

UPDATE

Guernsey Court of Appeal considers TIEA notice for the first time

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A recent decision of the Court of Appeal has provided helpful guidance on the ability to challenge a decision of the Director of Income Tax (the Director) to issue a notice in response to a TIEA request, as well as the manner in which the Director should act when considering such a request.

The proceedings

Mourant Ozannes was instructed by a taxpayer who became aware that the Director had issued a notice to a local institution requiring that it produce documents concerning entities said to be connected to the taxpayer. The notice was issued by the Director in response to a TIEA request from a foreign country. The Income Tax (Guernsey) Law, 1975 provided that the recipient of the notice (the **Institution**) could appeal the decision to issue the notice. However, it did not provide a right for any other person (such as the taxpayer) to challenge the notice, or even require that the Director provide the taxpayer with a copy of the notice.

The taxpayer wrote to the Director and the Institution to explain why the decision to issue the notice was unlawful. Notwithstanding, the Director declined to withdraw the notice. The Institution was unwilling to exercise its right of appeal and intended to comply with the notice. Left with no other option, the taxpayer decided to judicially review the decision of the Director to issue the notice.

The taxpayer was unsuccessful at first instance in obtaining permission to bring judicial review proceedings. The Judge upheld the arguments of the Director that his decision to issue the notice was not justiciable, and that the taxpayer had an alternative remedy in that he could challenge in the foreign jurisdiction the use of the documents obtained via the notice.

In the view of the Judge those were both 'knockout' blows.

The taxpayer appealed the first instance decision and also obtained an urgent injunction preventing transmission of the documents provided in response to the notice pending that appeal.

In allowing the taxpayer's appeal, the Court of Appeal conclusively rejected both of the Director's arguments. In relation to justiciability, the Court held: 'To acquiesce in the Respondent's approach would be to accept that the Royal Court either has no jurisdiction to consider, or should not consider, the rights of those affected by insular legislation concerning a TIEA. We think that cannot be right ...' The Court also rejected the argument that the creation of the statutory appeal right for recipients excluded the availability of judicial review. In doing so the Court noted the reality that whereas the recipient (such as the Institution) would likely only have an indirect interest in challenging a notice, a taxpayer or account holder (who may not be the same) would have a direct interest in ensuring that the power to issue the notice was exercised in accordance with the law. As to alternative remedy, the Court accepted the taxpayer's arguments that the foreign courts could not be expected to consider the lawfulness of the decision of the Director to issue the notice, which must be a matter for the Guernsey courts. The Director was ordered to pay the taxpayer's costs of the appeal, and the substantive review was remitted to the Royal Court for an early hearing.

The Court's decision confirms that the availability of judicial review exists in relation to a decision by the Director to issue a notice in response to a TIEA request. That right would lie, not only to a taxpayer, but also an account holder, or conceivably any other party who was able to demonstrate a sufficient interest.

The role of the Director

In reaching its conclusions, the Court considered the role played by the Director. The exercise of the power to issue a notice requires the Director to be satisfied that the underlying request is in accordance with the TIEA provisions. The Court rejected arguments that the Director could, in effect, self-certify that the request was valid, thereby removing any right of challenge. The Court held that whilst the Director must be satisfied that the request is in accordance with the TIEA, he is not required to make exhaustive investigations of foreign law to reach that conclusion. As the Court noted: 'He is entitled to proceed on the assumption that the requesting state is acting lawfully, at least until material is put before him that this might not be the case, at which time he should make such enquiries as would be reasonable to satisfy himself that the request is a proper one to which effect should be given.' The Court also confirmed that the Director must act rationally in exercising his powers, though that does not mean that he must critically examine the letter of request.

Disclosure of documents

The taxpayer had, prior to the hearing of the appeal, intimated that he would bring an application for disclosure of the request and associated correspondence. Though the Court was not called upon to consider that application, it did recognise the need to balance the competing European Convention rights of the taxpayer against the proper response to a request from a treaty partner. It also gave some limited guidance as to how an application might be considered in saying that 'there should be at least some plausible ground advanced on which it can be said that the Appellant needs to see the request to make the representations which are to be properly advanced on judicial review.' Presumably if an applicant could identify such a ground then disclosure of the request and accompanying documentation may conceivably be ordered.

Implications for recipients

Whilst there is no statutory obligation for the recipient of a notice to notify the taxpayer concerned, a recipient should now in light of this decision, consider carefully whether to inform the taxpayer (unless there is a prohibition imposed on doing so). In most cases a recipient will owe the taxpayer duties of confidentiality as they will be a current or former client. A recipient should carefully consider those duties when making its decision whether to inform the taxpayer that it has received a notice. If it does not inform the taxpayer and simply complies with the notice, it does so at the risk of being criticised for complying with a potentially invalid notice. It also begs the question how a recipient could fully and properly form a view as to whether a notice is valid, without engaging with the taxpayer whose affairs are said to be under investigation.

If a recipient decides to inform the taxpayer, it should do so promptly. A recipient's statutory right of appeal must be issued within 30 days from the date of a notice. Whilst there is no legislative time frame for seeking judicial review, it is likely the court would expect a judicial review to be issued within a similar period. Moreover, the value of any relief obtained is likely to be much less if the notice has already been complied with and the documents transmitted to the home jurisdiction.

The good news for recipients is that, if they engage constructively with the taxpayer, they should be able to shift the burden to bring any challenge back on to the taxpayer, where it will often more comfortably sit.

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[Document Reference]