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Exchange of tax information: a growth area, but litigation is increasing

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With rapid developments internationally (eg BEPS, CbC reporting, automatic exchange of financial and tax agreements, tax information exchange agreements generally, etc), exchange of tax information is set to explode in coming years. In fact, it's already under way. But there's cause for some reflective pause in this headlong rush of revenue authorities freely exchanging information.

When Country A asks Country B to assist by providing information, for tax administration, it can become an issue for more than just the taxpayers. Advisers and fiduciary companies may be asked by Country B to provide information, to be passed back to Country A.

Those third parties want to be confident that the requests are lawful, and that the information will be used for lawful purposes. Otherwise, the adviser or fiduciary may be liable to the taxpayer.

Appellate courts, in Australia and elsewhere, have now considered administrative actions under the "Exchange of Information" article in several Double Tax Agreements (**DTA**). Similar issues cropped up under Taxation Information Exchange Agreements (**TIEA**), where appellate courts have also considered matters.

This litigation is increasing. It has been hard fought. I discuss some trends below.

Thus each of *Chatfield* (NZ), *ABU* (Singapore), *Derrin Bros* (UK), *MH Investments* (Caymans) and *Larsen* (Jersey) involved appellate consideration of administrative action by a local revenue authority.

Chatfield involved a requirement to produce information, made by the NZ CIR. NZ was acting in compliance with a request by Korea's National Tax Service (NTS) under a DTA.

In *ABU*, the Singapore Comptroller sought documents from a bank, following a request from the JNTA, Japan under a DTA.

Closer to home, the *Hua Wang* (Australian) litigation spawned appellate decisions in the UK under the DTA, *Derrin Bros*; and the Cayman Islands, *MH Investments*, under the TIEA. There has also been an Australian appellate decision concerning the propriety of assessments, for debt collecting purposes, in *Anglo American Investments*.

Larsen (also litigated as *Volaw*) saw Jersey acting because of a request under its TIEA with Norway.

A repeated issue is whether the person asked for information by Country B (at the instance of Country A) is entitled to see the communications between countries.

Another important issue is whether information provided for one purpose can be deployed for another. This issue can be tied to whether the receiving country is acting improperly in requesting information or in deploying it.

***Chatfield* – Ellis J**

In the NZ *Chatfield* case, the lower court decisions also shed light on the kinds of issues faced.

Chatfield acted as tax agent for companies which were under investigation by Korea. Korea asked NZ, under their DTA, to obtain and provide information. NZ issued Chatfield notices to furnish information, as a result of Korea's request.

Chatfield sought judicial review of NZ's decision to issue it notices. To further that judicial review application, Chatfield asked for documents passing between Korea and NZ. This included the request under the DTA.

Chatfield said the documents would show NZ's reasons for NZ's decision to ask Chatfield for information, and the procedures followed. It said that the reasons and procedure were relevant to judicial review of the decision to issue notices.

Chatfield had also made a request under the NZ version of freedom of information laws, the *Official Information Act* (NZ). NZ had refused the request. So Chatfield sought the documents by asking the court to order disclosure (discovery) for the litigation.

The Korea-NZ DTA, article 25, is similar to the equivalent in the Korea-Australia DTA. It is based on article 26 of the OECD 1977 Model Convention.

NZ refused to produce the correspondence between the revenue authorities. They ran an affidavit from the "competent authority", under the DTA, a Mr Nash. Since NZ succeeded, Mr Nash's affidavit will be of interest to other revenue authorities: *Chatfield & Co Limited v Commissioner of Inland Revenue* [2015] NZHC 2099, [9] et seq.

Mr Nash swore, from his long experience with the Korean revenue, that they always displayed the utmost integrity. He considered that the request from Korea accorded with article 25 of the DTA, and with NZ domestic tax law.

He swore that article 25 of the DTA meant that Korea's request, and later correspondence between the countries, was confidential. (That point is not obvious from the language actually used in the DTA.) In doing so, Mr Nash had to point to later updates to the Model treaty, which expressly make such correspondence secret.

Ellis J denied NZ's claim for public interest immunity of the documents. It was insufficient to point to documents, identified as a class, to claim immunity from production. Privilege against production was based on contents of documents. Thus, it was not enough to say that privilege applied simply because the documents had been exchanged between States under the DTA: [49].

