



International treaty examination of the Agreement between the Government of New Zealand and the Government of Gibraltar on the Exchange of Information with Respect to Taxes

Report of the Finance and Expenditure
Committee

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Recommendation

The Finance and Expenditure Committee recommends that the House take note of its report.

The Finance and Expenditure Committee has conducted an international treaty examination of the Agreement between the Government of New Zealand and the Government of Gibraltar on the Exchange of Information with Respect to Taxes and has no matters to bring to the attention of the House.

The national interest analysis for the treaty is appended to this report.

Appendix A

Committee procedure

The committee met on 21 and 28 April 2010 to consider the agreement.

Committee members

Craig Foss (Chairperson)

Amy Adams

David Bennett

John Boscawen

Brendon Burns

Hon David Cunliffe

Aaron Gilmore

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Appendix B

Agreement between the Government of New Zealand and the Government of Gibraltar on the Exchange of Information with Respect to Taxes

National Interest Analysis

Executive Summary

1 On 13 August 2009, New Zealand signed the Agreement Between The Government Of Gibraltar And The Government Of New Zealand On The Exchange Of Information With Respect To Taxes (“the TIEA”).

2 The TIEA establishes a mechanism by which tax officials from New Zealand and Gibraltar (“the Parties”) can request information from each other (such as business books and accounts, bank information, and information on the ownership of legal entities) for the purpose of detecting and preventing tax avoidance and evasion. Access to this previously unobtainable information will enhance Inland Revenue’s ability to detect and prevent tax avoidance and tax evasion. Any reduction in tax avoidance or tax evasion will be beneficial to New Zealand in financial, fiscal and economic terms. New Zealand already has a network of 35 double tax agreements (“DTAs”) in place with key trading and investment partners which provide for exchange of information arrangements similar to those which are established under the TIEA. TIEAs are designed to be used to establish exchange of information arrangements with jurisdictions where DTAs may not be appropriate, such as with low-tax jurisdictions. Gibraltar is a low-tax jurisdiction, and is also an important international finance centre. New Zealand, to date, has signed a number of other TIEAs – with the Netherlands Antilles, in 2007, and with Bermuda, the Cayman Islands, the Cook Islands, Guernsey, the Isle of Man and Jersey this year.

3 The TIEA is based on a model produced in 2002 by the Organisation for Economic Cooperation and Development (“the OECD”). The TIEA provides a comprehensive set of rules that support the exchange of information. These rules ensure that requested information will be obtained and provided in a timely and effective manner. However, the rules also ensure that information may not be requested or used indiscriminately. Information requests may only be made in prescribed circumstances, and information received pursuant to a request may only be disclosed to authorised persons and used by those persons for authorised purposes (principally, the administration and enforcement of the domestic tax laws of the respective Party.) The text of the TIEA is attached as Annex A.

4 A key measure offered by New Zealand as encouragement to Gibraltar to enter into the TIEA, is found in Article 11 of the TIEA. This Article constitutes an obligation on the Parties not to impose “prejudicial or restrictive measures based on harmful tax practices” on each other. This obligation relates to the OECD Harmful Tax Practices initiative, in which the prospect of OECD member countries imposing sanctions on or taking other

defensive measures against jurisdictions identified as having harmful tax practices has previously been raised. The key identifier of harmful tax practices is whether a jurisdiction engages in effective exchange of information on tax matters. Given that the TIEA provides for full exchange of information on tax matters with Gibraltar, it would be inappropriate for New Zealand to impose any such measures on Gibraltar while the TIEA is in force. The provision was included in recognition of this, but was expressed as a reciprocal obligation on both Parties.

Date and nature of proposed binding treaty action

5 It is proposed that the TIEA be brought into force for New Zealand following completion of the Parliamentary treaty examination process in accordance with Standing Orders 388 to 391.

6 Subsequent to completion of the Parliamentary treaty examination process, the TIEA can then be incorporated into domestic legislation by Orders in Council pursuant to section BH 1 of the Income Tax Act 2007. Section BH 1 authorises the giving of overriding effect to DTAs by Order in Council.¹ Despite the reference to DTAs, the TIEA to which the section relates are those that have been negotiated for any one or more of the purposes listed in the section. The facilitation of exchange of information is a listed purpose. Therefore, the TIEA falls within the ambit of section BH 1.

