

National Interest Analysis [2012] ATNIA 12

with attachment on consultation

Agreements between

**the Government of Australia and the Government of the Kingdom of Bahrain
on the Exchange of Information with Respect to Taxes
done at Manama on 15 December 2011
[2011] ATNIF 34**

**the Government of Australia and the Government of the Principality of Andorra
on the Exchange of Information with Respect to Taxes
done at New York on 24 September 2011
[2011] ATNIF 20**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATIES
SUMMARY PAGE

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Nature and timing of proposed treaty actions

1. The proposed treaty actions are to bring into force the *Agreement between the Government of Australia and the Government of the Kingdom of Bahrain on the Exchange of Information with Respect to Taxes* (the proposed Bahrain Agreement) and the *Agreement between the Government of Australia and the Government of the Principality of Andorra on the Exchange of Information with Respect to Taxes* (the proposed Andorra Agreement). The proposed Bahrain Agreement and the proposed Andorra Agreement are hereinafter referred to collectively as “the proposed Agreements”.

Bahrain

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

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

Andorra

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

- from the date of entry into force with respect to criminal tax matters; and
- from 1 July 2012 for all other matters covered in Article 1 of the proposed Andorra Agreement, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

Overview and national interest summary

4. 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 the Governments of Australia and Bahrain, and the Governments of Australia and Andorra.

5. The proposed Agreements will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in Bahrain and Andorra 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.

6. The proposed Agreements are two of 33 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.

Reasons for Australia to take the proposed treaty actions

7. The proposed Agreements, alongside other TIEAs which Australia has with other countries, 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 Bahrain and Australia and Andorra, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.

8. 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.

9. 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.

10. 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 essentially follow the format of the Australian model TIEA.

11. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a relatively small flow of funds between Australia and Andorra and a significant flow of funds between Australia and Bahrain. 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.

12. 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 Bahrain and Andorra as locations for legitimate business activity.

13. The commitment by Bahrain and Andorra to implement the proposed Agreements is a positive step in their respective relationships with Australia. The OECD has identified Bahrain and Andorra as jurisdictions that have committed to and substantially implemented the internationally agreed standard for the exchange of information relating to tax.

Obligations

14. The proposed Andorra Agreement uses the term “Contracting Parties” with the proposed Bahrain Agreement using the term “Contracting States”. The proposed Agreements otherwise impose the same obligations.

15. Article 5(1) of the proposed Agreements obliges the competent authorities of the Contracting Parties (or States) 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. 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 Contracting Party (or State).

16. 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.

17. 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 if specifically requested by the competent authority of an Applicant Party (or State), to the extent allowable under the laws of the Requested Party (or State). This is intended to assist the Applicant Party (or State) to satisfy evidentiary requirements in domestic tax proceedings.

18. 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’ (institutions similar to trusts or foundations) and other persons. The Commissioner of Taxation currently has the necessary legal authority to meet Australia’s obligations under Article 5(4).

19. 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 Agreements oblige the Contracting Parties (or States) to acknowledge receipt of requests for information.

20. 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 Contracting Party (or State), with the written consent of the persons concerned.

21. 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) would be unable to obtain the requested information under its own laws.

22. Article 8 of the proposed Agreements obliges the Contracting Parties (or States) to keep information received under the proposed Agreements confidential. Such information may be disclosed only to persons or authorities concerned with the administration or enforcement of taxation covered by the proposed Agreements 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.

23. Article 9 of each of the proposed Agreements provides that, unless the competent authorities of the Contracting Parties (or States) otherwise agree, the Requested Party (or State) will bear the ordinary costs associated with responding to requests for information, with extraordinary costs to be borne by the Applicant Party (or State). As discussed in paragraph 29 below, the Australian Taxation Office (ATO) and the relevant competent authorities for each of the jurisdictions have negotiated standing arrangements for costs.

24. Article 11 of the proposed Agreements obliges each Contracting Party (or State) to refrain from imposing prejudicial or restrictive measures on residents or nationals of either Contracting Party (or State) on the basis that the other Contracting Party (or State) does not engage in effective exchange of information and/or because it lacks transparency in the operation of its law, regulations or administrative practices. A prejudicial or restrictive measure includes the denial of a deduction, credit or exemption, the imposition of a tax, or special reporting requirements.

25. Article 12 of the proposed Agreements requires the Contracting Parties (or States) to jointly endeavour to resolve difficulties or doubts concerning the interpretation or application of the proposed Agreements and provides that they may also decide upon other forms of dispute resolution.

Implementation

26. Article 10 of the proposed Agreements requires the Contracting Parties (or States) to implement legislation necessary to give effect to the proposed Agreements. In this case, no further legislation or regulation is required in order to implement the proposed Agreements, as Australia is able to fulfil its obligations under the proposed Agreements under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953*.

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

Costs

28. The proposed Agreements will have a small administrative and financial impact on the ATO. As Bahrain and Andorra 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 these jurisdictions in relation to their exchange of information procedures.

29. Pursuant to Article 9 of the proposed Agreements, the ATO and the relevant competent authorities of Bahrain and Andorra have negotiated memoranda of understanding, under which 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 Applicant Party (or State);
- reasonable litigation costs of the Requested Party (or State) in relation to a specific request for information; and
- reasonable costs of obtaining depositions or testimony.

30. 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 either of the jurisdictions and consequently, be required to collect information from Australian residents.

31. 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 program, 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, they could result in the generation of additional revenue for Australia.

Regulation Impact Statement

32. 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

33. The proposed Agreements do not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Contracting Parties (or States) may amend their respective proposed Agreement by mutual consent at any time, pursuant to Article 39 of the *Vienna Convention on the Law of Treaties 1969*. Any future amendments would be subject to Australia's domestic treaty-making process. 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

Bahrain

34. Article 14 of the proposed Bahrain 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) terminate the proposed Agreement by providing written notice of termination through the 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. However, both Contracting States would remain bound by the confidentiality obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Agreement between the two Contracting States.

Andorra

35. Article 14 of the proposed Andorra Agreement provides that it shall continue in effect indefinitely, but either of the Contracting Parties may terminate the proposed Agreement by providing written notice of termination through the 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. However, both Contracting Parties would remain bound by the confidentiality obligations contained in Article 8.

36. Termination of either of the proposed Agreements by Australia would be subject to Australia's domestic treaty-making process.

Contact details

International Tax and Treaties Division
Department of the Treasury

ATTACHMENT ON CONSULTATION

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CONSULTATION

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

38. 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.

39. 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.