NZ's domestic, tax secrecy rule accommodated disclosure in litigation. (In Australia, s 355-50 of the *Taxation Administration Act 1953* makes this clear, in a different way.)

Ellis J was wary of precedent cases based on differently worded treaties. But there were potential reasons, for different wordings, that might mean the Articles in different DTAs should be interpreted in the same way. Her Honour noted the evolution of the accompanying commentaries to Model DTAs, and of the domestic laws for taxpayer secrecy: [50] *et seq*.

Ellis J was prepared to look at later commentaries to the Model conventions. The later documents could be used to clarify that words should be read into the Korea-NZ DTA, imposing secrecy over communications under the "Exchange of Information" Article: [73]. Effectively, the result was to read Article 25 of the Korea-NZ DTA as giving weight to a secrecy request from Korea. This would then potentially raise public interest immunity: [77]. (Her Honour revised her views later, as shown below.)

Since no enquiry had been made, NZ was directed to ask Korea whether it claimed secrecy. The case went into abeyance pending an answer.

NZ sought Korea's views, and Korea claimed secrecy.

Further evidence and submissions were placed before the court. Ellis J denied Chatfield's application for disclosure: [2016] NZHC 1234.

As is usual in a claim for public interest immunity, some of the material filed by NZ was sealed, not available to Chatfield. This dealt with Korea's objection to production. However, in open material, it was clear that Korea objected.

But Ellis J had since revised her Honour's view. Her Honour now considered that public interest immunity and secrecy were truly governed by the domestic tax rule about secrecy, which allowed production of documents where required in the administration of the tax law: [8].

This was not an easy case. Ellis J had to weigh competing considerations, including the closed material stating why Korea claimed confidentiality.

Ellis J returned to first principles. Disclosure is not available as of right in judicial review proceedings. Further, disclosure has to be relevant to an issue that the court can and is asked to decide: [14].

Perhaps because Chatfield was operating in something of an information vacuum, Chatfield had not articulated an issue which called for disclosure of this material. Chatfield's claimed issues were: (a) whether the information sought by Korea was necessary for carrying out the provisions of the DTA or Korean domestic law; and (b) whether that information was available under the laws of Korea, or in the ordinary course of administration in Korea.

But, for good practical reasons articulated in the Singaporean case of *ABU* (below), her Honour was persuaded that *Chatfield* could not question NZ's issue of the information notices on those grounds. Thus, there was no justiciable issue to which the claimed disclosure would go.

Interestingly, in the Caymans case, *MH Investments*, below, the Grand Court allowed disclosure of the Australian request (unreported, No.G391/2012, 24/01/13, George Town, Quin J, at [89] [132]).

Chatfield – Lang J

Lang J then had to deal with an application to strike out Chatfield's pleading: [2016] NZHC 2289. His Honour noted the high threshold for the NZ to succeed, on a strike out application: [7].

The Commissioner had issued a memorandum, OS 13/02, about her usual procedures for issuing an information request to a tax agent. Generally, she would follow a process specified in OS 13/02 para.73, and she said she would first make all reasonable attempts to get information from other sources. And she would only issue an information notice to a tax agent where there was fraud or evasion, or an offence involved.

Lang J considered that this gave Chatfield, a tax agent, no legitimate expectation that this procedure would be followed, nor that a notice would only issue in the narrow circumstances stated in OS 13/02.

(As an aside, this obviously is concerning, given the non-statutory concessions, in Australia, for accountants and board papers. The reasons given by Lang J particularly refer to DTA obligations, as negating a legitimate expectation that non-statutory concessions would be followed.)

So the "legitimate expectations" cause of action was struck out.

Chatfield's other cause of action asserted that NZ had not taken into account consideration which were relevant (which had to be taken into account).

Lang J quickly discounted the need for the Commissioner to have regard to her own document, OS 13/02. (Again, this is concerning for anyone who still believes in such non-statutory concessions by revenue authorities.)

Lang J discounted as a necessary consideration the limits of the relationship between a tax agent and a client. Chatfield had asserted that a tax agent held limited information.

But it was possible for Chatfield to press a case that NZ had failed to take into account the terms of Article 25 of the DTA. On the state of the evidence, this could still go to trial.

By the time Ellis J's decision on disclosure was being appealed, 70 days later, there was thus a more limited case proceeding.

Chatfield – NZ Court of Appeal

Chatfield appealed Ellis J's decision about disclosure: [2016] NZCA 614.

