

Documents tabled on 20 August 2009:

National Interest Analysis [2009] ATNIA 17

with attachment on consultation

**Agreement between the Government of Australia and the
Government of Jersey 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,
done at London on 10 June 2009
[2009] ATNIF 15**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of Jersey 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, done at London on 10 June 2009 ([2009] ATNIF 15)

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 Jersey 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 Agreement) into force. Pursuant to Article 10, the Agreement will enter into force on the date of the latter written notification between Australia and Jersey giving notice that their necessary internal procedures for entry into force have been completed.
2. The Agreement will then have effect:
 - in respect of Australian tax, for any year of income beginning on or after 1 July in the calendar year following the date of entry into force; and
 - in respect of Jersey tax, for any year of income beginning on or after 1 January in the calendar year following the date of entry into force.

Overview and national interest summary

3. The Agreement provides for the allocation of taxing rights between Australia and Jersey with respect to certain income of certain classes of individuals who are residents of Australia or Jersey. This helps to prevent double taxation. It 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 Jersey. The Agreement is consistent with provisions contained in Australia's comprehensive bilateral tax treaties.
4. Jersey is a British Crown Dependency, located in the English Channel. It has a low-tax structure and is an internationally recognised offshore financial centre.
5. Detailed information on the level and type of economic activity between Australia and Jersey is not available. However, data held by the Australian Transaction Reports and Analysis Centre indicates that a significant amount of funds flow between Australia and Jersey.
6. The Agreement is part of a package of benefits offered to Jersey as part of negotiations to conclude a tax information exchange agreement (TIEA) with Australia. That agreement – the *Agreement between the Government of Australia and the Government of Jersey for the Exchange of Information with Respect to Taxes* - was signed simultaneously with this Agreement on 10 June 2009.

Reasons for Australia to take the proposed treaty action

7. The 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. The Agreement was signed in conjunction with a TIEA between Australia and Jersey on 10 June 2009. TIEAs are the bilateral means that facilitate the provision of information by low-tax jurisdictions, and enhance Australia's ability to protect its revenue base and improve the integrity of the tax system.

8. Jersey's commitment to implement this Agreement and the TIEA is a positive step in its relationship with Australia. On 2 April 2009, the Organisation for Economic Cooperation and Development (OECD) issued a Progress Report on the implementation of internationally agreed tax standards on the exchange of information, which identified Jersey as a jurisdiction that has substantially implemented these standards.

Obligations

9. Article 1 provides that the Agreement applies only to persons who are residents, for taxation purposes, of Australia or Jersey (as defined in Article 4). This precludes non-residents from obtaining the benefits of the Agreement. For Australia, the Agreement only applies to the federal income tax, and does not apply to State and Territory taxes (Article 2).

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

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

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

13. Article 7 obliges Australia not to tax maintenance, education or training payments received by students or business apprentices from Jersey 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.

14. Article 8 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 Jersey. Article 8 permits taxpayers affected by the actions of one Party to present a case to the competent authority of the other Party and obliges Australia and Jersey to endeavour to resolve such disputes. Affected taxpayers must invoke this process within three years of the first notification of the relevant adjustment.

15. Article 9 obliges the Parties to exchange information that is foreseeably relevant for the purposes of carrying out the Agreement. Article 9 specifies that any information may be exchanged pursuant to the provisions of the *Agreement between the Government of Australia and the Government of Jersey for the Exchange of Information with Respect to Taxes*, done at London on 10 June 2009.

Implementation

16. To give effect to the Agreement, minor amendments to the *International Tax Agreements Act 1953* will be necessary, including the insertion of the Agreement as a schedule to that Act. Legislation for this purpose is expected to be introduced into Parliament in late 2009.

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

Costs

18. The 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 Agreement ensures that this impact will be minimal.

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

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

Regulation Impact Statement

21. The Treasury has assessed the implementation of the 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 was consulted and confirmed that a Regulation Impact Statement is not required.

Future treaty action

22. The Agreement does not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Parties may amend the Agreement by mutual consent at any time. Any such amendments would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any future amendments to the Agreement may be considered in line with Australian policy for tax treaty negotiations current at that time.

Withdrawal or denunciation

23. Article 11(1) provides that the Agreement shall remain in force until terminated by written notice from either Party.

