Exchange of information – NZ Commissioner loses *Chatfield* appeal – Australian courts will likely pay attention

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Exchange of information is a hot topic. The decision of the New Zealand Court of Appeal (NZCA), in *Commissioner of Inland Revenue v Chatfield & Co Limited* [2019] NZCA 73 (28 March 2019) confirms that tax authorities must follow correct procedures in making, examining and executing a request for information. And they must be more transparent about the request for information.

The NZCA has confirmed that information notices issued by the NZ Commissioner (***CIR***) to an Auckland tax agent (***Chatfield***) were invalid. They upheld the decision of Wylie J [2017] NZHC 3289 (noted by me at 2018 WTB 3 [68]), though did not agree entirely with the trial judge's reasoning.

The information notices were issued by the CIR at the instance of the Korean tax authorities (***NTS***), following request under article 25 of the NZ - Republic of Korea Double Tax Agreement (***DTA***).

CIR said could not challenge decision in a court

The NZCA rejected the CIR's argument that a decision to issue an information notice, at the instance of the NTS, was non-justiciable. The NZCA upheld the trial judge, Wylie J.

As in Australia, the courts in NZ would potentially decline to decide a political issue or matter of high policy. In Australia, see *Thorpe v Commonwealth* [1997] HCA 21; in NZ see *Ririnui v Landcorp Farming* [2016] NZSC 62.

In Australia, we speak in terms of a decision properly committed to the Executive. One example, in both Australia and NZ, is the conduct of relations with a foreign country.

The margin is difficult to define. Australian courts, for example, do get involved in international matters, such as extradition requests.

It is necessary to identify the decision under review, and the source of power. As in Australia:

- The DTA became part of NZ domestic law (albeit by a different route).
- The power to issue an information notice was part of domestic law.
- A decision to issue an information request in NZ for purely domestic purposes is subject to judicial review.

The NZCA accepted that the CIR's use of her power to issue an information notice solely in furtherance of the NTS' request did not detract from liability to judicial review.

Significantly, the NZCA accepted that "the fact that the information identified … was sought solely for the benefit of a foreign state should give rise to heightened scrutiny": [2019] NZCA 73, [35] [36].

In part, the result followed from a correct concession that the recipient of the information notice could not demand a "mini-trial" in NZ of the possible Korean tax consequences.

The NTS' request should normally be taken at face value for these purposes. As we will see, however, the CIR had expressly declined to produce the NTS's request to Wylie J, at trial.

The CIR argued that the ability to challenge the government's issue of an information notice would lead to delays in response to a foreign government seeking information. The NZCA said that that could "afford no principled basis for treating the competent authority as immune from review", and urged a "more pragmatic response", which appears to refer to the Court's idea that redacted copies of key documents should be provided at an early stage (see below): [2019] NZCA 73, [44].

It was unfortunate that this justiciability argument was run by the government of an open democracy. But the argument has been laid to rest by the NZCA.

While this is an interesting area of the law and might otherwise be at the forefront of an application for leave to appeal to the NZ Supreme Court, the NZCA's reasons are persuasive.

Intensity of review

It seems that the NZ courts have followed England in an aspect of judicial review not adopted in Australia. The CIR contended that deference should be given to the CIR's administrative decision. This was referred to as "intensity of review". That kind of argument does not float the boat in the Federal Court of Australia: *SHJB v Minister for Immigration &c* [2003] FCAFC 303.

The difference in approach probably made little difference in this case. The NZCA framed the issue as whether the Commissioner had correctly interpreted and applied NZ law. Failing that, "their actions will be unlawful".

Given other findings at trial, the decisions to issue the notices were unlawful.

Secret documents?

At trial, the CIR sought to place documents before the judge in secret. Chatfield would have been excluded from court. Wylie J was uncomfortable about that. His Honour suggested a compromise, where independent counsel, as *amicus curiae*, could access the documents and put any argument to the court that resulted.

The CIR declined that approach. She announced she would proceed without tendering the secret documents. She did so after Wylie J warned that this might detrimentally affect her case. The CIR's position may have been at the suggestion of the NTS: [2019] NZCA 73, [54].

The NZCA said that Wylie J was correct in refusing to receive documents not disclosed by the CIR to Chatfield.

They cite Jersey authority that the court reserves to itself the decision whether it will order such documents to be disclosed to the other side. (There are analogous ways in which privileged documents are handled in NZ and Australia.)

The NZCA goes on:

"[69] For the future we see no reason why a suitably redacted copy of the request [from the foreign tax authority] should not be made available to the court and to the recipient of the notice [the applicant] …"

This is significant, since there had been a divergence in approaches internationally about access to fundamental documents, such as the foreign authority's request. See my previous note at 2017 WTB 10 [299].

Without access to that request, and supporting and subsequent correspondence, the applicant is at a severe disadvantage. The long history of the *Chatfield* litigation, recounted by me in that note, demonstrates the problems, remarkably overcome by Chatfield here.

There is now a tension between an initial decision of the NZCA concerning discovery, [2016] NZCA 614, and the present decision after trial. In 2016, the NZCA denied Chatfield discovery of the NTS' request (and other material exchanged under the DTA between the countries). Discovery was denied on the basis that the then pleadings did not rely upon the NTS' request (or presumably the other exchanged documents): [2016] NZCA 614, [32].

