Jersey & Guernsey Law Review – February 2014

WILL IT ALL END IN TIEAS?

Tax information exchange agreements: an introduction to the Channel Islands context

Ian C Jones and Harriet E Brown

The balance to be struck between the right of clients to the confidentiality of their private affairs and the right of external tax authorities to obtain tax information from the Channel Islands pursuant to inter-governmental tax information exchange agreements has given rise to considerable controversy. The authors examine the relevant jurisprudence against the nature of the agreements and the guidance provided by the OECD.

1. Introduction

1 The Jersey courts have recently considered tax information exchange agreements ("TIEAs") for the first time. It is an area that is likely to become increasingly relevant for lawyers and trust companies in Jersey as greater cooperation between states leads to an increase in requests for information under such arrangements.

2 In this article we consider the following—

(a) the continuing importance of the international political situation to tax matters;

(b) the way in which TIEAs are enforced in Jersey and Guernsey; and

(c) briefly, the recent case law and changes to the legislation enabling the Comptroller of Taxes to comply with requests made under TIEAs to which Jersey is a party.

2. The need for, and types of, international tax agreements

3 Until relatively recently, sovereign states seemed uninterested in inter-state collaboration in determining the extent of their taxing powers, or obtaining information about the tax affairs of their residents from other jurisdictions. In recent years there has been much greater interest (particularly in the

EU) in the allocation of taxing powers between states and in securing their tax revenues against losses through offshore jurisdictions.

4 Economic recession in much of the West may well have acted as a catalyst for greater cooperation between governments, not to mention a greater interest by legislatures in the nature and extent of their own powers of taxation. One example of this was when the UK Public Accounts Committee met in December 2012 to discuss global corporations trading in a number of jurisdictions. It is clearly not straightforward to say where such a corporation "should" be paying tax, and how the profits taxed "should" be "assigned" between the jurisdictions in which they operate.

5 Similarly, because it is increasingly easy for money and assets to be held in any part of the world, and the *situs* of certain assets readily changed, it is no longer the case that a tax authority can afford to rely solely on the information it can obtain in its own jurisdiction to discharge its taxing function.

6 Thus in order to combat tax avoidance and evasion, as well as to ensure proper allocation of taxing powers so that taxpayers are not subject to double taxation, a number of mechanisms are increasingly being used between states. The primary ones are: (i) double taxation agreements ("DTAs"); (ii) tax information exchange agreements ("TIEAs"); and (iii) agreements on one-way or mutual disclosure (known as "disclosure facilities").

7 Each of these types of international agreement is aimed at slightly different things. DTAs are, broadly, intended to ensure the fair and proper allocation of taxing powers between two states, especially to avoid double taxation of the taxpayer. An individual might be liable to tax on income in one jurisdiction because he is resident there, but also liable in a different jurisdiction because the income arises in that jurisdiction (for example, from dividends on shares of a company incorporated there). In these circumstances, a DTA can reflect an agreement between different jurisdictions as to how certain income will be chargeable to tax. This enables allocation of taxing powers, and reduces the likelihood of a taxpayer being taxed twice on the same income.

8 TIEAs are aimed at establishing a conduit for the passing of information between the tax authorities of different jurisdictions and are more likely to be aimed at combating avoidance and evasion. By their very nature (*i.e.* requiring the production of tax

information), they also assist in ensuring that taxing powers are properly allocated between different jurisdictions.

9 In relation to taxpayers and their advisers in the Channel Islands, by far the most likely way in which they will come into contact with a TIEA is if a notice requiring provision of information is given by the Comptroller of Taxes (Jersey) or the Director of Income Tax (Guernsey) in order to fulfill a request from another country under a TIEA. Where this provision of information relates to a client or a trust beneficiary, it will be important that advisers are clear on what information must be provided and when.

10 The third key category is the disclosure facility. Increasingly HMRC in the UK is using international disclosure facilities in order to encourage those with undisclosed assets in certain offshore jurisdictions to declare those assets. The first of these facilities was between the UK and Liechtenstein and, following from this success, came disclosure facilities with Switzerland and the Isle of Man (signed on 13 March 2013, with effect from 6 April 2013). Both Guernsey and Jersey have also recently entered into disclosure facilities with the UK.

3. The politico-legal context of international tax agreements

11 In 2011, in an article published in this Review[1] it was said (albeit in an EU context)—

> "There can be no doubt that the changing attitudes towards taxation policy precipitated by the global financial crisis have resulted in a new attitude to offshore taxation regimes. While it is true that these changes have been precipitated by political, as opposed to legal, pressure it is also the case that increasing pressure can, and is, being brought to bear on Jersey and similar jurisdictions."

This has now been seen in the context of TIEAs as well. The case of *APEF Management Co 5 Ltd v Comptroller of Income Taxes*[2] highlights the political difficulties, and the effects of political pressure in relation to TIEAs. In *APEF*, an application was made for an expedited hearing, on a public interest basis. The reasons for this were summarised by the court in its judgment—

---

[1] Brown, "Deemed dividends, zero/ten, Jersey and the EU" (2011) 15 J&G Law Rev 343–356.

[2] [2013] JRC 205A.

"On 11th October, 2013, Advocate White, for the Comptroller, wrote to the Bailiff's Judicial Secretary seeking an urgent hearing of a summons for the expedited hearing of the appeal saying this:—

'The urgency for the hearing of the enclosed summons and for the making of the application relates to the public interest of the unusual circumstances of this case.'

As you will be aware *Jersey has been told by France it will be placed on a list of uncooperative jurisdictions (so called 'blacklisting') with effect from the beginning of 2014. The consequences of such a listing are real and potentially severe. The French will apply an automatic substantial (75%) withholding tax to a wide range of French investments held by Jersey entities. The consequences of this will be, so we understand, that businesses who have such assets are seeking to relocate that business out of the island and new business is being diverted to competing jurisdictions . . .*

Whilst impossible to quantify, the potential damage to the Jersey economy and to tax revenues arising from the general loss of business, both directly and indirectly through the general impact on the Island's reputation is very severe.

The decision to place Jersey on a list of uncooperative jurisdictions for the purpose of Article 238–0A of the Code general des impôts *has been justified by the French authorities on the basis that the requests made under the Tax Information Exchange Agreement with Jersey (which entered into force on 11th October, 2010), have not resulted in the French authority having the information necessary to apply the French fiscal legislation . . . The tax information subject to this Appeal is a request that remains outstanding and is regarded as significant by the French authorities and forms part of the basis for Jersey still to be treated as uncooperative*." (Emphasis added)

12 The court went on to highlight the potential problems with the French approach, saying—

"It *does seem curious to me how the French authorities can treat Jersey as uncooperative when APEF is exercising its right of appeal against a notice issued as recently as 9th September, 2013*, and bearing in mind that the agreement with France provides as follows under Article 1:—

> 'The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.'

This appeal has only just started and it is difficult to see how the exercise of such a right can be characterised as unduly preventing or delaying the effective exchange of information. Even so, I have no reason to doubt that it is in the public interest for this appeal to be dealt with as soon as possible but as the Solicitor-General, for the Comptroller, accepted, this cannot be at the expense of justice, see *Volaw Trust Corporate Services Limited and Larsen v The Comptroller of Taxes* [2012] JRC 133 at paragraph 3. The appellant must be given the opportunity to prepare and argue its case fully, albeit that the public interest may require that opportunity to be set against a very tight timetable." (Emphasis added)

13 Nonetheless, the appeal procedure in relation to information requests under TIEAs has (since *APEF*) been amended in such a manner that the appeal process should in future be significantly shorter. It remains to be seen whether or not this will have been "at the expense of justice".

14 This perspective, and the political pressure being brought to bear on all jurisdictions to co-operate more closely on tax matters, clearly, therefore, remains today. It comes as no surprise that, while neither Jersey nor Guernsey is a signatory to the OECD treaty,[3] many of their DTAs and TIEAs are in fact based on the model terms produced by the OECD.[4] The OECD has been instrumental in the manner of co-operation between states that has led to greater prevalence of DTAs and TIEAs.