7 Upon the promulgation of the Orders in Council, the TIEA can then be brought into force, in accordance with Article 13 of the TIEA through an exchange of diplomatic notes that confirms the completion of the respective constitutional and legal requirements for entry into force of the TIEA by each Party.

Reasons for New Zealand taking the treaty action

8 New Zealand domestic law specifically prohibits Inland Revenue from divulging information it holds to foreign jurisdictions, except when authorised by a tax treaty.² Other countries generally follow the same principle. Therefore, to assist in the detection and prevention of tax avoidance and tax evasion, most developed countries are building networks of treaties that allow for the exchange of information on tax matters.

9 The most common type of tax treaty in which exchange of information provisions feature are DTAs. New Zealand currently has 35 DTAs in force. However, DTAs are typically only concluded between trading and investment partners with broadly similar tax systems. To cater for other situations, the OECD, in 2000, produced a model TIEA (with a comprehensive commentary) that provides solely for the exchange of information on tax matters. The OECD also, in 2000, published a list of low-tax international finance centres

¹ That is, the Order in Council may specify that the provisions of the agreement will have effect notwithstanding any provision of the Inland Revenue Acts, the Official Information Act 1982 or the Privacy Act 1993 – although only in relation to tax matters.

² Sections 81 and 88 of Tax Administration Act 1994 refer. The term “double tax agreement”, as used in section 88 (by virtue of its legislative definition) is also applicable to TIEAs.

with which member countries are encouraged to negotiate TIEAs, based on the OECD model TIEA.³ The 2000 list includes Gibraltar.

10 New Zealand signed its first TIEA, with the Netherlands Antilles, on 1 March 2007. A second TIEA, with Bermuda, was signed on 16 April 2009. TIEAs have since been signed with the Cayman Islands, the Cook Islands, Guernsey, the Isle of Man and Jersey. Each new TIEA concluded further expands New Zealand's network of exchange of information arrangements and reduces the tax evasion and avoidance options available to New Zealand residents.

11 The TIEA with Gibraltar provides a comprehensive set of rules to support the exchange of information. These rules are designed to ensure that requested information is obtained and provided in a timely and effective manner. The TIEA, however, also ensures that information is not to be requested or used indiscriminately. Requested information must be "foreseeably relevant" to the tax affairs of a particular person or entity (the OECD commentary clarifies that this means the Parties are not at liberty to engage in "fishing expeditions"). In addition, information received pursuant to a request may only be disclosed to authorised persons and may only be used by those persons for authorised purposes (principally, the administration and enforcement of the domestic tax laws of the respective Party.)

12 Interference from bank secrecy and domestic tax interest rules is specifically prohibited as an obstacle to effective information exchange.⁴ Otherwise, rights and safeguards secured to residents of either jurisdiction by domestic law or administrative practice remain in effect. In particular, as noted above, the Parties are required to maintain strict confidentiality in relation to any information received pursuant to a request.

13 The text of the TIEA is attached as Annex A.

Consideration of other options

14 New Zealand's objective in negotiations was to secure effective exchange of information arrangements with Gibraltar. The only other possible treaty mechanism for entering into such arrangements with Gibraltar would be as part of a DTA. However, DTAs are designed to be concluded between trading and investment partners with broadly similar tax systems. The fact that DTAs allocate taxing rights means that New Zealand would stand to lose tax revenue if it were to enter into a DTA with Gibraltar.

Advantages and disadvantages to New Zealand of the treaty action

15 The TIEA will enable New Zealand tax officials to request tax records, business books and accounts, bank information, and ownership information from Gibraltar. Access

³ The 2000 OECD report "Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices" refers.

