

# TIEAs - A modern day Scylla and Charybdis?

The British Virgin Islands operates one of the most robust and accountable regulatory systems in the world. It is more compliant with global financial regulatory standards and more transparent than many G7 countries including the UK and Germany. In recognition of the Territory's commitment to regulatory excellence, the BVI was placed on the OECD 'White List' in 2009. As a part of its continued commitment to promoting transparency and prevention of tax evasion, the BVI is a signatory to the Common Reporting Standard (the **CRS**), an OECD initiative that created a global automatic exchange of information between signatory nations. A fundamental part of the functioning of the CRS is the implementation of tax information exchange agreements (**TIEAs**). The BVI Government has signed and implemented 25 TIEA in recent years with jurisdictions such as Australia, Canada, China, France, Germany, India, Japan, the UK and the USA.

Latterly, onshore governments spurred by electorate concern at the apparent erosion of tax bases have shown a considerable appetite for seeking highly confidential fiscal information about BVI persons through the TIEA mechanism. The TIEA mechanism is not an arbitrary power however and has become open to abuse in an environment where offshore authorities are eager to appear cooperative.

Harneys is currently instructed to act for a number of BVI persons who have received TIEA requests seeking information regarding assets belonging to BVI companies named in the TIEA request and underlying beneficial ownership information. In the BVI, the International Tax Authority (the **ITA**) is a public body with functions under the Mutual Legal Assistance (Tax Matters) Act 2003 (the **MLA**). Harneys was instructed to seek leave to challenge the ITA's decisions to issue each of the Applicants with a Notice to produce information for the purpose of the BVI complying with a request from another State under a TIEA (the **Request**).

## How to deal with TIEAs – Judicial review?

Harneys acted swiftly in restraining the disclosure requirement under the Request and obtained leave to

judicially review (ie legally challenge the executive decision to issue the Notice). Harneys, on behalf of the Applicants, contended that the Notices did not comply with the ITA's duty of procedural fairness. The Applicants submitted that they are entitled to be told which country has sought the information (under which TIEA), in respect of which taxpayer and for what tax period, and all other information in the Request to enable the Applicants to satisfy themselves and to make informed representations as to whether the Request and therefore the Notice are both invalid and whether it is appropriate for the Request to be acted on by the authorities of the BVI. In granting leave, Ellis J., sitting in the BVI High Court, agreed with Harneys' preliminary argument as articulated above.

## The MLA and the TIEA

Section 5(1) of the MLA states that the Financial Secretary, or a person or authority designated by him, may, "for the purposes of complying with a request under [a relevant international Agreement], by notice in writing, require any person to provide such information as may be specified in the notice, provided that:

- (a) the person is reasonably believed to be in possession or control of the information to which the notice relates, or
- (b) the information requested is
  - (i) information held by a bank or other financial institution, or any person acting in an agency or fiduciary capacity, including a nominee or trustee, or any other person or entity
  - (ii) information regarding the beneficial ownership of a company, partnership or other person or entity

Therefore, a Notice can only validly be made if it is "for the purposes of complying with a request under [a relevant international Agreement]", ie a TIEA entered into between the BVI and another country. The validity of the Notice depends on the Request complying with the Agreement. To fail to comply with the Notice without lawful or reasonable excuse is a criminal offence, according to section 5(6). The relevant TIEA in the current case recognised in the Preamble that the Contracting Parties "will never engage in 'fishing expeditions'". The substance of the Agreement contains important limitations:

- Article 1 confines the information to that which is "foreseeably relevant" to tax liability
- Article 3 specifies the taxes which are covered
- Article 5.5(c) says that the Agreement does not create an obligation on a Requested State to obtain or provide "information in the possession or control of a person other than the taxpayer that does not directly relate to the taxpayer".
- Article 5.6 specifies the information which must be provided by the Requesting State. It includes: "*the identity of the person under examination or investigation*", "*the period for which the information is requested*", and "*the tax purpose for which the information is sought and the reasons for believing that the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the Requesting Party*".