---

[3]The OECD permits, and indeed encourages, a number of non-members (including Jersey and Guernsey) to adhere to OECD instruments and to otherwise participate in OECD activities. Further details can be found at: http://www.oecd.org/globalrelations/non-memberparticipationinformaloecd bodies/. Jersey, for example, is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

[4]It should be noted that the OECD model Tax Convention on Income and Capital, art 26 contains a very wide provision for the exchange of information in the context of "carrying on the provisions of this Convention", *i.e.* exchange of information for the purposes of the DTA. This provision is, unfortunately, beyond the scope of this article.

15 The OECD is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. In particular, the OECD global forum on taxation ("the Global Forum") has been important in this process. On its website the Global Forum explains[5]—

> "The Global Forum is the continuation of a forum which was created in the early 2000s in the context of the OECD's work to address the risks to tax compliance posed by tax havens. The original members of the Global Forum consisted of OECD countries and jurisdictions that had agreed to implement transparency and exchange of information for tax purposes.
>
> The Global Forum was restructured in September 2009 in response to the G20 call to strengthen implementation of these standards. The Global Forum now has 121 members on equal footing and is the premier international body for ensuring the implementation of the internationally agreed standards of transparency and exchange of information in the tax area. Through an in-depth peer review process, the restructured Global Forum monitors that its members fully implement the standard of transparency and exchange of information they have committed to implement. It also works to establish a level playing field, even among countries that have not joined the Global Forum."

16 The OECD has produced model terms both for DTAs ("the model DTA") and TIEAs ("the model TIEA") (together "the model Terms"). Many of their DTAs and TIEAs are in fact based on the model Terms. In Jersey's Strategic Plan for 2006–2011 the States committed to—

> "1.8.4 Participate in the OECD global forum on taxation from 2006 to safeguard the Island's interests and ensure a level playing field in the application of international standards . . .
>
> 1.8.5 Negotiate individual Tax Information Exchange Agreements with OECD members and implement agreements in our own right where reciprocal economic benefits are of sufficient value to Jersey from 2006 . . ."

17 In addition, Jersey has agreed to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters,

---

[5]http://www.oecd.org/tax/transparency/

committing to the automatic exchange of information under the EU Savings Directive, and participating in the G5 pilot to develop a single standard for improving the automatic exchange of tax information. Guernsey has also agreed to implement the single standard for improving the automatic exchange of tax information.

18 In addition to the model terms, the OECD produces and regularly updates commentaries in relation to both the model DTA and the model TIEA. It should be noted that while the commentaries on the OECD model agreements are not binding on either the Guernsey or the Jersey courts, they have been considered to be important guides in a number of cases. These cases are discussed below.

19 Given that many of the TIEAs that Jersey and Guernsey have entered into are based on the OECD model it is helpful to consider it, not only to understand generally what information can be surrendered under a TIEA, but also what information requests may be made under the "Channel Island" TIEAs.

4. Interpretation of TIEAs and DTAs in light of the OECD model

20 The model TIEA provides suggested terms that countries might use in their own TIEAs and provides a commentary explaining what each term is intended to do. In its introduction to the model TIEA, the OECD explains—

> "1. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.
>
> 2. . . .
>
> 3. The Agreement grew out of the work undertaken by the OECD to address harmful tax practices.*[6]* The lack of effective exchange of information is one of the key criteria in determining harmful tax practices . . . The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices.
>
> 4. This Agreement, which was released in April 2002, is not a binding instrument but contains two models for bilateral

---

[6]More information about practices considered to be "harmful" by the OECD can be found at http://www.oecd.org/ctp/harmful/.

agreements. A number of bilateral agreements have been based on this Agreement."

21 The introduction continues—

> "5. As mentioned above, the Agreement is intended to establish the standard of what constitutes effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. However, the purpose of the Agreement is not to prescribe a specific format for how this standard should be achieved. Thus, the Agreement in either of its forms is only one of several ways in which the standard can be implemented. Other instruments, including double taxation agreements, may also be used provided both parties agree to do so, given that other instruments are usually wider in scope."

22 While the model TIEA seeks to establish a standard of effective information exchange, it does not prescribe how this is to be achieved. Practically, in interpreting a particular agreement it will be important to consider which form has been used, and whether words have been changed.

23 While the courts in the Channel Islands have not yet clearly established how they will interpret the provisions of TIEAs or the importance of the model commentary, the English courts have done so on a number of occasions, and the courts in the Channel Islands may well (and, it is submitted, should) regard such decisions as persuasive. First, in *UBS AG v Revenue & Customs Commrs*[7] the English Court of Appeal had to consider the interpretation of a DTA between the UK and Switzerland, which was based on the model DTA (on income and capital). Arden, LJ explained (at para 61)—

> ". . . On questions of interpretation of the OECD convention, the commentary published with it is of persuasive value: see per Mummery J in IRC v Commerzbank AG . . .
>
> Article 23 forms part of an international treaty between the United Kingdom and Switzerland. Accordingly, *it must be interpreted in the manner applicable to such treaties and this means, among other things, that it should be interpreted in the light of its object and purpose*: see generally per Mummery J in IRC v Commerzbank AG,

---

[7][2007] STC 588.

approved by this court in Memec plc v IRC . . . the court must seek out the meaning of the general provisions in art 23(2), giving each phrase its proper effect and consider whether art 23(2) has effect in relation to the particular provision of domestic law in issue. . ." (Emphasis added)

24 *IRC v Commerzbank* has been quoted with approval in a number of other cases on DTAs, including by the Court of Appeal in *HMRC v Smallwood*[8] and the High Court in *Revenue & Customs Commrs v Ben Nevis (Holdings) Ltd.*[9] The New Zealand Court of Appeal has also stated that the commentary should be considered as part of the interpretative process.[10] In *Commr of Inland Revenue v JFP Energy Inc*,[11] it was held[12]—

> "The OECD Convention rules have an international currency used as they are by and in countries throughout the world and accordingly the language of the rules should be construed on broad principles of general acceptance and have an appropriate regard to the Commentary."

25 While Arden, LJ gives general principles of interpretation, she subsequently sounds a note of caution for those looking to adopt the same principles of interpretation established in relation to DTAs, in relation to TIEAs. She continues (at para 63)—

> "When interpreting a double tax convention, it is important to recall that *double tax treaties are generally the subject of hard bargaining between contracting states* (as to this, see the comments of Lord Walker of Gestingthorpe in the Pirelli case . . .), and that contracting states have their own reasons for entering into such treaties. *For instance, a contracting state may take into account considerations of its own fiscal policy*. In so doing, it would be open to it to take the view (for example) that it should confer generous tax benefits on non-residents with a view to encouraging investment in its own state. But, likewise, it might take the

---

[8][2010] STC 2045.

[9][2012] STC 2157.

[10]While this was in relation to earlier versions of the commentary, it established the general principle that the commentary is likely to be relevant.

[11][1990] 3 NZLR 536.

[12]A number of these cases were also quoted with approval by the Royal Court and Jersey Court of Appeal in the recent case of *Larsen v Comptroller of Income Tax* [2013] JRC 095, [2013] JCA 239.

