



International treaty examination of the Agreement between the Government of New Zealand and the Government of the Republic of San Marino 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 has examined the Agreement between the Government of New Zealand and the Government of the Republic of San Marino on the Exchange of Information with Respect to Taxes, and recommends that the House take note of its report.

This agreement establishes a mechanism for the exchange of information between New Zealand and the Republic of San Marino to enable the two jurisdictions to assist each other in the detection and prevention of tax avoidance and tax evasion.

We support the agreement and have 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 international treaty examination of the Agreement between the Government of New Zealand and the Government of the Republic of San Marino on the Exchange of Information with Respect to Taxes was referred to us by the Foreign Affairs, Defence and Trade Committee on 5 December 2016. We met on 14 December 2016, and 8 and 15 February 2017 to consider the agreement.

Committee members

Chris Bishop (Chairperson)

Andrew Bayly

Hon Clayton Cosgrove

Hon Craig Foss

Rt Hon Winston Peters

Grant Robertson

Jami-Lee Ross

Alastair Scott

David Seymour

James Shaw

Appendix B

National Interest Analysis

NATIONAL INTEREST ANALYSIS:

Agreement between the Government of New Zealand and the Government of the Republic of San Marino on the Exchange of Information with Respect to Taxes

Executive summary

1. The *Agreement between the Government of New Zealand and the Government of the Republic of San Marino on the Exchange of Information with Respect to Taxes* (“the TIEA”) was signed on 1 April 2016.

2. The TIEA establishes an exchange of information mechanism between New Zealand and the Republic of San Marino (“San Marino”) for the purpose of enabling the two jurisdictions to assist each other in the detection and prevention of tax avoidance and tax evasion.

3. Because of historical international and legal principles that otherwise impose barriers to countries assisting each other in enforcing their tax laws, forms of tax cooperation between jurisdictions such as exchange of information are typically established by means of tax treaties. The types of legal instruments that can be used for this purpose include:

- Double Tax Agreements (DTAs). These treaties are predominantly concluded between trading and investment partners, and cover a range of tax issues in addition to exchange of information. New Zealand has 40 DTAs in force. New Zealand does not have a DTA with San Marino.
- The joint OECD/Council of Europe *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (“the Multilateral Convention”), which has been in existence since 1988 but which was only opened for signature to all countries in 2010. The Multilateral Convention provides for a wide range of administrative co-operation in tax matters, including exchange of information. It has now been signed by over 100 jurisdictions. New Zealand and San Marino are both signatories to the Multilateral Convention.
- Tax Information Exchange Agreements (TIEAs). A model TIEA was developed by the OECD in 2002. Dealing solely with exchange of information, TIEAs are particularly useful for establishing bilateral exchange of information terms with jurisdictions that are not major trading or investment partners.

4. Once the TIEA enters into force, New Zealand and San Marino (“the Parties”) will have exchange of information mechanisms available to them under both the Multilateral Convention and the TIEA. The tax authorities of the two jurisdictions will have flexibility to choose the legal instrument that is most appropriate to the circumstances of any particular case. Both instruments allow for the Parties to 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.

5. The TIEA provides a comprehensive set of rules for effective exchange of information. These rules ensure that requested information will be obtained and provided in a timely and effective manner. 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 for the administration and enforcement of the domestic tax laws of the Parties).

6. It is in the national interest to conclude the TIEA with San Marino as it will extend and strengthen New Zealand's exchange of information network, and will also strengthen diplomatic ties with San Marino.

Nature and timing of the proposed treaty action

7. It is proposed that the TIEA be brought into force, by means of an exchange of diplomatic notes, following completion of each jurisdiction's domestic requirements for entry into force. The exchange of notes constitutes the binding treaty action. However, the full range of steps required in New Zealand, for entry into force of the TIEA are set out in the following paragraphs.

8. The TIEA is required to undergo Parliamentary treaty examination, in accordance with Standing Orders 397-400. Standing Order 397(1)(d) requires Parliamentary examination of any major bilateral treaty of particular significance that the Minister of Foreign Affairs decides to present to the House. Although a TIEA would not normally be considered major bilateral treaties of particular significance, it has been decided that any treaty that overrides legislation once in force should be subject to appropriate scrutiny under Standing Order 397(1)(d).