## The Notices

The ITA served notices on the BVI Companies. The ITA failed to provide the Applicants with the contents of the Request – and in particular the information provided under Article 5.6 of the Agreement – or with any of the following information:

- From which country the Request derives and to which authority the information is to be sent
- The identity of the relevant taxpayers

- The tax years under investigation or otherwise the relevant period of interest

## Procedural fairness

Harneys argued successfully before Ellis J. at the leave stage for judicial review that Procedural fairness requires that if a recipient of a TIEA notice is to have an obligation to comply with a Notice, under pain of criminal penalties, they are entitled to be told the information provided under Article 5.6 of the Agreement. Without such information, the Applicants cannot make any effective representations to the ITA, or any effective submissions to the Court, about

- Whether the Request is valid under the Agreement: has the required information been supplied by the Requesting State and is the information sought "foreseeably relevant" and otherwise within the scope of the Agreement?
- Whether the Notice is valid as within the scope of the Agreement and whether it is appropriate to act on the Request

The ITA had a duty to comply with procedural fairness in the present context. The ITA is a public authority with a limited power under section 5(1). It may only issue a Notice if the Request complies with the Agreement. As Lord Bridge of Harwich said (for the Appellate Committee of the House of Lords) in *Lloyd v McMahon* [1987] 1 AC 625, 702-703, it is "*well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness*". So it is no answer for the ITA to say that the MLA does not expressly impose requirements of procedural fairness. The law implies such obligations.

Nor is it an answer for the ITA to say it has considered whether the Notices comply with the Agreement. The law does not regard such an assurance as a substitute for procedural fairness which enables the Applicants to see the relevant information, and so form their own judgment on the validity of the Notices and to have the opportunity to make effective representations to the ITA and to the Court. It is a matter for the judgment of the Court, and not for the reasonable judgment of the ITA, to determine what procedural fairness requires: *R (Osborn) v Parole Board* [2014] AC 1115, paragraph 65 (Lord Reed for the Supreme Court). The demands of fairness will, of course, depend on the context. See *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560D-G (Lord Mustill for the Appellate Committee of the House of Lords). In the present context, fairness required that the BVI Companies be shown the Request, or at the very least a redacted version or a summary, because:

- The ITA is purporting to exercise a power to compel the Applicants to disclose otherwise confidential information

to a body outside the jurisdiction. The power under section 5(1) is a limited one, confined to what is "for the purposes of complying with a request under" the Agreement. The Notice is lawful only if it is in furtherance of a Request which is valid under the Agreement and complies with the requirements of the Agreement.

- The power under section 5(1) is backed by criminal sanctions for any failure to comply.
- Section 5(1) of the MLA does not impose a duty on the ITA to comply with the Request. It has a discretion, which the legislature must have intended to be exercised fairly and reasonably.

## Confidentiality

The ITA relies on Article 8 of the Agreement which addresses confidentiality. However, Article 8 expressly recognises that the information provided by the Requesting Party may be disclosed to those affected. Article 8 states that the courts and administrative bodies of the Requested State may use the information for the purposes of implementing the Agreement, "including the determination of any appeal, or the oversight of [implementation of the Agreement]. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings". Therefore, to the extent that BVI law requires disclosure to ensure a fair procedure, Article 8 so allows.

This is confirmed by the Commentary to the OECD's model TIEA agreement (on which the Agreement is very closely based). The Commentary states at paragraph 96 that Article 8 "means that the information may also be communicated to the taxpayer, his proxy or to a witness. The Agreement only permits but does not require disclosure of the information to the taxpayer. In fact there may be cases in which information is given in confidence to the requested Party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. The competent authorities concerned should discuss such cases with a view to finding a mutually acceptable mechanism for addressing them." Paragraph 94 of the Commentary explains that an important purpose of confidentiality is to protect the interests of taxpayers.

