

Exchange of Information Between Revenue Authorities

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Who we are

- Rebecca Rose, Bankside Chambers, Auckland –
 - Very experienced in commercial litigation & arbitration
 - Counsel for tax agent in *Chatfield*
 - Counsel for the government in fishing treaty/Law of the Sea: *Framhein v Attorney-General* [2018] CKCA 5
- David W Marks QC, Inns of Court, Brisbane
 - Practising in tax since 1990
 - Recent work includes advice under treaty conferring limited immunity from suit in Australia



Why are there special arrangements for EoI?

- One Nation State does not allow a second Nation State to enforce its tax laws within the first's territory – infringement on sovereignty
- Still the common law:
 - *Webb v Webb* [2020] UKPC 22, [32] (3 Aug 2020)
 - *Rothwells Ltd (in liq) v Connell* 93 ATC 5106, 5113 (QCA)
 - *A-G (UK) v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 129, 150 (NZCA)
- Also, domestic laws about secrecy of tax information, eg:
 - Part 4, *Tax Administration Act 1994 (NZ)*
 - Division 355, Sch 1, *Taxation Administration Act (Cth)*
- Very particular rules set out the exceptions ...

Australian and New Zealand – History of Cooperation

- Common legal heritage
- Both have a dualist system
- Dualist = Executive negotiates DTA, but given force by legislation (including regulation, Order-in Council)
- DTAs between Australia and New Zealand: 1960, 1972, 1995, major protocol 2005, new DTA 2009
- Thought to be many requests between competent authorities of Australia and New Zealand

The Web of Treaties

- Australian has 46 DTAs
- New Zealand has 40 DTAs
- Variety of wordings used, depending on:
 - age of DTA (model conventions change over time)
- AU and NZ are both party to:
 - more limited “Tax Information Exchange Agreements” **[TIEAs]**
 - multilateral instrument **[MLI]**
 - “Convention on mutual administrative assistance in tax matters” **[MAAC]**

2 important articles of DTAs

- Eol – “exchange of information”
- Mutual Assistance
- Behind these articles lie practical arrangements for:
 - automatic exchanges of information
 - one-off requests for information & assistance
- We concentrate on one-off matters. But most Eol is automatic (AEol). We deal with that first.



Standing arrangements - automatic

- Under exchange of information & mutual assistance articles of DTAs, for FATCA:
 - Au & USA – IGA under AU/USA DTA Arts 24 & 25
 - NZ & USA – IGA (with amendments) under NZ/USA DTA Arts 24 & 25
- Common reporting standard and AEOI:
 - NZ arrangements – facilitated by *Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 (NZ)*
 - Au arrangements – seem to be under the MAAC



One-off requests

- We have seen requests under Eol article of a DTA, & under the MAAC
- Sometimes the request references both DTA & MAAC
- Recent matter we've seen – request led to Receiving Country making informal approach to onshore person to provide info co-operatively
- Voluntary compliance will not always work (eg bank or professional secrecy obligations)
- Engage normal domestic info gathering powers, eg:
 - Au – Div 353, Sch 1, TAA read with s23 *International Tax Agreements Act* (Cth)
 - NZ – Section 17 of TAA, read with BH 1(4) *Income Tax Act 2007* (NZ)

Issues we've seen

- Request handling – eg:
 - how to prevent a Request being lost in the system;
 - when & how to seek clarification –
 - Requesting State's officer may struggle to articulate what they need, unfamiliar with Receiving State's institutions/laws
 - Requesting State's Request may not meet treaty threshold →
- Different wording of treaty provisions – different thresholds for instigating Receiving State action/enquiry – Competent Authority to consider up-front:
 - Make sure you have power to hand over information sought
 - Think about where information is going, & what may happen to it
- Different results when onshore party requests copy of Request
- Practical issues in litigating use of domestic powers for EoI Request

Wording of request

- Remember, as Receiving country: Requesting country doesn't know our institutions and laws. So be prepared to seek clarification –
 - eg a request about whether a company is “in good standing”
 - Fundamental and richly meaningful concept in USA
 - Unknown concept in Australia
- And as Requesting country, be prepared to clarify the request
- More technically (once the Request is understood) – is there an entitlement under the DTA/MAAC to the requested information:
 - Principle of reciprocity
 - Exhaustion of local measures
 - Other requirements of treaty (esp MAAC); and principles of international law

Sufficiency of request

- Older EoI articles, eg NZ-Korea {& Au-Hungary is very similar}
 - “such information **as is necessary** for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered”
- Newer EoI articles: eg NZ-Au (& note these will differ in some ways):
 - “such information **as is foreseeably relevant** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed ...”
- Yes, different scope of taxes negotiated. Check treaty by treaty.
- But note difference highlighted.

Issues for the litigation of EoI

- Whether the domestic subject of enquiry entitled to EoI Request etc
 - *Chatfield* – at trial, NZHC took hard line against IRD (which would not disclose at NTS' insistence, & would not agree to a neutral contradictor to view documents)
 - *Chatfield* – NZSC leave disposition [2019 NZSC 84, [13] (which has precedential value):

But we see the argument that the Commissioner wishes to pursue (in essence, that the Court should resolve the concerns raised by Chatfield against it without being able to refer to the key document, which was in the Commissioner's possession) as having insufficient prospect of success in the present case to justify putting Chatfield to the expense and inconvenience of a further appeal.
 - *Friar Tuck* (Eastern Caribbean High Ct), *MH Investments* (Caymans), & *AXY* (Singapore) – more liberal attitude to disclosing Request etc, as necessary to enable subject to test legality
 - Care here – Treaty wordings & domestic arrangements for Requests affect the results

Stage & Purpose of enquiries

- At least under older treaty wording ([previous slide](#)):
 - whether Requesting State has exhausted domestic options
 - whether there is a serious enquiry, or just “filling in the gaps”
 - whether enquiry went to covered taxes, or something else
 - relevance of limitation periods in Requesting State
 - *Chatfield* (at trial, [\[2017\] NZHC 3289](#), [79] ff)
- Some of above points likely relevant for newer treaty wordings (eg covered taxes)
- Query ability to make/respond to a Request which is really in furtherance of a criminal enquiry (eg exchange control regulations)

Treaty interpretation points:

- Query use of current OECD commentary to drag old wording up to new standard: *Chatfield* [2015] NZHC 2099
- Has been debate in Au – but probably limited use: *McDermott* [2005] FCAFC 67, [42]
- More generally, *Irish Bank Resolution Corpn Ltd v Revenue and Customs Comrs* [2020] EWCA Civ 1128 , [16](5)
- How the OECD Commentaries fit under the *Vienna Convention on the Law of Treaties* [**VCLT**]?

Whether subject can challenge

- In *Chatfield*, repeated all the way to NZSC by IRD, was question of justiciability
- Wylie J simply said the information notice to the tax agent was under s.17 TAA (NZ), and that was just a domestic issue obviously contestable in the court
- Rule of law obligations must be adhered to, despite time pressures to answer
- We don't see much future in this line

Trends, Last points, Questions

- We think more requests will be made under the MAAC:
 - some similar concepts to current model DTA
- We foresee more litigation of the one-off enquiries
- We foresee better crafted Requests, and more time required to analyse and respond
 - Because the implications go beyond one revenue authority and one taxpayer
- This work is difficult and interesting. It is important work.
- And there is other Treaty work on the horizon

David's disclaimer:

- Liability limited by a scheme approved under professional standards legislation