> contrary view that it did not wish to encourage investment (for example) by an enterprise resident in the other contracting state which carried on business within its own jurisdiction, but made losses, and thus paid no tax. These are not questions for the court interpreting the treaty, but underscore the *need for the court to interpret the treaty and any implementing legislation with attention to its precise terms*." (Emphasis added)

26 While these *obiter* comments remain untested, there are clear differences between DTAs and TIEAs, and the ways in which they are negotiated. For example, the national fiscal policy of a contracting state is relatively unlikely to impact on how it exchanges information. Consequently, it seems unlikely that they would also apply to TIEAs. DTAs have not been the subject of any consideration by the courts in either Jersey or Guernsey. As regards TIEAs however, the Jersey courts in deciding *Larsen* and *APEF* did not refer to the OECD commentaries (although they were before the court), and consequently it is not clear whether and to what extent the courts may have regard to them in the future. Both the Court of Appeal and the Royal Court did, however, refer to *IRC v Commerzbank* in *Larsen*, the Court of Appeal saying—

> "In an attempt by the Appellants to dislodge this literal reading of Article 6(5), we were reminded of the well-known rules as to the interpretation of instruments of the character of the J/N TIEA based on the summary by Mummery J (as he then was) in IRC v Commerzbank Attorney General [1990] STC 285 of the approach of the House of Lords in Fothergill v Monarch Airlines Ltd [1981] AC 351 and of the Vienna Convention on the Law of Treaties ('the Vienna Convention') which, in broad and unnuanced terms, requires a court to search first for what appears to be the clear meaning of the words used without being overly literal, secondly to bear in mind the purpose of the instrument, thirdly to bear in mind that its wording will have been the product of negotiation between states; fourthly if the result of the exercise so far leaves the meaning unclear or ambiguous or produces a manifestly absurd or unreasonable result, to have recourse to supplementary materials.
>
> Albeit Jersey is not a party to the Vienna Convention, we proceed on the basis that the approach canvassed in the previous paragraph is appropriate to construction of the J/N TIEA . . ."

27 Consequently, it seems clear that international agreements ought not to be subject to the same principles of statutory interpretation as might ordinarily be applied to national legislation. Thus, based on the *dicta* of the English courts outlined above, we would suggest that the following may be a good "rough guide" to the interpretation of TIEAs—

(a) the commentary on the OECD model TIEA should be persuasive;

(b) TIEAs should be interpreted in the light of their object and purpose (as set out, for example, in the introduction to the OECD model); and

(c) they should be interpreted by seeking out the general meaning of provisions.

A purposive interpretation should be given to TIEAs, with assistance drawn from the model commentary.

5. The model TIEA: key provisions

28 The model TIEA contains 16 articles and an extensive commentary. The key provisions are—

Article 1: object and scope of the agreement;

Article 2: jurisdiction;

Article 5: exchange of information on request; and

Article 7: possibility of declining a request.

The following paragraphs provide helpful background to the application of the TIEAs to which Jersey and Guernsey are respectively party.

Article 1

29 Article 1 provides—

> "The competent authorities of the Contracting Parties shall *provide assistance through exchange of information*[13] *that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement*. Such information shall include *information that is foreseeably*

---

[13] Article 4(m) explains that "the term 'information' means any fact, statement or record in any form whatever".

> *relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters*. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information." (Emphasis added)

The key phrase in this context is "foreseeably relevant". This is not, unsurprisingly, a defined term. The commentary, however, provides—

> "The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant Party concerning the taxes covered by the Agreement. The *standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer*. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement."
>
> The *Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information*. The standard of foreseeable relevance is also used in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters." (Emphasis added)

30 According to the commentary, the purpose of having a standard of "foreseeable relevance" is to provide for collection of information in the widest possible sense, without allowing "fishing expeditions". On its face, this gives contracting parties very wide powers to gather tax information.

31 Paragraph 4 of the commentary could be seen as further extending the scope of this wide power, by stating that it should

apply to "cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information". In our view there is a legitimate concern that in fact the scope of the model TIEA may be too wide, extending as it does to information which may not in the common sense be "foreseeably relevant" because it cannot of course be known whether or not the information is relevant until the information has been received.

Article 2

32 Article 2 provides that—

> "A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction"

33 In relation to art 2, the commentary provides—

> "Article 2 addresses the jurisdictional scope of the Agreement. It clarifies that *a requested Party is not obligated to provide information which is neither held by its authorities nor is in the possession or control of persons within its territorial jurisdiction*. The requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested. The term 'possession or control' should be construed broadly and the term 'authorities' should be interpreted to include all government agencies. Of course, a requested Party would nevertheless be under no obligation to provide information held by an 'authority' if the circumstances described in Article 7 (Possibility of Declining a Request) were met." (Emphasis added)

Article 5

34 Article 5 provides—

> "1. The competent authority of the requested Party *shall provide upon request information for the purposes referred to in Article 1*. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

> 2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that *Party shall use all relevant information gathering measures*[14] *to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes*." (Emphasis added)

35 Information under an OECD model-type TIEA can only be exchanged upon a request from the other contracting party. In addition, a government cannot give the excuse that it does not need the information requested itself to avoid having to gather it.

36 In relation to art 5, the commentary explains:

> "Paragraph 1 provides the general rule that the competent authority of the requested Party must provide information upon request for the purposes referred to in Article 1. The paragraph makes clear that *the Agreement only covers exchange of information upon request (i.e., when the information requested relates to a particular examination, inquiry or investigation) and does not cover automatic or spontaneous exchange of information*. However, Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations.
>
> The reference in the first sentence to Article 1 of the Agreement confirms that *information must be exchanged for both civil and criminal tax matters*. The second sentence of paragraph 1 makes clear that information in connection with criminal tax matters must be exchanged irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested Party." (Emphasis added)

37 The commentary emphasises the wide scope of the TIEA. It does provide some restriction on art 5(1), in that the information requested must relate to a particular examination, inquiry or investigation.

---

[14]Article 4(l) provides: "the term 'information gathering measures' means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information".

38 The commentary continues—

> "Paragraph 2 is intended to clarify that, in responding to a request, *a Contracting Party will have to take action to obtain the information requested and cannot rely solely on the information in the possession of its competent authority*. Reference is made to information 'in its possession' rather than 'available in the tax files' because some Contracting Parties do not have tax files because they do not impose direct taxes.
>
> Upon receipt of an information request the competent authority of *the requested Party must first review whether it has all the information necessary to respond to a request. If the information in its own possession proves inadequate, it must take 'all relevant information gathering measures' to provide the applicant Party with the information requested* . . . An information gathering measure is *'relevant' if it is capable of obtaining the information requested by the applicant Party. The requested Party determines which information gathering measures are relevant in a particular case*." (Emphasis added)

39 The primary information gathering power of the Comptroller of Taxes in Jersey is the power to gather information by way of notice pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (as amended[15]) ("the TIEA Regulations"). Similarly, in Guernsey the primary power available to the Director of Income Tax is by way of notice but not pursuant to separately enacted regulations. Rather, the powers outlined in part VIA of the Income Tax (Guernsey) Law 1975 (as amended) ("the Guernsey Law")[16] have been extended by s 75C to apply, *inter alia*, to TIEAs.

40 Article 5 of the model TIEA then continues—

> "4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, *have the authority to obtain and provide upon request*:

---

[15]The TIEA Regulations were amended extensively throughout 2013 by six separate orders, indicating the increased rate of change in international tax matters.

[16] Part VIA of the Guernsey Law was inserted pursuant to the Income Tax (Guernsey) (Amendment) Law 2005 which came into force on 25 January 2006.

a) *information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees*;

b) information regarding the ownership of companies, partnerships, trusts, foundations, 'Anstalten' and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties." (Emphasis added)

41 The commentary provides—

"Paragraph 4, sub-paragraph a), by referring explicitly to persons that may enjoy certain privilege rights under domestic law, makes clear that such rights can not form the basis for declining a request unless otherwise provided in Article 7. For instance, the inclusion of a reference to bank information in paragraph 4, sub-paragraph a) rules out that bank secrecy could be considered a part of public policy (*ordre public*).

Sub-paragraph a) should not be taken to suggest that a competent authority is obliged only to have the authority to obtain and provide information from the persons mentioned. Sub-paragraph a) does not limit the obligation imposed by Article 5, paragraph 1.

Paragraph 4, sub-paragraph a) further mentions information held by persons acting in an agency or fiduciary capacity, including nominees and trustees. A person is generally said to act in a 'fiduciary capacity' when the business which he transacts, or the money or property, which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part. The term 'agency' is very broad and includes all forms of corporate service providers (*e.g.*, company formation agents, trust companies, registered agents, lawyers).