It is therefore plain that under the Agreement that:

- Procedural fairness to the taxpayer and his proxy is an important objective of the Agreement. Nothing in Article 8 prohibits disclosure to the taxpayer or his proxy
- The expectation is that the basis for the Request will be disclosed to those affected
- There may be exceptional cases where some of the information is confidential, but there was no evidence of that in the present case

- Article 8 is therefore inconsistent with the ITA's contention that it is obliged to keep the contents of the Request confidential. It does not breach Article 8 for the Court to decide, on a judicial review application challenging the Notice, that the ITA must disclose the Request in order to ensure fairness

## Judicial authorities from other jurisdictions

The Applicants' contention that procedural fairness requires the disclosure of information in this context was supported by the authorities from Bermuda and Jersey. They are the judicial authorities to which Madame Justice Ellis referred in *Brewcorp* at paragraph 94. In *Durant International Corporation v Attorney-General and Federal Republic of Brazil* [2006] JLR 31, the Royal Court of Jersey heard a case concerning the Attorney General's refusal to disclose two letters of request from Brazil for information required for criminal investigations. Deputy Bailiff Burt stated at paragraph 37: "the powers to obtain information ... are strong powers which enable private and confidential material to be compulsorily disclosed. The need to investigate alleged criminal conduct must be balanced against the need for justice to be done to those who are the subject of such notices. We note that in the majority of cases to which we have referred, information was in fact disclosed, either by way of disclosure of the letter of request itself, a redacted version or a summary of its contents. We agree with the approach of the [Divisional Court] in *[R (Evans) v Director of the Serious Fraud Office [2003] 1 WLR 299]* that the interests of justice can usually be met if, when a request is made for disclosure of a letter of request, information is given as to the nature of the investigation and the exact source of the letter of request. We accept that in providing such information, the Attorney General will need to have regard to any concerns of the requesting authority as to particularly sensitive parts of the request, but in order to fulfil his duty of fairness, the level and degree of information supplied must be sufficient to enable the subject, if he thinks fit, to make representations on issues such as the lawfulness of the request and the general nature of the alleged offences and the investigation in the overseas jurisdiction. We also agree with the Court in *Evans* that, although the course we have suggested would normally be sufficient, there may be some cases where justice requires disclosure of the letter of request itself or a redacted version".

In *The Minister of Finance v Bunge Ltd* [2013] CA (BDA) 4 Civ, the Court of Appeal for Bermuda considered statutory provisions which were in very similar terms to the MLA. Evans JA held for the Court (at paragraph 22) that on the proper construction of the statutory provisions "the person on whom the notice is served is entitled to see, and the Minister is bound to produce, the terms of the Request, so far as they are relevant to the notice that is given." Evans JA agreed with the statement of the Judge at first instance that the Request could be "redacted to exclude any sensitive material." Evans JA said, "Without production of the terms of the Request, the person cannot know that the notice is valid." He added that procedural fairness "provides an

*independent ground for requiring production of the terms of the Request in a particular case.*" The Bermuda Court of Appeal noted at paragraph 21 that international agreements envisage disclosure of information.

In *The Minister of Finance v AD* [2015] CA (Bda) 18 Civ, the Court of Appeal for Bermuda applied the revised Bermuda legislation. For the Court of Appeal, Kay JA referred to procedural fairness at paragraph 15: *"To the extent that the case for the Minister goes so far as to contemplate that the subject of an ex parte order may be fixed with its burden, reinforced by criminal sanctions, without being assured of a right of review and without being permitted to see the material upon which it is based, it is highly exceptional. Moreover, there is no overriding public interest such as national security, which might, in exceptional circumstances, justify a departure from the normal fundamentals of fairness."* At paragraphs 21-23, the Bermudan Court of Appeal noted that international agreements envisage disclosure of information.

These authorities strongly support the contention that a requirement to provide information for transmission to a foreign authority must comply with procedural fairness: the person concerned is entitled to see the Request or at the very least the substance of what it contains. In none of these cases was a person required – as in the present case – to comply with a demand to provide information to a foreign authority without being told the identity of the authority, and the nature and details of the inquiry to which the information is relevant.

## Conclusion

In the BVI, as the Court recognised in granting leave to challenge the Notices, there are clear and sacrosanct checks and balances to protect BVI persons and their interests and prevent the arbitrary use of executive power in providing information to authorities outside of the jurisdiction.



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