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# CHATFIELD - END OF THE ROAD IN DTA DISPUTE?

## By David W Marks QC, Inns of Court, Brisbane

1. When Auckland tax agents, Chatfield & Co, received information requests in 2014 from the New Zealand Commissioner of Inland Revenue (***CIR***), they were doubtless in a difficult position.
2. Client information is entrusted to an accountant on the basis that the professional will not breach a confidence.
3. Hence an accountant must work out whether an information notice is properly made. If it is, it must be complied with, excusing breach of the professional obligation of confidence: see the analogous case of bankers' confidentiality, in *ANZ v Konza* [2012] FCAFC 127, 206 FCR 450, 90 ATR 591, [30]. (There can be a further complication if there is a potential claim for legal professional privilege. No issue of legal professional privilege arose in the present case of *Chatfield*.)
4. So Chatfield & Co asked for some details of the notices. Then they challenged the notices.
5. At trial, Wylie J of the New Zealand High Court declared that the decision to issue the notices was invalid. His Honour quashed those notices: *Chatfield v Commissioner of Inland Revenue* [2017] NZHC 3289, noted at 2018 WTB 3 [68].
6. His Honour was upheld by the New Zealand Court of Appeal. The Court of Appeal did not agree with everything Wylie J had said, but focused on the flawed justification for the

decision, as given in the Competent Authority's affidavit: *Commissioner of Inland Revenue v Chatfield* [2019] NZCA 73; noted at 2019 WTB 17 [578].

7. This matter has been hard fought. What I have not mentioned so far in this note is that it had an international dimension. The compulsory information notices were issued by the New Zealand CIR after considering a request from the Republic of Korea's NTS, under the NZ-Korea DTA.

8. Having lost in the Court of Appeal, the CIR sought leave to appeal to the ultimate appellate court in New Zealand, the New Zealand Supreme Court (***NZSC***).

9. Leave to appeal was denied on 7 August 2019: *Commissioner of Inland Revenue v Chatfield* [2019] NZSC 84 (Glazebrook & O'Regan JJ).

# 1 Lessons from the NZ Supreme Court

10. We can learn some lessons from the NZSC's detailed reasons here.

11. But first, it is important to understand the differences between the High Court of Australia and the NZSC. An Australian special leave decision is usually brief, and never creates a precedent: *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104, [112], [119].

12. In NZ, the NZSC has a statutory obligation to give reasons for refusing leave to appeal: section 77 *Senior Courts Act 2016 (NZ)*. Leave dispositions are cited by the NZSC later.

13. Thus the relatively lengthy reasons for refusing leave in *Chatfield* are of potential assistance in understanding what issues would attract leave in future, and how the law is to be applied in future.

14. Here, and as a point in favour in grant of leave, the NZSC accepted "that the interpretation of the DTA may give rise to points of public importance, given their international and domestic law status": NZSC para [9].

15. I always saw the attraction of this feature to an ultimate appellate court. But the Court of Appeal had focused on the Competent Authority's misstatement of the test to be applied under the DTA.

16. The Competent Authority's affidavit had interchangeably used the actual language of the NZ-Korea DTA, but also of the later model convention and the *Convention on Mutual Administrative Assistance in Tax Matters* (to which these two States are now party). That idiosyncrasy of the evidence was dispositive in the Court of Appeal, and for this leave application: NZSC para [10].

17. But there were two features of this leave disposition of wider interest.

## 2 Two points about the rule of law

18. The CIR persisted with her argument that her decision to issue the information notices was not justiciable.

19. She was saying no court could examine her decision.

20. She was saying that the trial judge and the Court of Appeal were both wrong on this point.

21. Her reasons justifying her claim to be exempt from judicial scrutiny were:

    (a) the dual nature of the DTA as both domestic legislation and a treaty subject to public international law; and

    (b) the difficulty that the availability of judicial review would pose for the CIR in responding in a timely way to requests for information under DTAs: paraphrasing NZSC para [4].

22. Secondly, in the alternative, the CIR wanted the NZSC to consider her argument that judicial review of her decision to issue the information notices was a limited review. As summarised by the NZSC, the CIR wished "to argue the Courts below were wrong to review the correctness of the approach of the Competent Authority … to the NTS's request": NZSC para [6].

23. Neither of those arguments enjoyed sufficient prospect of success, to justify leave to appeal to the NZSC.

# 3 Where to from here?

24. If Korea remains interested in obtaining information, perhaps we will see further action. None of the judgments shed light on what other practical steps are open to the NTS or CIR, apart from a ground of review that further investigative steps remained open in Korea.

25. The profession can take some lessons from the litigation.

26. The NZSC leave disposition indicates factors of interest to appellate courts.

27. First there is an appetite for considering the interpretation of treaties of wide commercial import. However it has to be the right case.

28. Secondly, attempts to exclude the courts from review of administrative decisions, even where connected with assisting a foreign power under a treaty, appear unattractive. Especially the secondary argument, for a minimalist scope of review, enjoyed insufficient prospects of success in New Zealand to gain leave. We can now, happily, put that line of thinking to bed.

29. Modern treaties, including the multilateral instrument on administrative assistance in taxation matters, use a different verbal formula from Article 25 in the NZ-Korea treaty. The threshold for a viable request for information from a foreign state is arguably lower, when using the more modern treaties. NZ's disclosed treaty negotiations include updating the exchange of information (***EoI***) article in some specific treaties.

30. Nevertheless, whatever the wording of the EoI article, the administrative steps taken can, and will, be reviewed by the courts. This is consistent with the position internationally: eg *AXY v Comptroller of Income Tax* [2018] SGCA 23 (Singapore). It also seems that the letter of request from the foreign revenue authority will need to be disclosed as a matter of course. Appropriate redactions may be made, but even these will be reviewed by the Court.

31. Finally, fact patterns like this raise another issue, regardless of the specifics of this case. An accountant may have to remain engaged, to defend a professional confidence, for many years of exhausting litigation. This issue can arise when there are privileged documents, but also where the accountant simply must defend a client's ordinary, implied contractual right to see the client's information kept confidential.

32. That, in turn, has implications for the engagement letter negotiated with every client. But it may not be as simple as changing terms of engagement letters. If a client claims to be unable to fund defence of a confidence, and the accountant is not released from that confidence (because an information notice is arguably invalid), the professional is in a very difficult position.

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