Sub-paragraph b) requires that the competent authorities of the Contracting Parties must have the authority to obtain and provide ownership information. *The purpose of the sub-paragraph is not to develop a common "all purpose" definition of ownership among Contracting Parties, but to specify the types of information that a Contracting Party may legitimately expect* to receive in response to a request for ownership information so that it may apply its own tax laws, including its domestic definition of beneficial ownership.

Sub-paragraph b) also provides that a requested Party must have the authority to obtain and provide ownership information for all persons in an ownership chain provided, as is set out in Article 2, the information is held by the authorities of the requested State or is in the possession or control of persons who are within the territorial jurisdiction of the requested Party*. This language ensures that the applicant Party need not submit separate information requests for each level of a chain of companies or other persons.*" (Emphasis added)

42 Finally, the last two paragraphs of art 5 explain:

"5. The competent authority of the *applicant Party shall provide the following information* to the competent authority of the requested Party when making a request for information under the Agreement *to demonstrate the foreseeable relevance of the information to the request*:

a) the identity of the person under examination or investigation;

b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

c) the tax purpose for which the information is sought;

d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

e) to the extent known, the name and address of any person believed to be in possession of the requested information;

f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that

if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) if the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal." (Emphasis added)

43 Importantly, the model TIEA recognises the need for evidence that the information requested is foreseeably relevant. The commentary provides—

"Paragraph 5 lists the information that the applicant Party must provide to the requested Party in order to demonstrate the foreseeable relevance of the information requested to the administration or enforcement of the applicant Party's tax laws. While paragraph 5 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs a) through g) nevertheless need to be interpreted liberally in order not to frustrate effective exchange of information. The following paragraphs give some examples to illustrate the application of the requirements in certain situations."

44 The commentary goes on to give examples of the type of information which should be provided, scenarios where not all the information can be provided and what alternatives might be acceptable. This may provide useful guidance as to when information should reasonably be provided and what a request must contain in order to be sufficient to elicit a helpful response

Article 7

45 Finally, in relation to the model TIEA, art 7 provides—

> "1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.
>
> 2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.
>
> 3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:
>
> a) produced for the purposes of seeking or providing legal advice or
>
> b) produced for the purposes of use in existing or contemplated legal proceedings.
>
> 4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).
>
> 5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

> 6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances."

46 Article 7 is of paramount importance in TIEAs because it provides the only express restriction on the scope of such agreements. The commentary explains—

> "The purpose of this Article is to identify the situations in which a requested Party is not required to supply information in response to a request. If the conditions for any of the grounds for declining a request under Article 7 are met, the requested Party is given discretion to refuse to provide the information but it should carefully weigh the interests of the applicant Party with the pertinent reasons for declining the request. However, if the requested Party does provide the information the person concerned cannot allege an infraction of the rules on secrecy. In the event that the requested Party declines a request for information it shall inform the applicant Party of the grounds for its decision at the earliest opportunity."

47 Again, the subsequent paragraphs of the commentary go on to explain how and under what circumstances this article should be applied. Consideration should be given to this commentary when dealing with an OECD-type agreement in circumstances similar to those outlined in the commentary. Analysing both the provisions of a particular TIEA and the OECD commentary could provide important insight into the likely interpretation and application thereof.

6. TIEAs in the Channel Islands—Jersey and Guernsey: practical impact of TIEAs

48 Both Jersey and Guernsey have entered into a number of TIEAs. A full list of each is available online.[17] All of these TIEAs are based on the model TIEA. This is, in many respects, helpful both for the relevant authorities and for taxpayers whose affairs

---

[17] For a full list of those TIEAS which Guernsey and Jersey have entered into see: http://www.gov.gg/tiea (Guernsey); and http://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/ID%20TIEAsSignedToDate.pdf

are subject to an information request. In practice there is likely to be little difference in the procedure, and the principles to be applied, irrespective of the country from which the request is being made. Additionally, it should mean that once a body of case law has been developed, this should apply to requests under most of the TIEAs, because of the similarity of their terms.

49 In Jersey, the competent authority under TIEAs is the Minister for Treasury and Resources, but he has delegated this function to the Comptroller of Taxes. The Government of Jersey requests that other competent authorities actually address requests to the Deputy Comptroller of Taxes (International).[18]

50 Similarly, in Guernsey the competent authority under TIEAs is the Director of Income Tax. Guernsey has specified a contact list of all those individuals working under the Director of Income Tax who can be contacted in specific instances.[19]

51 The key issue for advisers in relation to TIEAs is determining whether a notice requiring the production of information legitimately falls within the scope of the legislative framework. It is, however, necessary to understand the scope of the local provisions that allow the Jersey and Guernsey tax authorities to gather further information to fulfill their obligations pursuant to the relevant TIEA based on art 5(2) of the OECD model.

52 The provisions that will be used to obtain such information are the TIEA Regulations and the Guernsey Law respectively. These can be used in order to ensure that either a taxpayer, or a third party (including an adviser, trustee *etc.*) ("a third party"), produces the necessary/requested information. Both the TIEA Regulations and Part VIA of the Guernsey Law have been implemented/extended to ensure that Jersey and Guernsey comply with their obligation to obtain information under art 5(2) of the OECD model.

53 TIEA Regulation 2 provides—

---

[18] This and other information in relation to TIEAS, including the text of TIEAs to which Jersey is a party; can be found at: http://www.gov.je/TaxesMoney/InternationalTaxAgreements/TIEA/Pages/index.aspx.

[19] The relevant information for Guernsey's competent authority and who precisely to contact in specific instances can be found at: http://www.gov.gg/CHttpHandler.ashx?id=74742&p=0.

"(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require the taxpayer to provide to the competent authority for Jersey all such information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph (1) shall be made by notice in writing."

54 The definitions set out in TIEA Regulations 1 and 1A, provide—

"(1) . . .

'tax' means any tax listed in the third column in the Schedule opposite the entry for a third country;

(1A) (1) For the purposes of these Regulations 'tax information' means information that is foreseeably relevant to the administration and enforcement, in the case of the person who is the subject of a request, of the domestic laws of the third country whose competent authority is making the request concerning any tax listed in the third column in the Schedule opposite the entry for that third country, including information that is foreseeably relevant to—

(a) the determination, assessment and collection of such taxes;

(b) the recovery and enforcement of such taxes;

(c) the recovery and enforcement of tax claims; or

(d) the investigation or prosecution of tax matters.

(2) Tax information may be—

(a) information within an individual's knowledge or belief; or

(b) information recorded in a document or any other record in any format, that a person has in his or her possession, custody or control."

55 Thus the provision of information will be in response to a request for information made under a TIEA. The OECD commentary on the meaning of "foreseeably relevant" ought to be relevant in interpreting the TIEA Regulations. Thus there is a potentially very wide power to demand information by notice from the taxpayer himself.

56 There is a similarly wide jurisdiction to demand information by notice from third parties. TIEA Regulation 3 provides—

"(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require a third party, being a person other than the taxpayer, to provide to the competent authority for Jersey all such tax information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph(1) shall be made by notice in writing.

(3) Where a third party notice does not name the taxpayer to whom it relates, it must provide an account number or other identification for the tax information required.

(4) Subject to paragraph (5), the competent authority for Jersey shall send to the taxpayer to whom a third party notice relates a copy of the third party notice—

(a) in a case where, at the time the third party notice is given, the competent authority for Jersey does not know the taxpayer's name and address—within 7 days after the third party has provided to the competent authority for Jersey the tax information required by the third party notice; or

(b) in any other case—within 7days after the third party notice is given.