In the interim, substantial elements of its pleading had been struck out by Lang J. All that was left was an alleged failure by NZ to take into account the terms of Article 25 of the DTA.

Chatfield pointed to the requirement of Article 25 that the request by Korea be "necessary" for carrying out the DTA or the domestic law of either country: [29]. Chatfield said disclosure should go to that issue, and thus be granted.

That was a fishing expedition, not a proper basis on which to order disclosure, and the Court of Appeal upheld Ellis J, albeit on narrower, and differently expressed grounds (given the change to the pleading).

***ABU* case**

In *Chatfield*, Ellis J relies heavily on the decision of the Singapore Court of Appeal, *ABU v Comptroller of Income Tax* [2015] SGCA 4.

Importantly, the Singapore Court of Appeal looked at how you can attack the local revenue authority's decision, to act on the foreign request under a DTA.

The local court looks at the face of the foreign request. This is not an opportunity to run a case testing the substantive merits of the foreign tax issue.

The Court of Appeal discouraged judicial review turning into a full blown trial with witnesses, going to foreign tax questions.

Although the Singapore case is not quoted, that is the approach also favoured by the Jersey courts, when doing the same exercise under an TIEA: *APEF Management Company 5 Limited v Comptroller of Taxes* [2014] 1 JLR 100; [2013] JRC 262; & *Volaw Trust & Corporate Services Limited and Larsen v The Office of the Comptroller of Taxes*, (JCA) below.

Hua Wang, Derrin Bros, MH Investments

The *Hua Wang* litigation was complex. Australia made requests of the UK and Cayman Island Revenue authorities. This led to litigation in those countries, and a question in Australia about what use could be made of the documents obtained from the Caymans (in unusual circumstances).

Caymans complied with a request under a TIEA. The Grand Court of the Cayman Islands said the request should not have been complied with: *MH Investments v The Cayman Islands Tax Information Authority*(unreported, No. G391/2012, Quin J, George Town, 13/9/13). The Court ordered that Caymans seek that (a) Australia undertake not to divulge the documents in Australian proceedings, and (b) Australia return or destroy the documents.

The Court of Appeal of the Cayman Islands dismissed an appeal (unreported, No. CICA No.31/2013, Chadwick P, Mottley & Newman JJA, 23/04/15).

Australia did not comply with the requests for undertakings and destruction, made by Caymans.

Australian tax assessments, allegedly based on that material, have so far withstood studied attack, in Australia. There was no defence in debt-collecting proceedings: *Anglo American Investments Pty Ltd v DCT* [2017] NSWCA 17 – see 2017 WTB 7 [223]. The ATO has successfully tendered those documents in a tax appeal: *Hua Wang Bank Berhad v FCT (No 7)* [2013] FCA 1020; 217 FCR 1.

An important point, which the ATO resisted on the facts, was that ATO was not in contempt in using the Treaty to obtain documents in the midst of a legal case: *Hua Wang Bank Berhad v FCT (No 2)* [2012] FCA 938; 298 ALR 178.

I also note the lack of success, in the UK, in challenging information notices issued by the UK, at the instance of Australia, under the DTA.

Essentially, it was found that the entitlement to reasons, for issue of such UK notices, did not extend to the banks and fiduciaries who were not the focus of Australia's audit. And reasons, to the extent given, were adequate: [2014] EWHC 1152 (Admin); appeal denied [2016] 1 WLR 2423, [2016] EWCA Civ 15; refused permission to appeal *R (Derrin Bros Properties Ltd) v First-Tier Tribunal (Tax Chamber)* [2016] 1 WLR 4936.

***Larsen* and *Volaw* cases**

Jersey is party to a number of TIEAs. It has a sophisticated and well-advised fiduciary industry.

I will mention 4 separate strands of litigation, starting with the most intensely fought.

The *Volaw* and *Larsen* litigation has been running since about 2013. The substantive Jersey Court of Appeal decision is *Volaw Trust & Corporate Services Limited and Larsen v The Office of the Comptroller of Taxes* [2013] JCA 239; [2013] 2 JLR 499. There is much satellite litigation, but references are to that case unless stated otherwise.

To understand the stakes for which Mr Larsen was playing, note that Norway had levelled criminal charges against him in 2010, and revised the charges in 2011. He was convicted in October 2013, and sentenced to 5 years' imprisonment plus heavy fines, for offences including tax issues. See [2013] JCA 239, [133]; [2015] JRC 104, [3].