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

25. In addition, Article 11(3) provides that the Agreement will terminate and cease to be effective three months after receipt of notice of either Party terminating the related *Agreement between the Government of Australia and the Government of Jersey for the Exchange of Information with Respect to Taxes* (the TIEA).

26. Termination 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.

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CONSULTATION

27. The tax information exchange agreement negotiations with Jersey were not in the public domain and, consequently, the public was not consulted.
28. The ATO was consulted in the development of the Australian model ‘additional benefits’ agreement, which was used as a basis for this Agreement. ATO officials negotiated the text of this Agreement with Jersey. The ATO will administer the Agreement.
29. The State and Territory Governments will be consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of this treaty will be included in the six-monthly schedules of treaties to State and Territory representatives.
30. In addition to the Assistant Treasurer, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister agreed to this treaty.

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE CANBERRA

Agreement between the Government of Australia and the Government of Jersey for the Allocation of Taxing Rights with respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in respect to Transfer Pricing Adjustments

(London, 10 June 2009)

Not yet in force

[2009] ATNIF 15

The Government of Australia and the Government of Jersey ("the Parties"),

Recognising that the Parties have concluded an Agreement for the Exchange of Information with Respect to Taxes, and

Desiring to conclude an Agreement 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,

Have agreed as follows:

**ARTICLE 1
PERSONS COVERED**

This Agreement shall apply to persons who are residents of one or both of the Parties.

**ARTICLE 2
TAXES COVERED**

1 The existing taxes to which this Agreement shall apply are:

- (a) in Australia, the income tax imposed under the federal law of Australia; (hereinafter referred to as "Australian tax").
- (b) in Jersey the income tax; (hereinafter referred to as "Jersey tax").

2 This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Parties shall notify each other within a reasonable period of time of any substantial changes to the taxation laws covered by this

Agreement.

3 This Agreement shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions, or possessions of a Party.

ARTICLE 3 DEFINITIONS

1 For the purposes of this Agreement, unless the context otherwise requires:

- (a) "Australia", when used in a geographical sense, excludes all external territories other than:
 - (i) the Territory of Norfolk Island;
 - (ii) the Territory of Christmas Island;
 - (iii) the Territory of Cocos (Keeling) Islands;
 - (iv) the Territory of Ashmore and Cartier Islands;
 - (v) the Territory of Heard Island and McDonald Islands; and
 - (vi) the Coral Sea Islands Territory,and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the seabed and subsoil of the continental shelf;
- (b) "Jersey" means the Bailiwick of Jersey, including its territorial sea;
- (c) "competent authority" means, in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner and, in the case of Jersey, the Treasury and Resources Minister or an authorised representative of the Minister;
- (d) "Party" means Australia or Jersey, as the context requires;
- (e) "national", in relation to a Party, means any individual possessing the nationality or citizenship of that Party;
- (f) "person" includes an individual, a company and any other body of persons;
- (g) "tax" means Australian tax or Jersey tax, as the context requires; and
- (h) "transfer pricing adjustment" means an adjustment made by the competent authority of a Party to the profits of an enterprise as a result of applying the

domestic law concerning taxes referred to in Article 2 of that Party regarding transfer pricing.

2 As regards the application of this Agreement at any time by a Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, for the purposes of the taxes to which this Agreement applies, with any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

ARTICLE 4 RESIDENT

1 For the purposes of this Agreement, the term "resident of a Party" means:

- (a) in the case of Australia, a person who is a resident of Australia for the purposes of Australian tax; and
- (b) in the case of Jersey, a person who is a resident of Jersey for the purposes of Jersey tax.

2 A person is not a resident of a Party for the purposes of this Agreement if the person is liable to tax in that Party in respect only of income from sources in that Party.

3 Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Parties, then the person's status shall be determined as follows:

- (a) the individual shall be deemed to be a resident only of the Party in which a permanent home is available to that individual; if a permanent home is available in both Parties, or in neither of them, that individual shall be deemed to be a resident only of the Party with which the individual's personal and economic relations are closer (centre of vital interests);
- (b) if the Party in which the individual has their centre of vital interests cannot be determined, the individual shall be deemed to be a resident only of the Party of which the individual is a national;
- (c) if the individual is a national of both Parties or of neither of them, the competent authorities of the Parties shall endeavour to resolve the question by mutual agreement.