(5) Paragraph (4) does not require the disclosure or provision of the third party notice to a taxpayer—

(a) if the competent authority for Jersey does not know the taxpayer's name and address;

(b) if its disclosure or provision would identify or might identify a person who has provided information that the competent authority for Jersey takes into account in deciding whether to give the notice;

(c) if the competent authority for Jersey is satisfied that there are reasonable grounds for suspecting that the taxpayer has committed a relevant criminal offence;

(d) if the competent authority for Jersey is satisfied that disclosure of information of the description contained in the notice may prejudice the assessment, collection or recovery of tax or the investigation or prosecution of tax matters; or

(e) if the third country has requested that the taxpayer should not be informed of any matter relating to the request on the ground that—

(i) disclosure to the taxpayer would identify or might identify a person who has provided information relating to the third party request,

(ii) there are reasonable grounds for suspecting that the taxpayer has committed a relevant criminal offence, or

(iii) disclosure of information of the description contained in the notice may prejudice the assessment, collection or recovery of tax or the investigation or prosecution of tax matters.

(6) The third party notice shall—

(a) state whether the competent authority prohibits the third party from disclosing to the taxpayer the third party notice or any information relating to the notice (including any information about a warrant issued under Regulation 12 or other information relating to enforcement); and

(b) if the third party notice prohibits that disclosure to the taxpayer, state the ground on which it prohibits that disclosure, by reference to one or more grounds mentioned in paragraph (5).

(7) The third party shall not disclose the third party notice nor any information relating to it to the taxpayer that it is prohibited from so disclosing by virtue of any prohibition contained in the third party notice except—

(a) with the written consent of the competent authority for Jersey; or

(b) with the consent of the Royal Court.

(8) The competent authority for Jersey shall as soon as practicable send to the taxpayer the third party notice if the Royal Court gives consent to the third party to disclose it.

(9) For the purposes of paragraph (5) the competent authority for Jersey shall not be treated as knowing the name or address of the taxpayer by virtue of anything provided by the third party unless, upon providing the tax information, the third party expressly draws to the attention of the competent authority for Jersey the taxpayer's name or address.

> (10) In this Regulation, a reference to the taxpayer's address is a reference to any address at which the taxpayer may be given information."

This provision was amended significantly at the end of 2013.

57 Guernsey has taken a different approach, including its provisions for tax information exchange in primary legislation. Section 75C of the Guernsey Law provides—

> "(1) Subject to subsection (2), the Director of Income Tax may exercise his powers under sections 75A and 75B if, pursuant to the provisions of an approved international agreement, a request for information is made to him by the competent authority of a requesting state.
>
> (2) The Director of Income Tax must be satisfied that the request for information is made in accordance with the provisions of, and for the purposes of, the approved international agreement pursuant to which it is made.
>
> (3) The Director of Income Tax may ask the competent authority for further information, documents and particulars in support of a request for information.
>
> (4) In this Part of this Law—
>
> > 'approved international agreement' means an agreement or arrangement providing for the obtaining and exchanging of information in relation to tax which is made between the States of Guernsey and the government of another territory and which is specified for the purposes of this Law by Ordinance of the States,
> >
> > 'competent authority' means the person or authority designated by the requesting state as the competent authority for the purposes of the approved international agreement pursuant to which the request for information is made, and
> >
> > 'requesting state' means the party to the approved international agreement on behalf of which the request for information is made.
>
> (5) This section is without prejudice to the generality of sections 75A and 75B."

58 Unlike Jersey, Guernsey has chosen not to provide the Director of Income Tax with any specific powers in relation to TIEAs. Instead, Guernsey, by use of s 75C, has extended the powers of the Director of Income Tax as detailed in ss 75A and

75B to respond to requests received pursuant to international agreements which will include TIEAs.

59 Pursuant to s 75A the Director of Income Tax has the following powers—

> "(1) Subject to the provisions of this section, the Director of Income Tax may by notice in writing, for the purposes of performing his functions, require a person—
>
> (a) to deliver to him such documents as are in that person's possession or power and which *in the Director of Income Tax's opinion contain*, or may contain, information relevant to—
>
> (i) any liability to tax to which that person is or may be subject, or
>
> (ii) the amount of any such liability,
>
> (b) to furnish him with such information as the Director of Income Tax may require as being relevant to, or to the amount of, any such liability, and
>
> (c) without prejudice to the generality of paragraphs (a) and (b), to furnish him with such evidence of residence, in Guernsey or elsewhere, as the Director of Income Tax may require." (Emphasis added)

60 Pursuant to s 75B, the Director of Income Tax can by way of notice request third parties to provide documents that are in their possession or power and to furnish information in connection with another person's tax liability. For example, under this section a trust company or trustee may be asked to provide details of payments made to a beneficiary:

> "(2) Subject to the provisions of this section, the Director of Income Tax may by notice in writing require any person other than the taxpayer to deliver to the Director of Income Tax or, if so required by the Director of Income Tax, to make available for inspection by the Director of Income Tax such documents, and to furnish the Director of Income Tax with such information, as are in that person's possession or power and which (in the Director of Income Tax's opinion) are, or may be, relevant to—
>
> (a) any liability to tax to which the taxpayer is or may be, or may have been, subject, and
>
> (b) the amount of any such liability."

61 Importantly, for third parties who are likely to be service providers, trust companies and trustees *inter alia*, these wide powers are applicable where a request is received by the Director of Income Tax pursuant to a TIEA. Section 75C of the Guernsey Law makes it clear that these are the powers that the Director of Income Tax will rely on when acceding to requests made pursuant to TIEAs.

62 The Guernsey Law goes on to provide at s 75M—

"(1) A requirement imposed by or under—

(a) section 75A, 75B, 75D, 75E or 75F,

(b) a notice or order under any of those sections, or

(c) section 75I or a warrant granted thereunder,

has effect notwithstanding any obligation as to confidentiality or other restriction on the disclosure of information imposed by statute, contract or otherwise; and, accordingly, the obligation or restriction is not contravened by the making of a disclosure pursuant to such a requirement.

(2) Where a person claims a lien on a document, its production under—

(a) section 75A, 75B, 75D, 75E or 75F,

(b) a notice or order under any of those sections, or

(c) section 75I or a warrant granted thereunder,

is without prejudice to his lien.

(3) A direction given by the Administrator under section 75B(4) to a person that he must not—

(a) inform, or cause or permit to be informed, the taxpayer that a notice has been given under that section, or

(b) disclose, or cause or permit to be disclosed, to any person (including the taxpayer) any information or matter which is likely to prejudice the inquiry to which the notice relates or the performance by the Administrator of his functions,

has effect notwithstanding any contractual or other obligation to which the person to whom the direction was given is subject; and, accordingly, the obligation is not contravened by compliance with the direction.

(4) A statement made by a person in response to a requirement described in subsection (1) may not be used in evidence against him in criminal proceedings in Guernsey or elsewhere except—

(a) in proceedings for an offence under section 75L(3), or

(b) in proceedings for some other offence where in giving evidence he makes a statement inconsistent with it,

and for the purposes of this subsection proceedings under this Law in respect of the enforcement of a penalty or surcharge are not criminal proceedings."

63 Important for those who receive a notice from the Director of Income Tax, particularly third parties, is the fact that, notwithstanding obligations as to confidentiality or any other restriction as to the disclosure of information imposed by law or contract, notices must be complied with. There is a particular concern in relation to duties owed by, for example, fiduciaries in relation to confidentiality. It may well require the intervention of the courts to determine which duty will take priority.

64 It will be necessary for a third party to consider not only the terms of the notice but also their obligations under the TIEA Regulations or the Guernsey Law as appropriate, and the terms of the TIEA in question. In addition, in the (likely) event that the TIEA is based on the model TIEA, the OECD commentary ought also to be consulted.

65 The purpose of doing this is to ensure that the third party does not provide information which should not properly be provided under the notice, either because the notice does not request it, or because such information cannot be requested, or need not be provided, either under the terms of the TIEA or the TIEA Regulations/Guernsey Law. Equally, the reverse will be true in that a third party will not want to find itself in a situation where it fails to disclose information that it is obliged to. This will be particularly important in the case of fiduciaries (such as trustees) and those who have a professional duty (for example lawyers, where the information they hold is legally privileged). If in doubt, it will be important for a third party to take advice on what should and should not be disclosed pursuant to a notice.