⁴ This is a key aspect of the TIEA. Access to bank information on transactions and savings assists tax administrations in determining whether a person has correctly declared their income. Bank secrecy rules prevent the disclosure of bank information, and therefore facilitate tax evasion. TIEAs override any such domestic bank secrecy rules with an explicit treaty obligation to provide bank information. Domestic Tax Interest rules prohibit a jurisdiction from complying with a request for information if that jurisdiction itself does not itself need that information for tax purposes. TIEAs therefore also override any domestic tax interest rules with an explicit treaty obligation to provide information regardless of whether or not there is a domestic interest.

to this previously unobtainable information will enhance Inland Revenue's ability to detect and prevent tax avoidance and tax evasion (the TIEA permits New Zealand to request information in relation to "taxes of every kind and description". Its likely principal application, however, will be in respect of income taxes). Any reduction in tax avoidance or tax evasion will be beneficial to New Zealand in financial, fiscal and economic terms. The TIEA is based on the 2002 OECD model TIEA and is subject to the comprehensive commentary produced by the OECD to support consistent interpretation and application of the TIEA provisions.

16 Gibraltar is unlikely to raise many requests for information from New Zealand. If requests for information are received from Gibraltar, New Zealand will incur administrative costs in obtaining and providing the requested information. However, streamlined and effective mechanisms for dealing with exchange of information requests have already been established in relation to New Zealand's existing DTAs and TIEAs. The administrative costs of responding to requests from Gibraltar will therefore only be marginal. Experience gained from administering the exchange of information arrangements already in place under New Zealand's existing tax treaties indicates that the benefits arising from the enhanced ability to reduce tax avoidance and evasion outweigh any of the costs that arise.

17 New Zealand may be required to bear some costs in relation to requests for information that it makes to Gibraltar. The less-than-treaty status Understanding Between The Chief Secretary Of The Government Of Gibraltar And The New Zealand Inland Revenue Department Concerning The Liability For Costs Of Obtaining And Providing Information In Response To A Request Under The Agreement Between The Government Of New Zealand And The Government Of Gibraltar On The Exchange Of Information With Respect To Taxes ("the Understanding") sets out the shared understanding of the Parties with respect to costs, as is required by Article 9 of the TIEA. "Ordinary" costs of complying with a request will be borne by the requested Party, but "extraordinary costs" (such as the cost of hiring translators or interpreters) will be reimbursed by the requesting Party. However, prior consultation will be required if extraordinary costs appear likely to exceed US\$1000. This will ensure that New Zealand will only progress information requests giving rise to significant reimbursement costs if the need to obtain the information justifies the expenditure.⁵

18 The TIEA contains one article, Article 11, not found in the OECD model TIEA. Article 11 imposes an obligation on the Parties not to impose "prejudicial or restrictive measures based on harmful tax practices" against each other. This obligation relates to the OECD Harmful Tax Practices initiative, in which the prospect of OECD member countries taking defensive measures to restrain the harmful tax practices of other countries has previously been raised.⁶ The key identifier of harmful tax practices is whether a

⁵ In recognition of the possibility that capacity issues in Gibraltar may mean that, on occasions, they may struggle to find the staff or other resources to comply with a single or multiple requests for information from New Zealand, the Understanding also provides that the two sides are to consult in such circumstances with a view to finding solutions. For example, where it is vitally important for Inland Revenue to obtain the information, New Zealand may agree to pay a larger share of the costs.

⁶ The 1998 OECD report "Harmful Tax Competition: An Emerging Global Issue" and 2000 OECD report "Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices" refer. The G20 Leaders Summit of 2 April 2009 re-raised the prospect of counter-measures against non-complying jurisdictions. The Leaders

jurisdiction engages in effective exchange of information on tax matters. Given that the TIEA provides for full exchange of information on tax matters with Gibraltar, it would be inappropriate for New Zealand to impose any such measures on Gibraltar while the TIEA is in force. The provision was included in recognition of this, but was expressed as a reciprocal obligation on both Parties.

19 On balance, it is in New Zealand’s interests to conclude the TIEA with Gibraltar.

Obligations which will be imposed on New Zealand by the treaty action, the position of reservations to the treaty, and an outline of any dispute settlement mechanisms

20 The TIEA places a reciprocal obligation on each Party to provide, upon request, information that is relevant to the administration and enforcement of specified taxes. In the case of Gibraltar, the specified taxes are “income taxes”. As noted above, Gibraltar currently has a very limited tax system, and so is unlikely to make many requests for information from New Zealand.

21 The Parties are required to maintain strict confidentiality in relation to any information received pursuant to a request. Such information may only be disclosed to authorised persons and may only be used for specified purposes (principally the administration and enforcement of the domestic tax laws of the respective Party).