4 Where by reason of paragraph 1 a person other than an individual is a resident of both Parties, then it shall be deemed to be a resident only of the Party in which its place of effective management is situated.

ARTICLE 5 PENSIONS AND RETIREMENT ANNUITIES

1 Pensions (including government pensions) and retirement annuities paid to an

individual who is a resident of a Party shall be taxable only in that Party. However, pensions and retirement annuities arising in a Party may be taxed in that Party where such income is not subject to tax in the other Party.

- 2 The term "retirement annuity" means:
- (a) in the case of Australia, a superannuation annuity payment within the meaning of the taxation laws of Australia;
 - (b) in the case of Jersey, a retirement annuity contract approved by the Comptroller of Income Tax in accordance with the provisions of the taxation laws of Jersey; and
 - (c) any other similar periodic payment agreed upon by the competent authorities.

ARTICLE 6 GOVERNMENT SERVICE

- 1 (a) Salaries, wages and other similar remuneration, other than a pension or retirement annuity, paid by a Party or a political subdivision or a local authority thereof to an individual in respect of services rendered to that Party or subdivision or authority shall be taxable only in that Party.
- (b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Party if the services are rendered in that Party and the individual is a resident of that Party who:
- (i) is a national or citizen of that Party; or
 - (ii) did not become a resident of that Party solely for the purpose of rendering the services.

2 Notwithstanding the provisions of paragraph 1, salaries, wages and other similar remuneration in respect of services rendered in connection with any trade or business carried on by a Party or a political subdivision or a local authority thereof may be taxed in accordance with the laws of a Party.

ARTICLE 7 STUDENTS

Payments which a student or business apprentice, who is or was immediately before visiting a Party a resident of the other Party and who is temporarily present in the first-mentioned Party solely for the purpose of their education or training, receives for the purpose of their maintenance, education or training shall not be taxed in that Party, provided such payments arise from sources outside that Party.

ARTICLE 8
MUTUAL AGREEMENT PROCEDURE IN RESPECT OF TRANSFER PRICING
ADJUSTMENTS

1 Where a resident of a Party considers the actions of the other Party results or will result in a transfer pricing adjustment not in accordance with the arm's length principle, the resident may, irrespective of the remedies provided by the domestic law of those Parties, present a case to the competent authority of the first-mentioned Party. The case must be presented within 3 years of the first notification of the adjustment.

2 The competent authorities shall endeavour to resolve any difficulties or doubts arising as to the application of the arm's length principle by a Party regarding transfer pricing adjustments. They may also communicate with each other directly for the purposes of this Article.

ARTICLE 9
EXCHANGE OF INFORMATION

The competent authorities of the Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement. Information may be exchanged by the competent authorities for the purposes of this Article in accordance with the provisions of the Agreement for the Exchange of Information with Respect to Taxes concluded by the Parties. (whether or not this Agreement, in whole or in part, forms part of the domestic law of either Party).

ARTICLE 10
ENTRY INTO FORCE

The Parties shall notify each other, in writing, through the appropriate channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall, provided an Agreement for the Exchange of Information with Respect to Taxes is in force between the Parties, thereupon have effect:

- (a) in respect of Australian tax, for any year of income beginning on or after 1 July in the calendar year next following the date on which this Agreement enters into force; and
- (b) in respect of Jersey tax, for any year of income beginning on or after 1 January in the calendar year next following the date on which this Agreement enters into force.

ARTICLE 11
TERMINATION

1 This Agreement shall continue in effect indefinitely, but either of the Parties may give to the other Party written notice of termination.

2 Such termination shall become effective:

- (a) in respect of Australian tax, in the year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;
- (b) in respect of Jersey tax, in the year of income beginning on or after 1 January in the calendar year next following that in which the notice of termination is given.

3 Notwithstanding the provisions of paragraph 1 or 2, this Agreement shall, on receipt through appropriate channels of written notice of termination of the Agreement for the Exchange of Information with Respect to Taxes between the Parties, terminate and cease to be effective on the first day of the month following the expiration of a period of 3 months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

DONE at London, this tenth day of June, 2009, in duplicate in the English language.

FOR THE GOVERNMENT OF
AUSTRALIA:

H E John Dauth LVO
High Commissioner

FOR THE GOVERNMENT OF
JERSEY:

Senator Philip Ozouf
Deputy Chief Minister
for Treasury and Resources