66 In relation to the OECD model, the nature of the information within the scope of TIEAs is wide; but this does not mean it is unbounded. As shown above, the two key provisions restricting

the scope of what needs to be disclosed under a TIEA are arts 2 and 7 of the model TIEA.

67 Article 2 restricts the territorial scope of a TIEA so that information need not be provided by Jersey or Guernsey (and by extension by a third party to Jersey or Guernsey) where it is "neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction . . .".

68 In response to an information notice, therefore, a third party must first carefully consider what information is in its possession or control (this expression is to be widely construed in accordance with the commentary). For example, where a group of companies has a company which is registered, say, in England, and another company registered in Jersey, it would be arguable that information which may be available to the latter, but which is actually within the possession and control of the former, should not be disclosed pursuant to that notice because it is in the possession or control of persons outside Jersey's territorial jurisdiction. The consequences of wrongly disclosing information could be serious, especially in the case of trustees and the legal profession because of the nature of their obligations and duties owed to their clients.

69 Article 7 further narrows the scope of a TIEA, by explaining the circumstances in which a request can be refused. Article 7(1) provides that information need not be provided (broadly) where it could not be obtained under the law of the country requesting the information. Again, while the restrictions within art 7 are, strictly speaking, restrictions on the "competent authority" in Jersey, it is necessary for third parties to consider them, because arguably where the competent authority is asking for information which ought not to be disclosed pursuant to the TIEA, the third party should not have to disclose the information, and may open himself to potential liability from his client, the taxpayer, if he wrongly discloses it.

70 A third party may, therefore, wish to take expert advice as to what information could be obtained under the law of the requesting country before providing any information. If the information requested could not be obtained in the requesting country then this may be a basis on which to challenge the information notice.

71 Article 7(2) provides that trade, business, industrial, commercial or professional secrets or trade processes need not be disclosed. Any third party which believes that information requested falls into this category will need to proceed very

carefully and obtain legal advice before releasing any information of this kind.

72 Article 7(3) provides that there shall be no obligation to provide information to which legal professional privilege ("LPP") attaches. In relation to third parties, they may hold documents which are subject to LPP which is not their LPP, *i.e.* the LPP "belongs" to the taxpayer. For example, a trustee or accountant may hold legal advice given to a taxpayer on his tax affairs. This will likely be privileged, but the privilege is that of the taxpayer, not the accountant or trustee. In those circumstances, only the taxpayer could waive privilege, and the trustee or accountant could not be obliged to disclose such privileged information. If there is concern that privilege may attach to information requested under the TIEA Regulations and/or the Guernsey Law, and pursuant to a TIEA, legal advice should be sought in order to protect the third party from possible claims by the taxpayer.

73 Where a third party believes that he holds information which should not be disclosed, and does not disclose it, TIEA Regulation 11 sets out a process by which a court order can be obtained to obtain possession of such information. Similarly, ss 75E–75H of the Guernsey Law set out how the Director of Income Tax can obtain a court order if necessary. Section 75J of the Guernsey Law provides for situations where it is impractical to obtain a court order and instead a warrant to enter private premises is required.

74 If therefore the third party is advised that the information requested pursuant to a notice should not be provided, generally they should avoid an order being obtained under TIEA Regulation 11, or pursuant to Sections 75E–75H of the Guernsey Law by challenging the notice in the following way.

75 TIEA Regulation 14 provides that once a request has been made of either a taxpayer or a third party then the correct route to raise a challenge is by way of judicial review.

76 The equivalent s 75K of the Guernsey Law provides *inter alia*—

> "(1) A person aggrieved by a decision of the Director of Income Tax to give him notice under section 75A or 75B may, subject to subsection (3), appeal against the decision to the Royal Court . . .
>
> (3) An appeal against a decision to give notice may not be instituted unless the Bailiff, on the application of the

appellant made within a period of 10 days immediately following the date of the notice, gives leave to appeal . . .

(5) An appeal from a decision of the Bailiff made under subsection (3) . . .

(b) must be instituted within a period of 7 days immediately following the date of the Bailiff's decision."

77 Thus, where the third party is unsure whether or not information should be provided, they must act quickly to ensure that a judicial review/appeal (as appropriate) is entered in the appropriate time frame. Absent such an application, failure to comply will potentially render the third party guilty of an offence, and liable to a fine.

78 Unfortunately, this may well leave third parties stuck between the proverbial rock and a hard place in terms that they may be guilty of an offence if they fail to provide information, but by providing it may potentially open themselves up to action by the taxpayer in question. Consequently, it is imperative that, upon receipt of an information notice a third party, acts timeously to obtain advice as to what information ought to be disclosed, and if necessary, challenge the request for such disclosure and commence a judicial review/lodge an appeal in the mandated timeframes.

7. TIEAs in the Channel Islands—Jersey: the view of the Royal Court in *Larsen*

79 As it is early days in the life of TIEAs, one might anticipate a paucity of jurisprudence and indeed that is the case in Guernsey where there is no case law on point. In Jersey, though, there have been three judgments on the TIEA Regulations in the two forms which preceded the November 2013 amendments (the "TIEA cases").[20] Consequently, specific reliance on and/or reference to the TIEA cases will necessarily be limited, at least to some extent. Nevertheless, arguably the leading judgment, *Volaw & Larsen v Comptroller of Income Tax*[21] provides some useful and, it is suggested, reliable guidance as to—

---

[20] The three decisions are *Larsen v Comptroller of Income Tax* [2013] JRC 075; *Larsen v Comptroller of Income Tax* [2013] JCA 239; and *APEF Management Company 5 Ltd v Comptroller of Income Tax* [2013] JRC 262.

[21] [2013] JRC 148C.

(a) the approach and policy of the Comptroller of Taxes towards requests made pursuant to the TIEA Regulations; and

(b) the approach and views of the Jersey judiciary to the TIEA Regulations and more importantly their interpretation / application.

Salient background to Larsen

80 This appeal was brought by Volaw and Mr Larsen ("the appellants") against a decision by the Comptroller to serve a notice to obtain information from a third party on Volaw pursuant to reg 3 of the TIEA Regulations.[22] As described above, reg 3 sets out the procedure for obtaining information if a request is received pursuant to a TIEA.

81 Mr Larsen is a Norwegian oil magnate and was at the time the subject of criminal proceedings in Norway in respect of the acquisition of unlawful gains. It is alleged that these gains were obtained by Mr Larsen acting fraudulently in breach of trust, as well as by tax evasion. Mr Larsen was faced with the prospect of both imprisonment, as well as a hefty fine. He was convicted of a number of criminal tax offences last year.

82 At the time the appeal was heard the court was persuaded to consider the matter afresh, acting as if it were standing in the shoes of the Comptroller, rather than simply reviewing the Comptroller's decision to show that he erred on certain limited grounds, such as his decision being "unreasonable" or "unlawful" (*i.e.* a judicial review type process). Following the recent amendment of the TIEA Regulations, this procedure is no longer available under the Regulations as now any party who wishes to challenge a decision of the Comptroller is required to do so by way of judicial review, significantly restricting the scope of any challenge as well as reducing the chances of making a successful challenge to a notice issued by the Comptroller.

83 The Comptroller, by way of notice, requested the production by Volaw of certain documents relevant to the tax affairs in Norway of Mr Larsen, who was Volaw's client. Thus it can be seen that requests under the TIEA Regulations are likely to impact upon trust companies and trustees. The request from the Norwegian government was made pursuant to a Tax Information Exchange Agreement between Jersey and Norway ("the Norwegian TIEA"), which came into force on 7 October

---

[22]See the TIEA Regulations, as amended by R&O 141.2013.

2010, and was largely based on the provisions of the model TIEA described above.

84 Prior to the entry into force of the Norwegian TIEA the Norwegian authorities had been limited to obtaining documents from the Attorney General, pursuant to the Investigation of Fraud (Jersey) Law 1991. Such provision was, as a matter of law, made subject to an undertaking given by the Norwegian authorities that the documents provided would only be used for the purpose of criminal proceedings. Thus it was necessary to access information under the TIEA Regulations for the purposes of the civil proceedings.