9. Subsequent to completion of the Parliamentary treaty examination process, the TIEA will be incorporated into domestic legislation by Order in Council pursuant to section BH 1 of the Income Tax Act 2007. Section BH 1 provides that such Orders in Council may specify that the provisions of a DTA 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. Section BH 1 expressly applies only to “double tax agreements”. However that term is defined for the purposes of that section as any agreement negotiated for any one or more listed purposes. The facilitation of exchange of information is a listed purpose. Therefore, TIEAs fall within the ambit of section BH 1.

10. Upon the promulgation of the Order in Council, the TIEA will be brought into force, in accordance with Article 12 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. The TIEA comes into force on the date of the last notification, and takes effect from that date for criminal matters. In relation to all other matters, the TIEA comes into effect for taxable periods beginning on or after the date of entry into force or, where there is no taxable period, for all charges to tax arising on or after that date. (In practice this means that requests for retrospective information may only be made in respect of criminal tax matters.)

11. Once an exchange of information mechanism has been established with another jurisdiction, New Zealand can approve that jurisdiction for the purposes of the venture capital exemption at section CW 12 of the Income Tax Act 2007. (Qualifying foreign investors from approved territories are exempt from paying income tax on any gains derived from the sale of shares in qualifying venture capital investments. The purpose of the exemption is to facilitate increased venture capital investment into New Zealand.) Approval of a jurisdiction for the purposes of section CW 12 requires the making of an additional Order in Council. This will be attended to after the TIEA enters into force.

12. The TIEA will not apply to the Cook Islands, Niue or Tokelau.

Reasons for New Zealand becoming party to the treaty

13. To assist in the detection and prevention of tax avoidance and tax evasion, New Zealand, like most developed countries, has developed a wide network of tax treaties that allow for the exchange of information on tax matters.

14. Historically, DTAs were the only available type of tax treaty. However, DTAs are typically only concluded between trading and investment partners with broadly similar tax systems. This meant that it could be difficult, if not impossible, to establish exchange of information arrangements other jurisdictions, and in particular with low tax jurisdictions and international finance centres. The international community increasingly came to recognise this as a problem, as much tax avoidance and tax evasion activity occurs through such jurisdictions.

15. In response, in 2002, the OECD produced a model TIEA that provides solely for exchange of information. In 2010, the OECD then also arranged for the joint OECD/Council of Europe *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* to be updated and opened for signature to all countries.

16. New Zealand currently has 40 DTAs and 11 TIEAs in force. In addition, New Zealand signed the Multilateral Convention on 26 October 2012. Over 100 jurisdictions are now party to Multilateral Convention, although it is currently only in force in respect of 73 of these. Combining our DTAs, TIEAs and Multilateral Convention partners, New Zealand currently has exchange of information arrangements in force with 89 jurisdictions. As is the case with San Marino, a number of our bilateral treaty partners are also signatories to the Multilateral Convention.

17. New Zealand's exchange of information network is under constant development, with a view to establishing exchange of information arrangements with as wide a range of partners as possible. Experience to date from administering exchange of information provisions is that the benefits arising from the enhanced ability to reduce tax avoidance and evasion outweigh any of the costs that arise.

18. San Marino has had a standing request with New Zealand for a DTA. Due to incompatible tax settings, this was not possible in New Zealand's view. New Zealand instead offered to negotiate a TIEA. At the time of these discussions, San Marino had not signed the Multilateral Convention. However, even if it had, having a choice of legal instrument provides the tax authorities of the two jurisdictions with the flexibility to choose which instrument is most appropriate for the circumstances of any particular case. In addition, the TIEA will also strengthen diplomatic ties with San Marino.

19. The TIEA with San Marino will extend and strengthen New Zealand's exchange of information network and enhance Inland Revenue's ability to detect and prevent tax evasion.

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

Advantages

20. The TIEA will enable New Zealand tax officials to request tax records, business books and accounts, bank information, and ownership information from San Marino under this bilateral information exchange. Access to this information is an important part of 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", but 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.

21. The TIEA closely follows 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.

22. The TIEA provides a comprehensive set of rules to support the bilateral exchange of information. These rules are designed to ensure that requested information is obtained and provided in a timely and effective manner. The TIEA also addresses privacy and confidentiality concerns, by ensuring 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 be used by those persons only for authorised purposes (principally, the administration and enforcement of the domestic tax laws of the Parties).

