Agreement between the Government of Australia and the Government of Liberia on the Exchange of Information with Respect to Taxes* (the proposed Liberia Agreement). The four agreements are hereinafter referred to collectively as “the proposed Agreements”.

Liechtenstein

2. Pursuant to its Article 11, the proposed Liechtenstein Agreement will enter into force one month after the date of the last notification between Australia and Liechtenstein establishing that the necessary domestic procedures for entry into force have been completed. The proposed Liechtenstein Agreement will then have effect from that date for all requests made, but only with respect of taxable periods beginning on or after 1 July 2011.

Costa Rica

3. Pursuant to its Article 12, the proposed Costa Rica Agreement will enter into force on the date of the last notification between Australia and Costa Rica establishing that the

necessary domestic procedures for entry into force have been completed. The proposed Costa Rica Agreement will then have effect:

- from 1 July 2011 with respect to criminal tax matters; and
- from 1 July 2011 for all other matters covered in Article 1 of the proposed Agreement, but only in respect of taxable periods beginning on or after 1 July 2011, or where there is no taxable period, all charges to tax arising on or after 1 July 2011.

Macao

4. Pursuant to its Article 13, the proposed Macao Agreement will enter into force on the date of the last notification between Australia and Macao establishing that the necessary domestic procedures for entry into force have been completed. The proposed Macao Agreement will then have effect:

- from 1 July 2011 with respect to criminal tax matters; and
- from 1 July 2011 for all other matters covered in Article 1 of the proposed Agreement.

Liberia

5. Pursuant to its Article 12, the proposed Liberia Agreement will enter into force on the date of the last notification between Australia and Liberia establishing that the necessary domestic procedures for entry into force have been completed. The proposed Liberia Agreement will then have effect:

- from 1 July 2010 with respect to criminal tax matters; and
- from 1 July 2010 for all other matters covered in Article 1 of the proposed Agreement, but only in respect of taxable periods beginning on or after 1 July 2010, or where there is no taxable period, all charges to tax arising on or after 1 July 2010.

Overview and national interest summary

6. The key objective of the proposed Agreements, commonly referred to as Tax Information Exchange Agreements (TIEAs), is to establish a legal basis for the exchange of tax information relating to certain persons and other entities between Australia and Liechtenstein, Australia and Costa Rica, Australia and Macao, and Australia and Liberia.

7. The proposed Agreements will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in Liechtenstein, Costa Rica, Macao and Liberia and will help improve the integrity of the tax system by discouraging tax evasion by individuals and other entities. The proposed Agreements also incorporate a number of important safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.

8. The proposed Agreements are four of 32 TIEAs signed by Australia. The proposed Agreements are part of Australia's efforts to conclude TIEAs with jurisdictions that have committed to work with member countries of the Organisation for Economic Cooperation and Development (OECD) to improve transparency and establish effective procedures for the exchange of tax information.

9. Liechtenstein, Costa Rica and Liberia are independent countries responsible for their own domestic affairs. Macao is a region of the People's Republic of China which enjoys a high degree of autonomy in all areas except in defence and foreign affairs. Article 136 of

their Basic Law provides: “The Macao Special Administrative Region may, on its own, using the name "Macao, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports fields.”

Reasons for Australia to take the proposed treaty action

10. The proposed Agreements, alongside other TIEAs which Australia has signed, are an important tool in Australia’s efforts to combat offshore tax evasion. The proposed Agreements provide for the effective exchange of information between Australia and Liechtenstein, Australia and Costa Rica, Australia and Macao and Australia and Liberia, which will promote fairness and enhance Australia’s ability to administer and enforce its domestic tax laws.

11. The proposed Agreements are part of Australia’s ongoing commitment to the OECD’s work on eliminating harmful tax practices that contribute to international tax avoidance and evasion. Australia has taken a leadership role in this work and is currently the Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which has a membership of more than 100 jurisdictions.

12. Since 2002, more than 100 jurisdictions have publicly committed to the implementation of OECD standards of transparency and information exchange for tax purposes, which have been endorsed by both the United Nations and the G-20. These standards, when implemented, help to ensure the availability of information needed by tax authorities to determine a taxpayer’s correct tax liability. TIEAs are the key bilateral means that facilitate the provision of such information by low-tax jurisdictions.

13. In April 2002, the OECD released a model TIEA to facilitate negotiations between OECD member countries and committed jurisdictions. In October 2003, the then Australian Treasurer approved an Australian model TIEA which is closely aligned to the OECD model. The Australian model TIEA was subsequently approved by the current Australian Government. The proposed Agreements with Liechtenstein, Costa Rica, Macao and Liberia essentially follow the format of the Australian model TIEA.

14. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a relatively small flow of funds between Australia and Costa Rica and between Australia and Liberia. AUSTRAC data indicates a significant flow of funds between Australia and Liechtenstein and between Australia and Macao. While most financial flows to and from low-tax jurisdictions are legitimate, the legal frameworks and systems that make low-tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere. In particular, the use of secrecy laws to conceal assets and income that are subject to Australian tax is of concern to Australia.

15. It is in Australia’s interest to continue to develop its network of TIEAs with low-tax jurisdictions. The proposed Agreements, along with existing and future TIEAs, will make it harder for taxpayers to avoid or evade Australian tax and discourage those taxpayers from participating in illegitimate tax arrangements by increasing the probability of detection. This will help Australia protect its revenue base and improve the integrity of the tax system while enhancing the reputations of Liechtenstein, Costa Rica, Macao and Liberia as locations for legitimate business activity.

16. The commitment by Liechtenstein, Costa Rica, Macao and Liberia to implement the proposed Agreements is a positive step in their respective relationships with Australia. The OECD has identified Liechtenstein, Costa Rica, Macao and Liberia as jurisdictions that have committed to and substantially implemented the internationally agreed standard for the exchange of information relating to tax.

Obligations

17. Article 5(1) of the proposed Agreements obliges the competent authorities of the Contracting Parties to provide, on request, information that is foreseeably relevant to the administration and enforcement of the other Party's domestic tax laws, including the collection of taxes and the investigation or prosecution of tax matters. (The proposed Costa Rica Agreement uses the term 'Contracting States' instead of 'Contracting Parties', but otherwise imposes the same obligations.) A request for information must be in writing and contain the information set out in Article 5(5) of the proposed Agreements. This obligation applies irrespective of whether the conduct being investigated would constitute a crime under the domestic law of the Requested Party (or State) if it occurred in the territory of that Party (or State).

18. Article 5(2) of the proposed Agreements provides that where the information in the possession of the Requested Party (or State) is insufficient to enable compliance with a request, the Requested Party (or State) must use its information gathering powers to obtain and provide the information, even if it is not needed for the Requested Party's (or State's) domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the *OECD Model Convention with Respect to Taxes on Income and on Capital*, which has been incorporated into Australia's tax treaty policy.

19. Article 5(3) of the proposed Agreements requires the provision of information in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under the laws of the Requested Party (or State). This is intended to assist the Applicant Party in the proposed Liberia and Liechtenstein Agreements, Applicant State in the proposed Costa Rica Agreement and Requesting Party in the proposed Macao Agreement to satisfy evidentiary requirements in domestic tax proceedings.

20. Article 5(4) of the proposed Agreements obliges each Contracting Party (or State) to ensure its competent authority has the 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 ownership of companies, partnerships, trusts, foundations, 'Anstalten' and other persons. The Commissioner of Taxation currently has the necessary legal authority to meet Australia's obligations under Article 5(4).

21. Article 5(6) of the proposed Agreements obliges the Contracting Parties (or States) to provide the requested information as promptly as possible. Additionally, the proposed Costa Rica, Macao and Liberia Agreements oblige the Contracting Parties (or States) to acknowledge receipt of requests for information.

22. Article 6 of the proposed Agreements provides that one Contracting Party (or State) may, on request, permit interviews with individuals and the examination of records within its jurisdiction by officials of the other Party, with the written consent of the persons concerned.

23. Article 7 of the proposed Agreements provides various grounds for the refusal of requests, including where requests are not in conformity with the respective proposed Agreement or if the Applicant Party or State (in the proposed Liechtenstein, Costa Rica and

Liberia Agreements), or Requesting State (in the proposed Macao Agreement) would be unable to obtain the requested information under its own laws.

24. Article 8 of the proposed Agreements obliges the Contracting Parties (or States) to keep information received under each proposed Agreement confidential. Such information may be disclosed only to persons or authorities concerned with the administration or enforcement of taxation covered by the proposed Agreement and may only be used for such purposes, although this may include public court proceedings or in judicial decisions. The express written consent of the competent authority of the Requested Party (or State) is required for the disclosure of the requested information to any other person, entity, authority or jurisdiction. Additionally, the proposed Liechtenstein Agreement provides that personal data may be transmitted to the extent necessary for carrying out provisions of the proposed Agreement and emphasises that information received by the Requested Party in conjunction with a request for assistance under the proposed Agreement is to be treated as confidential.

25. Article 9 of the proposed Agreements provides that the Requested Party (or State) will bear ordinary costs associated with responding to requests for information. Extraordinary costs are to be borne by the Applicant Party (or State) or the Requesting Party in the proposed Macao Agreement, unless the Contracting Parties (or States) otherwise agree. As discussed in paragraph 30 below, the Australian Taxation Office (ATO) and the relevant competent authorities for each of the jurisdictions have negotiated standing arrangements for costs.