22 In the Understanding, the respective tax authorities set out their shared understanding of how incidents of costs incurred in providing assistance will be addressed. The requesting Party is to reimburse the requested Party for “extraordinary costs” (such as the cost of engaging an interpreter or translator) incurred in responding to the request. Otherwise costs are to be borne by the requested Party. Prior consultation will be required if extraordinary costs appear likely to exceed US\$1000.

23 Both Parties are constrained from imposing “prejudicial or restrictive measures based on harmful tax practices”. New Zealand does not currently impose any such measures and, given that the TIEA provides for full exchange of information on tax matters with Gibraltar, would not contemplate introducing such measures with respect to Gibraltar while the TIEA is in force.

24 Reservations are not provided for under the TIEA.

25 Article 12 of the TIEA provides that any difficulties or doubts arising as to the interpretation or application of the TIEA are to be resolved, if possible, by mutual agreement between the competent authorities (for New Zealand, the Commissioner of Inland Revenue or his or her authorised representative; for Gibraltar, the Chief Secretary or such other person as the Minister of Finance may appoint). The Parties may also decide upon other forms of dispute resolution.

Statement from that Summit contained the statement that “we stand ready to deploy sanctions to protect our public finances and financial systems”.

Measures the Government could or should adopt to implement the treaty action, including the specific reference to implementing the legislation

26 Subject to the completion of the Parliamentary treaty examination process, the TIEA will be implemented into New Zealand domestic law by Orders in Council in accordance with section BH 1 of the Income Tax Act 2007.

27 After the Orders in Council have entered into force, New Zealand will notify Gibraltar by diplomatic note that all of its domestic constitutional and legal procedures for entry into force of the TIEA are complete. Gibraltar will likewise notify New Zealand by diplomatic note when it has completed its domestic constitutional and legal procedures for entry into force of the TIEA. The TIEA will enter into force on the date of the last notification. The provisions will apply prospectively (for example, this means that the TIEA provisions cannot then be used to obtain information predating entry into force).

Economic, social, cultural and environmental costs and effects of the treaty action

28 No social, cultural or environmental effects are anticipated. Any economic effects are expected to be favourable, as noted above.

The costs to New Zealand of compliance with the treaty

29 New Zealand will be required to reimburse Gibraltar for extraordinary costs (such as the cost of hiring translators or interpreters) that may arise from a New Zealand request made under the TIEA. However, the Understanding provides for consultation if extraordinary costs appear likely to exceed US\$1000. This will ensure that New Zealand will only progress information requests giving rise to significant reimbursement costs if the need to obtain the information justifies the expenditure.

30 New Zealand is likely to raise more requests for information than Gibraltar but, if requests for information are received from Gibraltar New Zealand will incur administrative costs in complying with those information requests. As noted above, however, streamlined and effective mechanisms for dealing with exchange of information requests have already been established in relation to New Zealand's existing DTA and TIEA network. The administrative costs of responding to requests from Gibraltar are therefore expected to be marginal.

31 Any costs arising to Inland Revenue as a result of the operation of the TIEA will be met within existing baselines.

Completed or proposed consultation with the community and parties interested in the treaty action

32 The Ministry of Foreign Affairs and Trade and the Treasury have been consulted and agree with the proposed treaty action. Further, the concept of TIEAs in general has been canvassed in published policy work programmes.

Subsequent protocols or amendments to the treaty and their likely effects

33 No future amendments are anticipated. New Zealand will consider any proposed amendments to the TIEA on a case by case basis, and any decision to accept an amendment would be subject to the usual domestic approvals and procedures.

Withdrawal or denunciation provision in the treaty

34 Article 14 of the TIEA provides that either Party may terminate the TIEA by giving three months' written notice through the diplomatic channel. The Parties will remain bound by the confidentiality provisions contained in Article 8 of the TIEA even after it has been terminated.

35 Any decision by New Zealand to terminate the TIEA would be subject to the usual domestic approvals and procedures.

Adequacy statement

36 The Inland Revenue Department has prepared this extended national interest analysis and has assessed it as adequate and in accordance with the Code of Good Regulatory Practice.