85 The request from Norway was substantial. The Norwegian tax authority had been investigating Mr Larsen and certain companies wholly or partially owned by him for a number of years. As part of this process, it was investigating transactions between Norwegian companies and offshore companies, and in particular Jersey registered companies.

86 The stated purpose for which information was sought was to stipulate tax on Mr Larsen's general income. However, as set out above, TIEAs only apply to specific taxes which are listed in the particular agreements themselves and specified in a Schedule to the TIEA Regulations. In the case of Norway, this included tax on general and personal income, VAT, withholding tax on dividends, as well as several other forms of taxation not recognised in Jersey.

87 The request stated that it was specifically in respect of a criminal tax matter and, in support, it was stated that Mr Larsen had been charged with tax evasion and fraudulent breach of trust.

88 There was some considerable delay between the request being received, action being taken by the Comptroller and the appeal to the Royal Court. There had been voluminous exchanges of correspondence between the Comptroller and Mr Larsen/Volaw on his behalf between the date of the request from Norway and the notice from the Comptroller being served. It is important to note that if a notice is received by a taxpayer or a third party, open and early dialogue with the Comptroller should take place in order to establish whether matters might be resolved at an early stage and court proceedings thereby avoided, which will be in the interests of all of the Comptroller, the taxpayer and any third parties that may be involved.

Issues for the Royal Court

89 As detailed above, the Royal Court had regard to the TIEA Regulations that were in force at the date of the Comptroller's decision on 28 May 2012. However, amended Regulations came into force on 1 January 2013 (and have since been re-amended) which *inter alia* altered the wording of reg 3 which, crucially, sets the threshold to which the Comptroller must be satisfied before he issues any notice to a third party service provider. The threshold of which the Comptroller must now satisfy himself prior to exercising his discretion is less onerous than the threshold found in the TIEA Regulations in force when the notice was served on the appellants.

90 Since the amendments in January 2013, the Comptroller has to be satisfied that it is "reasonable to respond to a request concerning a taxpayer" before issuing a notice whereas, previously, he had to be satisfied that certain key limbs of the following test were satisfied before exercising his discretion to issue a notice. In relation to a notice issued to a third party service provider, he previously had to be satisfied that—

(a) a taxpayer may have failed to comply, or may fail to comply, with a domestic law of a third country concerning tax; and

(b) any such failure by the taxpayer had led or was likely to lead to serious prejudice to the proper assessment or collection of tax.

91 Further, the Comptroller also had to be satisfied that—

(a) the document or record [held by the third party] contains or in the reasonable opinion of the Comptroller may contain tax information; and

(b) the tax information in question is foreseeably relevant to the administration and enforcement of the domestic laws of the requesting country.

92 Against this background there were in essence three key issues before the Royal Court—

(a) whether information predating the entry into force of the Norwegian TIEA on 7 October 2009 was caught by the Norwegian TIEA and could be obtained at all;

(b) whether there were reasonable grounds for believing that Mr Larsen may have failed to comply with Norwegian law as regards income tax (being one of the taxes covered by the Norwegian TIEA); and

(c) whether the request was in reality in respect of a criminal tax matter and, if so, the extent to which any information supplied by the Comptroller may be put.

Predating

93 Article 10 of the Norwegian TIEA provides that it applies to—

(a) "criminal tax matters" which are "tax matters involving intentional conduct whether before or after the entry into force of the Agreement, which is liable to prosecution under the criminal law of the requesting Party" on 7 October 2009; and

(b) all other tax matters on 7 October 2009, but only in respect of any tax year beginning on or after 1 January 2010.

94 The Comptroller's arguments found favour and the court concluded that it is entirely legitimate to require the production of documents that pre-date the entry into force of a TIEA, if such requirement relates to a criminal tax enquiry.

95 In arriving at its decision, the court referred to the English decision of *HMRC v Ben Nevis (Holdings) Ltd*[23] and drew a distinction between the legal effect of past acts or omissions being retroactively changed by the law (which would be objectionable) and simply basing new legal consequences on past acts (which would not be objectionable). The court ruled that liability to Norwegian tax or prosecution for a Norwegian criminal offence relating to tax remained exactly the same as before the enactment of the Norwegian TIEA

96 The court dismissed the appellant's argument that the TIEA does no more than recognise the power to obtain information pursuant to the Investigation of Fraud (Jersey) Law 1991, as this would produce an "absurd" result, namely that notwithstanding Jersey's inter-state commitment to Norway, Jersey's domestic legislation giving effect to that commitment would have the effect of reducing its ambit.

Reasonable grounds

97 The second argument advanced by the appellants sought to establish that there was no basis for the allegations made by the Norwegian Tax Authority's, namely that the information before the Comptroller and the court did not support the

---

[23] [2012] EWHC 1.

Norwegian Tax Authority's suspicions about the extent of Mr Larsen's interests and the relationships between the companies. In essence it was argued that there was nothing that could give rise to an income tax liability on the part of Mr Larsen pursuant to Norwegian law.

98 Volaw and Mr Larsen filed affidavits deposing certain core information about the entities involved, including the individuals with interests in those entities and argued that this disproved the evidence that had been provided by the Norwegian Tax Authority in support of its requests. The appellants sought to persuade the court that the Comptroller ought to have investigated such issues further and the fact that he did not meant that the thresholds prescribed by the TIEA Regulations at the relevant time were not satisfied.

99 The appellants further argued that the Comptroller failed to observe his duties with the requisite degree of rigour. The court said that while a request should of course be considered carefully by the Comptroller, it was not for him or the court to devise additional hurdles for the requesting party to clear. The court provided guidance as to what the Comptroller should take into account and/or consider when deciding whether to issue a notice, finding that—

(a) the Comptroller is bound to have regard to the totality of the information made available to him;

(b) there is no requirement for the information to be verified by affidavit or otherwise take any particular or prescribed form;

(c) for the purposes of deciding whether to act on a request the Comptroller is at liberty to ask the requesting state authorities for clarification or further information; but

(d) the Comptroller is under no obligation to do so.

100 The court also held that the Comptroller is not under any obligation to require the production of evidence to support the alleged facts forming the basis of the request, nor is he required to verify such facts. Where the Comptroller is faced with conflicting assertions as between the requesting authority (in this case the Norwegian tax authority) and those affected by the request (the appellants) it is not for the Comptroller to reach any conclusion on where the truth lies.

101 Finally, the court held that the Comptroller should not be expected to act as a final adjudicator but simply to decide, having regard to the material before him, whether there are "reasonable grounds for believing" the basis for the request.

This is, in the authors' view, correct and consistent with the normal approach on an administrative appeal.

102 The court pronounced itself satisfied that there were good grounds available to the Comptroller for believing that the Norwegian tax authority's suspicions were well-founded. Interestingly, the court had the benefit of two Norwegian tax experts but whilst acknowledging the potential benefit of such specialist assistance, the court acknowledged that such assistance was unusual and was careful to clarify that—

> "it is no part of the Comptroller's function when deciding whether to issue a Regulation 3 notice in response to a request under the TIEA . . . to resolve contentious issues of Norwegian tax law, or to reach definitive conclusions about whether the person the subject of the request is or is not liable to Norwegian tax."

Extent to which any provided information can be used

103 Any information disclosed pursuant to the Norwegian TIEA could only be used for the purposes outlined in art 1 of the Norwegian TIEA, which states as follows—

> "the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, recovery and enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation of tax matters or the criminal prosecution of tax matters in relation to such persons."

104 The court was asked by the appellants to consider whether, if the Norwegian Tax Authority stated that the request concerned their interest in a criminal tax matter, it was restricted to using the information for a criminal investigation or prosecution, or whether the information could be used for another, collateral purpose, such as a civil tax assessment. In other words, once the information had been obtained pursuant to the operation of the Norwegian TIEA (or otherwise) whether the Norwegian Tax Authority could use the information obtained for any other purpose. In essence, the argument focussed upon whether art 10 of the Norwegian TIEA, which enables the obtaining of information for "criminal tax matters" from an earlier date than it does for "civil tax matters" operated as a restriction on use by the Norwegian Tax Authority.

