



International treaty examination of the Third Protocol to the Agreement between the Government of New Zealand and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income

Report of the Foreign Affairs, Defence
and Trade Committee

Contents

Recommendation	2
Appendix A	3
Appendix B	4

Third Protocol to the Agreement between the Government of New Zealand and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income

Recommendation

The Foreign Affairs, Defence and Trade Committee has conducted an international treaty examination of the Agreement between the Government of New Zealand and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and recommends that the House take note of its report.

The committee supports the double taxation agreement and has no matters to bring to the attention of the House. The national interest analysis for the agreement is appended to this report.

Appendix A

Committee procedure

The treaty was referred to the committee for examination on 10 December 2012. We met on 31 January 2013 to consider it.

Committee members

John Hayes (Chairperson)

Hon Phil Goff

Kennedy Graham

Hon Tau Henare

Dr Paul Hutchison

Su'a William Sio

Lindsay Tisch

Appendix B

National Interest Analysis

Third Protocol Amending The Convention Between The Government Of New Zealand And The Government Of Malaysia For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income

Executive Summary

1. On 6 November 2012, New Zealand signed the Third Protocol Amending The Convention Between The Government Of New Zealand And The Government Of Malaysia For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income (the Third Protocol).
2. Exchange of information provisions are designed to enable tax administrations to assist each other in the detection and prevention of tax evasion and tax avoidance. For example, a tax administration which wishes to confirm that a particular taxpayer has correctly reported income earned in a foreign jurisdiction, or which is investigating a suspected tax avoidance structure, can request relevant records (business books and accounts, bank information, ownership information, and other tax related information) from the other country. If the requested tax authority does not itself hold the information, it is required under the DTA to use its information gathering powers to obtain the information and to forward it to the requesting country.
3. The Third Protocol updates exchange of information provisions of the 1976 double tax agreement between New Zealand and Malaysia, to take into account international developments in the prevailing international standard for exchange of information. In particular, the updated provisions will now prohibit interference by bank secrecy laws. New Zealand does not have bank secrecy laws. Malaysia does not have bank secrecy laws generally, but it has established the Island of Labuan as an international finance centre which is protected by bank secrecy laws.
4. The Third Protocol will facilitate more effective exchange of information between New Zealand and Malaysia, by enabling Inland Revenue to request and obtain information that previously may have been unobtainable by view of Malaysia's bank secrecy laws.

Nature and timing of proposed binding treaty action

5. The Third Protocol Amending The Convention Between The Government Of New Zealand And The Government Of Malaysia For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income (the Third Protocol) was signed on 6 November 2012.
6. The proposed binding treaty action is to bring the Third Protocol into force through an exchange of diplomatic notes that confirm the completion of the respective constitutional and legal requirements for entry into force by each country, pursuant to Article 2 of the Third Protocol.

Reasons for New Zealand to become a Party to the treaty

7. The purpose of the Third Protocol is to update the Exchange of Information Article in their 1976 DTA with New Zealand to the new international standard for full and unrestricted exchange of information.

Double tax agreements (DTAs) are bilateral international treaties that are principally designed to encourage growth in economic ties between countries. DTAs encourage growth in economic ties by reducing tax impediments to cross-border trade and investment. More specifically they provide greater certainty of tax treatment, eliminate double taxation, reduce withholding taxes on cross-border investment returns, and exempt certain short-term activities in the host state from income tax.

8. For tax administrations, the Exchange of Information Article of a DTA is a key feature. It enables tax authorities to assist each other in the in the detection and prevention of tax evasion and tax avoidance. For example, a tax administration which wishes to confirm that a particular taxpayer has correctly reported income earned in a foreign jurisdiction, or which is investigating a suspected tax avoidance structure, can request relevant records (business books and accounts, bank information, ownership information, and other tax related information) from the other country. If the requested tax authority does not itself hold the information, it is required under the DTA to use its information gathering powers to obtain the information and to forward it to the requesting country.

9. DTA provisions generally override domestic law. However, DTA Exchange of Information Articles typically contain a proviso that “In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation ... to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State”. This proviso is included for sound reasons (principally to protect the rights and safeguards accorded to persons under domestic law). However, it leaves open a loophole that countries can exploit by introducing legislation that blocks the effective exchange of information in key areas. Because of the above proviso in our DTAs, the Exchange of Information Article is then defeated in that it cannot override such domestic legislation.

10. In recent years, the importance of effective exchange of information has received increasing international attention. This has resulted in concerns being raised, in particular, with regard to bank secrecy rules and domestic tax interest rules. “Bank secrecy” laws prohibit the disclosure of bank information to revenue and other regulatory authorities. “Domestic tax interest” laws prohibit a tax authority from using its information gathering powers in response to requests for information from a DTA partner unless that tax authority itself has an interest in obtaining that information.

11. In response, in 2003, the OECD updated the Exchange of Information Article in its model tax convention to specifically override bank secrecy and domestic tax interest rules. The 2003 wording of the OECD Exchange of Information Article is now referred to as “the new international standard for full and unrestricted exchange of information”.