Importantly, however, Mr Larsen was acquitted of those charges, by the Gulating Court of Appeal, Norway on 31 August 2016: see *Dagens Næringsliv* ("Today's Business").

Norway originally requested assistance from Jersey in 2006, under another law only concerning transnational investigation of *criminal* matters. There was a concern that Norway's prosecutors might give Jersey material to the Norwegian Tax Authority. Through Jersey authorities, Norway had tendered an undertaking not to use the material for tax investigations: [2013] JCA 239, [59] *et seq*.

But Norway then sought release from the undertaking.

Twice.

In 2010, the Norwegian Tax Authority requested assistance from Jersey under their newly established TIEA.

By the time the matter reached the Jersey Court of Appeal in 2013, the Jersey legal issues were tied to Jersey's changing regulatory landscape, and infused with European human rights law.

In short, the Jersey Court of Appeal decided that a request by Norway, in aid of a criminal tax prosecution, under that TIEA, could be for documents pre-dating the TIEA: [2013] JCA 239, [117]. (Note the opposite finding, in relation to civil matters, by the Caymans court in *MH Investments*, above.)

Next, the Court of Appeal dismissed an argument that Jersey should, as a matter of discretion, have declined to comply with a request from a country that allegedly discriminated against a Jersey company. But the treaty (as with many Australian TIEAs) spoke of discrimination against a "national" or a "citizen" of Jersey. This did not include a company.

Mr Larsen said there were no reasonable grounds for Jersey to have acted on the request, and went into evidence to dispute the Norwegian indictment. He relied on a Singapore High Court decision, *Income Tax Comptroller v AZP* [2012] SGHC 112.

But in *AZP*, the Indian request to Singapore did not provide a solid link to the person in Singapore.

In contrast, Norway's supporting material was detailed. Thus, Jersey's decision to act on Norway's request would not be second-guessed despite Mr Larsen's affidavit evidence (on which Mr Larsen had not been cross-examined by Jersey): [159] [164].

Indeed, the Court of Appeal said Jersey was entitled to assume Norway had a proper basis for its indictment: [160]. (It is necessary to repeat that Mr Larsen was later acquitted, but that was 3 years after the Court of Appeal's decision.)

Leaving to one side other allegations, of lesser interest, I finally note that the Court of Appeal confirmed that, despite the information being requested in aid of a criminal tax matter, under the TIEA, Norway would be free to use the information to raise an assessment of tax. Thus, there was nothing to an allegation that Jersey should not have provided co-operation based on a fear of such use of the information: [242].

The Privy Council has denied leave to appeal: [2015] JRC 104, [2].

Implications in Australia

We have seen that it can be difficult to challenge assessments in Australia, even if offshore procedures used to gather information were flawed: *Hua Wang* and *Anglo American Investments* cases.

I turn to Australian action on behalf of another country.

In Australia, s 23 of the *International Tax Agreements Act 1953* authorises use of information gathering provisions (nowadays, ss 353-10 and 353-15 *Taxation Administration Act 1953*), for the purpose of gathering information to be exchanged in accordance with the Commissioner's obligations under an international agreement. Section 23 is not limited to a case where information sought relates to Australian tax.

On the other hand, the Commissioner's authority to make a request of a foreign tax authority under such an article comes from the Commissioner's general power of administration: *Hua Wang Bank Berhad v FCT (No 2)*[2012] FCA 938; 298 ALR 178, [24] (Perram J).

Summary

Given the volume of litigation we have seen, it is not surprising that differences have emerged. But there are some themes.

The *Chatfield* and *MH Investments* cases come to different results, concerning getting access to the foreign request by litigation disclosure. Close attention to the treaty is required. And some later treaties conclude the issue in favour of secrecy: eg Australia-Switzerland DTA, Article 25.

Chatfield, *ABU*, and *Volaw* emphasise, in a way we would recognise in Australia, the limits of the ability to challenge on the basis of the merits of the foreign investigation.

But *AZP* shows that the request must at least make sense, in making a realistic connexion with the administrative action the ATO wishes to take.

An adviser or fiduciary who is caught up in this process has a difficult task. It must respect the client's confidence, unless validly required to provide information.

Once information is in the hands of the ATO, nothing yet has prevented it using that information.

[Postscript – a further article in the WTB in 2018 followed the *Chatfield* litigation at trial. See my page containing a selection of my papers.]