23. Interference from bank secrecy rules and domestic tax interest rules is specifically prohibited as an obstacle to effective information exchange. Otherwise, rights and safeguards secured to residents of either jurisdiction by domestic law or administrative practice (such as legal professional privilege) remain in effect.

24. The approval of San Marino for the purposes of the section CW 12 venture capital exemption may result in increased venture capital exemption into New Zealand.

Disadvantages

25. To the extent that requests for information are received from San Marino, 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, TIEAs, and the Multilateral Convention. The administrative costs of responding to requests from San Marino under the TIEA 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.

26. On balance, it is in New Zealand's interests to conclude the TIEA with San Marino.

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

27. 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 (Article 1). Such information includes information that is relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. The taxes that the TIEA will apply to are set out in Article 3(1). In the case of San Marino, the TIEA will apply to general income tax which is levied on individuals or bodies corporate and proprietorships, even if collected through a withholding tax. For New Zealand, the TIEA will apply to "taxes of every kind and description".

28. The legal obligations established by the TIEA include the requirement to provide information without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if such conduct occurred in the Requested Party (Article 5). Such an obligation is a feature of the OECD model TIEA, and is intended to counter any domestic law provision of a country that prevents the exchange of information on matters unless they constitute a crime. Such rules can frustrate effective exchange of information. This is a standard clause in TIEAs to guard against the possibility of the existence or future introduction of any such rule in either country.

29. The TIEA also contemplates the possibility that representatives of the tax administration of the Requesting Party may be allowed to visit the Requested Party to interview individuals and examine records (Article 6). The treaty does not impose any obligation on the Requested Party to agree to such a visit. However, the possibility may prove to be useful in certain cases. For example, in a complex case officials of one Party may wish to consider visiting the other jurisdiction for the purposes of conducting interviews.

30. The Parties are required to maintain strict confidentiality in relation to any information received pursuant to a request (Article 8). Such information may be disclosed only to authorised persons and may be used only for specified purposes (principally for the administration and enforcement of the domestic tax laws of the respective Party).

31. Article 11 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 San Marino, the Central Liaison Office).

32. Reservations are not provided for under the TIEA.

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

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

34. Section BH 1 of the Income Tax Act 2007 enables TIEAs to be given effect by Order in Council. Section BH 1 provides that TIEAs will then override the Inland Revenue Acts, the Official Information Act 1982, and the Privacy Act 1993. The override of the Acts is necessary to give effect to the terms of a TIEA, given that the TIEA 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 jurisdictions are not required to be disclosed. The Privacy Act is overridden to ensure that information can be exchanged regarding natural persons under the exchange of information provisions of the TIEA.

35. After the Order in Council has entered into force, New Zealand will notify San Marino by diplomatic note that all of its domestic constitutional and legal procedures for entry into force of the TIEA are complete. San Marino 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 (Article 12). The provisions of the TIEA will generally apply prospectively. However, in criminal tax matters the TIEA provisions can be used to obtain information pre-dating entry into force.

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

36. 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

37. Ordinary costs of responding to a request will be borne by the jurisdiction actioning the request. To the extent that requests for information are received from San Marino, New Zealand will therefore incur administrative costs in complying with those information requests (Article 9). 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 as well as the Multilateral Convention. Any administrative costs of responding to requests from San Marino are therefore expected to be marginal.

38. Each Party will be required to reimburse the other for extraordinary costs (such as the cost of hiring translators or interpreters) that may arise from a request made under the TIEA.

39. 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

40. The Ministry of Foreign Affairs and Trade, and the Treasury have been consulted and agree with the proposed treaty action.

Subsequent protocols and/or amendments to the treaty and their likely effects

41. 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

42. Article 13 of the TIEA provides that, after three years from the date of its entry into force, either Party may terminate the TIEA by giving six months' written notice through the diplomatic channel. The Parties will remain bound by the confidentiality provisions in Article 8 of the TIEA even after it has been terminated.

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

Agency Disclosure Statement

44. Inland Revenue has prepared this extended national interest analysis. Inland Revenue has undertaken an analysis of the issue of implementing a TIEA between New Zealand and San Marino and the legislative and regulatory proposals arising from that implementation. Inland Revenue has considered all other possible options in that process, and is of the view that there are no significant constraints, caveats and uncertainties concerning the regulatory analysis.

45. An Order in Council is required to implement the TIEA into New Zealand domestic law.

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

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