26. Article 12 of the proposed Macao Agreement, Article 11 of the proposed Costa Rica and Liberia Agreements and Article 10 of the proposed Liechtenstein Agreement require the Contracting Parties (or States) to jointly endeavour to resolve difficulties or doubts concerning the interpretation or application of the proposed Agreement and provides that they may also decide upon other forms of dispute resolution.

Implementation

27. Australia is able to fulfil its obligations under the proposed Agreements under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953*. While Article 10 of the proposed Costa Rica, Liberia and the Macao Agreements requires the Contracting Parties to implement legislation necessary to give effect to the proposed Agreements, no further legislation or regulation is required in order to implement the proposed Agreements for Australia. Liechtenstein has a number of existing TIEAs and is able to fulfil its obligations under the proposed Liechtenstein Agreement.

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

Costs

29. The proposed Agreements will have a small administrative and financial impact on the ATO. As Liechtenstein, Costa Rica, Macao and Liberia are unlikely to routinely need Australian information for their own tax purposes, it is likely that most requests for information will originate from Australia. Some resources may need to be allocated by the ATO to provide technical assistance to the jurisdictions in relation to their exchange of information procedures.

30. Pursuant to Article 9 of the proposed Agreements, the ATO has negotiated memoranda of understanding with the competent authorities of Liechtenstein, Costa Rica,

Macao and Liberia. Under these arrangements, certain costs associated with Australian requests for information will be borne by the ATO. Examples of such costs, classified as extraordinary costs, include:

- reasonable fees charged by third parties for carrying out research;
- reasonable fees charged by third parties for copying documents;
- reasonable costs of engaging experts, interpreters or translators;
- reasonable costs of conveying documents to the Requesting Party;
- reasonable litigation costs of the Requested Party in relation to a specific request for information; and
- reasonable costs of obtaining depositions or testimony.

31. Australian residents are unlikely to incur significant compliance costs in relation to the proposed Agreements. It is unlikely Australia will receive many requests for information from any of the jurisdictions and consequently be required to collect information from Australian residents.

32. Overall, it is estimated that the administrative and financial impact of the proposed Agreements will be absorbed by the ATO's existing exchange of information programme, which currently administers similar arrangements (TIEAs and double-taxation agreements) with more than 70 countries. On a broader level, as the proposed Agreements are intended to help reduce tax avoidance and evasion by Australian taxpayers, it could result in the generation of additional revenue for Australia.

Regulation Impact Statement

33. The Treasury has assessed the implementation of the proposed Agreements against criteria in the *Best Practice Regulation Handbook* and concluded that these regulatory options have no/low impact on businesses and individuals or on the economy. The Office of Best Practice Regulation has been consulted and confirms that Regulation Impact Statements are not required.

Future treaty action

34. The proposed Agreements do not provide for amendments or for the negotiation of future legally binding instruments. Pursuant to international law, in the absence of specific procedures, the Parties may amend their respective proposed Agreement by mutual consent at any time. Any future amendments would be subject to Australia's domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any such amendments to the proposed Agreements may be considered in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

Liechtenstein

35. Article 12 of the proposed Liechtenstein Agreement provides that it shall continue in effect indefinitely, but either of the Contracting Parties may, after the expiration of three years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following

the expiration of a period of three months after the date of receipt of the notice of termination by the other Contracting Party. However, both Contracting Parties would remain bound by the confidentiality obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Liechtenstein Agreement between the two Contracting Parties.

Costa Rica

36. Article 13 of the proposed Costa Rica Agreement provides that it shall continue in effect indefinitely, but either of the Contracting States may, after the expiration of three years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting State. Both Contracting States would remain bound by the confidentiality obligations contained in Article 8.

Macao

37. Article 14 of the proposed Macao Agreement provides that it shall remain in force indefinitely, but either of the Contracting Parties may, after the expiration of five years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting Party. Both Contracting Parties would remain bound by the confidentiality obligations contained in Article 8.

Liberia

38. Article 13 of the proposed Liberia Agreement provides that it shall continue in effect indefinitely, but either of the Contracting Parties may, after the expiration of three years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting Party. Both Contracting Parties would remain bound by the confidentiality obligations contained in Article 8.

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

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

40. The proposed Agreements address only administrative matters, namely facilitating the full exchange of information between tax authorities. Accordingly, the public was not consulted.

41. The ATO was involved in the negotiation of the proposed Agreements and will administer them. Given that the proposed Agreements align with the international standard on tax information exchange and with Australia's recent bilateral tax treaty practice, the ATO was supportive of the proposed treaty actions.

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