It should be remembered that Chatfield's pleading was subsequently amended to flesh out a complaint about non-compliance with the DTA. To answer that amended pleading, the CIR herself sought to rely on undisclosed confidential documents: [2019] NZCA 73, [58].

Nevertheless, the present NZCA judgment calls for pragmatism, and does point to the importance of the foreign request, suggesting its disclosure (if only after redactions). In the general run of matters, it is difficult to see how the request from the other government would not be relevant, and discoverable.

What error did the CIR make?

Here this case descends into specifics.

For example, the NZ-Korean DTA is on an older model. The exchange of information (***EOI***) article speaks of exchanging information "necessary" for carrying out the DTA or domestic laws concerning taxes covered.

More recent DTAs, and the multilateral instrument, speak of information which is "foreseeably relevant": at [2019] NZCA 73, [77]-[78]. Some care must be taken in applying all that is said by the NZCA, to later cases which may involve different EOI articles.

However, *Chatfield* remains most relevant in other respects.

First, the NZCA considered what the "competent authority" – a CIR official designated for DTA work – and the court on review had to do: at [2019] NZCA 73, [73]-[74].

Neither "… could be expected to inquire into factual assertions underlying [Korea's] … request, nor as to the law … [of Korea]".

If the competent authority did not consider there was some lack of clarity in a request, and did not consider there was doubt raising a question of validity, the competent authority could determine the validity of a request on the face of the document.

But the reason the CIR lost was short and simple.

There were inconsistencies in the affidavit of NZ's competent authority. That affidavit occasionally referred to the "foreseeably relevant" test, not the "necessary" test applicable under this DTA. On that narrow basis, the CIR lost this critical point.

Chatfield had succeeded at trial on other bases, as well. The NZCA did not agree, but since those matters are fact specific, I will not deal with them.

Interpretation of Treaties

The NZCA briefly addresses the correct approach to the interpretation of the DTA.

At trial, Wylie J had said that more recent OECD commentary might be used to interpret a DTA concluded before that commentary, if the commentary reflects "a common view as to what the meaning is and always has been". His Honour said that, otherwise, relying on more recent commentary risked retrospectivity: [2017] NZHC 3289, [31].

The CIR argued that an ambulatory approach should be used, thus justifying reference to more recent OECD commentaries. In Australia, I consider later OECD commentaries should generally not be used. The point is difficult, and my view runs contrary to a statement in the present OECD commentary. See *Russell v FCT* [2009] FCA 1224, [118], and my article in (2019) 53(6) *Taxation in Australia* 314.

In NZ, the point had recently been considered in *CIR v Lin* [2018] NZCA 38, noted by Ms Rebecca Rose at 2018 WTB 26 [800].

The NZCA in *Chatfield* does not finally resolve the point as to whether resort might be had to a subsequent OECD commentary.

But the present NZCA decision points to a need for caution, as "each treaty is the result of a discrete round of bilateral negotiations": [2019] NZCA 73, [106]. Thus, each treaty "must be construed discretely and in accordance with its own particular terms".

Lessons

Courts in Australia, and further afield, will pay attention to this persuasively written, well organised judgment of an intermediate appellate court.

The government's persistence in its claim that the courts could not hold it to account (non-justiciability argument) was surprising. As said in a previous note about *Chatfield* (2018 WTB 3 [68]): "It may be hoped we do not see this ventured again in a democracy where the Executive is subject to the rule of law."

Counsel in Australia should apply for a "Kevlar gown allowance" if it is suggested that argument be run here, about an information notice in like circumstances.

More materially:

- The NZCA indicated a heightened scrutiny where an information notice is issued purely at the instance of a foreign country, to provide information to the foreign country.
- No one contended for a mini-trial about the application of the foreign law. (That has been concluded by earlier international authority.)
- Relatively undemanding standards have been set for scrutiny of the validity of a foreign request.
- But the local revenue authority (and effectively the foreign revenue authority) must be prepared to provide at least redacted versions of the request, and perhaps further documents.

Wylie J's idea of having *amicus curiae* counsel appear, instead of the applicant's counsel, where documents are to remain secret, is unlikely to take off in Australia. As suggested previously (2018 WTB 3 [68]), we regularly deal with sensitive documents by giving undertakings limiting disclosure even to the client, called *Fielder Gillespie* orders: [1984] 2 Qd R 339. While this causes ethical conundrums, the litigant is not also disadvantaged by having amicus curiae counsel come cold into a difficult matter.

If the NTS had been more forthcoming with critical documents, perhaps the *Chatfield* litigation would have concluded earlier and differently.

As to treaty interpretation - the case of *Lin*, above, encouraged looking at later commentary, not extant at date of treaty. A note of caution has been injected by the present NZCA panel, in deciding *Chatfield*. This draws NZ closer to the Australian position.

This remains an active area of litigation offshore, as well.

The Privy Council still has reserved 2 appeals from Jersey in the long-running *Volaw* litigation. Volaw initially concerned requests from Norway, but latterly Jersey itself has an interest. These were heard on 7-8 November 2018: appeal no's JCPC 2016/0001 & 2016/0091. The *Volaw* litigation grinds on, back in Jersey: *Larsen v A G* [2019] JRC 40, 18 March 2019. (There is no suggestion that the allegations in the *Volaw* litigation are made in the *Chatfield* litigation, and vice versa.)

In *Chatfield*, the CIR has until early May 2019 to seek leave to appeal to the NZ Supreme Court.

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