105 The court concluded, perhaps surprisingly, that information obtained in relation to one of the purposes set out in art 1 (*i.e.* information obtained for the purposes of a criminal investigation or prosecution) can be subsequently used for any of the other purposes in art 1 (*i.e.* civil tax assessment). It reasoned that to do otherwise would involve editing the wording of art 1.

106 The appellants argued that there was an element of bad faith on the part of the Norwegian Tax Authority and alleged that the true reason Norway wanted the information was to conduct a civil tax assessment of Mr Larsen and not for the purposes of his prosecution (which was well underway in Norway) for alleged criminal offences. The court failed to find any bad faith at work on the part of the Norwegian tax authority and said that "there would have to be compelling evidence before this Court before it would be justified in making such a finding". The appellants failed to provide any such compelling evidence.

Why Larsen is still relevant

107 There may be some question of the relevance of the Royal Court's decision in *Larsen* given that (a) it was appealed to the Court of Appeal; and (b) the legislation that *Larsen* considers has now been significantly amended. In relation to the former, the answer is simply that the Court of Appeal largely upheld the Royal Court on the main substantive issues, in large parts simply adopting the reasoning and decision of the Royal Court wholesale.

108 In relation to the latter point, it is necessary to consider the regulations that amended the procedure for appealing an information notice made by the Comptroller pursuant to a TIEA request. This was the Taxation (Exchange of Information with Third Countries) (Amendment No 7) (Jersey) Regulations 2013 ("the Amending Regulations")—

> "These Regulations may be cited as the Taxation (Exchange of Information with Third Countries) (Amendment No. 7) (Jersey) Regulations 2013 and shall come into force on the day after they are made."

109 Thus the commencement provisions leave open the question as to whether or not in all or any circumstances the change to the TIEA Regulations will cause there to be "offensive" retrospectivity if the judicial review process in the TIEA Regulations as amended by the Amending Regulations are applied to tax years, or requests, or documents created before the Amending Regulations came into force. Where

legislation applied retrospectively is found to be offensive, it will (usually) not be applied retrospectively by the courts.

Human rights

110 The decision of the Court of Appeal in *Larsen* supported that of the Royal Court, it did have to consider an issue not before the Royal Court, *viz.* the application of the European Convention on Human Rights.

111 It is first necessary to give the point some context. The Court of Appeal summarised the issue as follows—

> ". . . the fact that the Royal Court exercises an appellate jurisdiction does not of itself identify what *kind* of appeal has been provided for and, accordingly, the extent of the material to which it can have regard. At the end of the spectrum are appeals *stricto sensu* in which the question for consideration is whether the decision subject to appeal was right on the material which the decision-making body had before it. In such an appeal fresh evidence cannot be called. At the other end are appeals *de novo* in which there is a fresh hearing with the parties being able to call fresh evidence. *Quilter v Mapleson* 1882 9 QBD 672 at p676.
>
> We approach the issue of classification from this point of departure. The Comptroller will necessarily have before him a request from the Requesting state. He will need to consider whether it provides the reasonable grounds for a belief or opinion that the 2008 Regulations require. *Whether or not he had reasonable grounds for such a belief could be construed to restrict an appeal to the Royal Court to an assessment of whether the material that he had before him provided, objectively, reasonable grounds for his belief*. If for example he was unduly tolerant of an inadequately composed Request, on this footing, the Royal Court could set aside the notice.
>
> An appeal on this limited basis supplemented by any further appeal to this Court, would involve a procedure without undue complexity.
>
> There is nothing in the actual language of the 2008 Regulations inconsistent with such a construction: nor does the J/N TIEA insofar as relevant require its rejection since it does not oblige the Requested party to provide any safeguards: indeed the last sentence in Article 1 of the J/N TIEA suggests that the safeguards should not unduly hamper the exchange process.

> . . .
>
> Our presumptive conclusion is fortified by an appreciation of the legal context in which the 2008 Regulations were composed. There are in this jurisdiction rules of court governing the proceedings of the Royal Court, *Royal Court Rules* 2004, which must be taken to have been known to the maker of the Regulations. Within the general corpus there is a discrete category of rules for administrative appeals, which, while the phrase is not defined, would appear apt to embrace an appeal against the decision of an administrative officer such as the Comptroller . . ." (Emphasis added)

112 This highlights both the problems apparent from treating something other than a judicial review as an "administrative appeal" and the unusual nature of an appeal from the Comptroller's decision to the Royal Court. Human rights were raised in the following way—

> "The Appellant's most substantial argument for applying Rules 14–15[24] to the 2008 Regulation so as to allow for a full re-hearing with fresh evidence was based on the ECHR incorporated into the Bailiwick since December 2006 via the Human Rights (Jersey Law) 2000.

113 Article 6 of the ECHR provides, so far as material—

> "In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

114 In response to this the Court of Appeal held—

> "Article 6 does not, however, inevitably require an unrestricted appeal from the decisions of an administrative body based on findings of fact and the exercise of judgment. Indeed judicial review can in appropriate circumstances suffice. [*Lester, Pannick and Herberg: Human Rights Law and Practice*: 4.6.24. [p299]] *Fordham* 59.5.7, p.600.

---

[24]These rules, broadly, set out the limits of an administrative appeal with regards to evidence and other associated matters, and when such limits will be extended.

Article 8.1. provides for the right to respect for, *inter alia*, private and family life subject to the well-known limitations in Article 8.2 (materially) 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of . . . the economic well-being of the country, for the prevention of . . . crime . . .'

In B. Larsen Holdings v Norway [2013] ECHR 24117/08 a challenge to the acquisition by Norwegian tax authorities by seizure of a 'back up' tape of information and documents pertaining to the tax payer was based on Article 8. The challenge failed. Materially for present purposes the ECtHR said the relevant provisions of domestic law were subject to 'important limitations" and contained "adequate and effective safeguards.' [para 172]

In our view the 2008 Regulations do contain 'important limitations' by *defining, and so restricting, circumstances in which the Comptroller can respond to a request from a competent authority* (requiring notably not merely suspicion but reasonable belief) accompanied by 'adequate and effective safeguards' i.e. (quite apart from the obliged provision of fairness before the Comptroller) *a two stage appeal to judicial bodies*. Moreover if Article 6 does not directly require that an appeal should be by way of unrestricted oral hearing, Article 8 cannot be construed indirectly to do so.

We note too the distinction drawn by the ECtHR in B.L. Holdings Ltd between a 'search and seizure' case and a demand by a public authority for information [para 173], and its appreciation of 'the public interest ensuring efficiency in the inspection of information provided by the Applicant company for tax assessment purposes.'" (Emphasis added)

115 Since the key legislation considered by the Court of Appeal has been amended, it remains to be seen whether or not the right to a fair trial (or indeed the right to private and family life) might be breached by the new procedure and if so under what circumstances.[25]

---

[25] The point does not appear to have been argued in *Taylor Fladgate & Yeatman Ltd v Comptroller for Taxes* 2014 JRC 064

Conclusions

116 In many ways the recent case law in Jersey still leaves open many questions about the manner in which TIEAs will be observed and enforced through the Jersey courts. This is partly due to the recent changes to the legislation which mean that *Larsen* may be considered to be confined to its own facts.

117 For this reason, if no other, the commentary to the OECD will still be a valuable tool in interpreting and responding to information requests in the future. There are, however, as we have suggested, still a number of areas of uncertainty in relation to TIEAs, and their application in Jersey through the TIEA Regulations. While it seems likely that further case law will emerge, in the meantime those subject to information notices, especially third party information notices will need to exercise great caution in "walking the tightrope" between the Comptroller and their duties towards their clients.

Advocate Ian Jones is a Jersey advocate and Senior Associate at Carey Olsen. Advocate Harriet Brown is a Jersey advocate and English barrister. She practises out of Tax Chambers 15 Old Square.