12. Malaysia does not have general bank secrecy laws, but it has established the Island of Labuan as an international finance centre which is protected by bank secrecy laws. However, Malaysia has now agreed to update the Exchange of Information Article in their 1976 DTA with New Zealand to the new international standard for full and unrestricted exchange of information.

Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand

13. The Third Protocol will enable New Zealand tax officials to request tax records, business books and accounts, bank information, and ownership information from Malaysia, in particular, from the Island of Labuan. 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.

14. New Zealand does not have bank secrecy or domestic tax interest rules. Therefore there is not expected to be any change in respect of Malaysian requests for information from New Zealand. No disadvantages to New Zealand from entering into the Third Protocol have been identified.

15. It is an option for New Zealand to retain the current Exchange of Information Article in the Belgian DTA. That is, continue to only exchange information with Malaysia on a limited basis. However, this will reduce New Zealand's ability to detect and prevent tax avoidance and tax evasion.

16. On balance, it is in New Zealand's interest to enter into the Third Protocol with Malaysia.

Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms

17. The Third Protocol will not impose any specific obligations on New Zealand in addition to those that already exist under the Exchange of Information Article of the DTA. The sole impact of the Third Protocol is to obtain additional obligations from the Malaysian Government to provide a greater range of information to New Zealand than is currently the case.

18. The dispute settlement mechanisms that are currently in place for the Malaysian DTA will also apply to the Third Protocol.

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

19. Subject to the successful completion of the Parliamentary treaty examination process, the Second Protocol will be implemented domestically by means of an overriding Regulation.

20. Section BH 1(3) of the Income Tax Act 2007 authorises the making of an Order in Council to give the provisions of a DTA overriding effect in relation to the Inland Revenue Acts, the Official Information Act 1982 and the Privacy Act 1993. The override of the Inland Revenue Acts is necessary to give effect to the terms of the Protocol, given that it requires New Zealand to provide information it holds to foreign jurisdictions which is forbidden under those Acts. The Official Information Act is overridden to ensure that communications with other states during negotiations are not disclosed. The Privacy Act is overridden to ensure that information can be exchanged regarding natural persons under the exchange of information provisions of the DTA.

21. After the Order in Council has entered into force, New Zealand will notify Malaysia by diplomatic note that all of its domestic constitutional and legal procedures for entry into

force of the Third Protocol are complete. Malaysia will likewise notify New Zealand by diplomatic note when it has completed its domestic constitutional and legal procedures for giving effect to the Third Protocol. The Third Protocol will enter into force on the date of the receipt of the last notification. Its provisions will then have effect for requests made on or the date of entry into force with regard to tax years beginning on or after 1 January following entry into force.

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

22. 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

23. No costs are anticipated.

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

24. The Ministry of Foreign Affairs and Trade and the Treasury have been consulted and concur with the terms of the Third Protocol. No private sector consultation has been entered into.

Subsequent protocols or amendments to the treaty and their likely effects

25. No future protocols are anticipated. New Zealand would consider proposed amendments on a case by case basis and any decision to accept an amendment would be subject to the normal domestic approvals and procedures.

Withdrawal or denunciation provision in the treaty

26. It is intended that the Third Protocol remains in force as long as the Malaysian DTA is applicable.

27. Either party may terminate the Malaysian DTA by giving notice of termination, through diplomatic channels, on or before 30 June in any calendar year, in accordance with Article 25 of the Malaysian DTA.

Agency Disclosure Statement

28. Inland Revenue has prepared this extended national interest analysis. It has undertaken an analysis of the issue of implementing the Third Protocol that amends the DTA between New Zealand and Malaysia, and the legislative and regulatory proposals arising from that implementation. It has considered all other relevant options in that process. Inland Revenue is of the view that there are no significant constraints, caveats or uncertainties concerning the regulatory analysis.

29. The Third Protocol amends the DTA between New Zealand and Malaysia by updating the exchange of information Article of the DTA to bring it in line with international norms. To the extent that costs arise from implementing the Third Protocol, they will be limited to administration costs. However, given that the DTA already includes exchange of information provisions (albeit a more restricted version), no additional costs are anticipated.

30. An Order in Council is required to implement the Third Protocol into New Zealand domestic law. The Order in Council will override the Inland Revenue Acts, the Official

Information Act 1982 and the Privacy Act 1993; this is authorised by section BH 1 of the Income Tax Act 2007 and is necessary to give effect to the terms of the Third Protocol.

31. Inland Revenue notes that the form of the Third Protocol and national interest analysis is consistent with previous protocols concluded by and national interest analyses prepared by New Zealand. The amendment made by the Third Protocol to the exchange of information Article of the DTA is consistent with the approach adopted in other DTAs and Protocols that New Zealand has signed since 2004.

32. Inland Revenue is of the view that the policy options considered will not impose additional costs on businesses; impair private property rights or market competition; adversely impact the incentives on businesses to innovate and invest; or override fundamental common principles.

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