

My family are all Australian citizens, and we are all resident in Australia. My wife and children are also US citizens, and therefore subject to the very flawed Australia/US Tax Treaty.

Note: The below outline refers to Australian individual citizens and tax residents that the US claims as "US Persons", currently residing in Australia and subject to Australian taxation, not Australian Citizens residing in the United States or elsewhere.

The Problem:

The US-Australia tax treaty was last revised (the 2001 Protocol) at a time when it was primarily applicable to businesses and other non-individual entities, rather than to everyday individuals. The US has recently changed its practice and through FATCA is now more actively enforcing these rules for all people that it considers "US persons" living in Australia (including Australian citizens that the US claims, who may never have visited the US). This change in practice substantially increased the costs to Australian individuals that are required to comply with US tax rules, whilst the treaty fails to prevent double-taxation and in practice, locks in double taxation in some instances. Note that this is a problem affecting many Australian citizens, not just temporary American migrants. Whilst the exact number is hard to estimate, the best estimate is that there are approximately 200,000 Australian citizens and tax residents that are considered US Persons under US law and the FATCA IGA (source: https://wiki.fixthetaxtreaty.org/doku/doku.php?id=wiki:contents:resources:numbers_stakeholders#best_estimate).

As the US has universally changed its practices regarding enforcing these rules on individuals (rather than non-individuals), it has dramatically increased costs for Australians claimed by the US. These additional costs include US tax paid on the Australian source income of Australian resident taxpayers, including US tax on both their superannuation contributions and distributions, US taxation of means-tested Australian government payments that are untaxed in Australia, US taxation on capital gains of their Australian primary place of residence, and significant disadvantage to small businesses owned by dual citizens due to the transition tax and GILTI measures included in the 2017 US tax reform package. There are also significant compliance costs for individuals, even if they only have minor or no additional tax to pay to the US.

Many, or most, of the estimated 200,000 Australians that are claimed by the US will hold superannuation accounts that are taxed extra-territorially by the US, at potentially considerable cost to the integrity of Australia's social security system. The US-Australia tax treaty does not deal adequately with the tax treatment of superannuation contributions, leaving superannuation ambiguous. This ambiguity results in tax professionals generally preparing tax returns in a conservative manner, by including superannuation contributions (including mandatory SG contributions) as taxable income at marginal tax rates on US tax returns, as well as taxing superannuation withdrawals as taxable income. Any Australian tax resident who is also a US person (as defined in the US Internal Revenue Code) is therefore at a distinct disadvantage as they prepare for retirement. The amount that the US has taxed these superannuation amounts will most likely be borne by the Australian pension system, as these Australian tax residents will enter retirement with reduced superannuation balances, after years of extra-territorial taxation by the US.

Allowing the US to claim Australian resident taxpayers, especially Australian citizens, as "US Persons" for FATCA and US tax purposes is an affront to the sovereignty of Australia. The Australian government has dismissed this concern in the past because they believe the US has the right to make laws affecting US citizens. It seems that they see this as a problem affecting "Americans" rather than a problem affecting **Australians** claimed by the US government. More than half of the US citizens who are resident in Australia are also Australian citizens. It seems unreasonable that Australia allows for US citizenship to trump their Australian citizenship while they are living on Australian soil.

Potential Solutions:

The **ideal solution** is that the treaty provides for a general filing exemption for "US Persons" that are Australian tax residents if their gross income from all Australian sources is below a certain threshold (for example, pegged to the US "Foreign Earned Income Exclusion" amount, which is USD108,700 in 2021 but changes from year-to-year). This exemption should include a general exemption from filing in the US if the only income is Australian source income (including all income, including from salary, wages, business income, trust income, passive income, etc) below that amount. In effect; this revision of the treaty would have the US leave the majority of individuals that are Australian resident taxpayers alone. Foreign income declared on Australian tax returns need not be included in this exemption, nor would Australian source income in excess of the exemption amount (if necessary). As all affected persons would be Australian resident taxpayers, the ATO would have their data as part of their tax returns, and data sharing and enforcement of this arrangement would be straight-forwards.

If the above ideal solution is unobtainable, the treaty should at least provide for the following for individual Australian resident taxpayers:

- US exemption from taxation on superannuation, or at the least, explicit equivalence of superannuation in Australia with Social Security in the US.
- US exemption on tax-free Australian government payments.
- US exemption on taxation of gains of primary place of residence.

Further details on the problem and potential solutions are summarized on the excellent website: <http://fixthetaxtreaty.org/>

Regards,

Bryce Winter.