

The taxman cometh: International co-operation in tax affairs

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Introduction

In recent years considerable pressure has been applied to offshore jurisdictions by onshore governments to be more transparent about any relevant assets that may be held by onshore residents in offshore jurisdictions. Such pressure (or more accurately, a refusal to bow to that pressure) has led to some offshore jurisdictions being placed on certain 'blacklists'. In response to this pressure, many countries entered into formal written commitments to the Organisation for Economic Co-operation and Development's (OECD) principles of transparency and exchange of information and have subsequently actively participated in the OECD Global Forum on Taxation. The BVI itself entered into such a commitment on 2 April 2002. As a consequence, many countries have entered into Tax Information Exchange Agreements (TIEAs). TIEAs provide for the exchange of information on request from one government to another relating to specific criminal or civil tax investigations or civil matters under investigation and are designed to promote harmonization between countries in tax matters. TIEAs comply with the principles set out in the OECD Model Tax Convention. However, such information will only be exchanged if the request is properly made and is in line with the terms of the relevant TIEA. The conditions of each TIEA can be tailored and certain categories of data of information can be restricted. It is, therefore, vital that the exact terms of each TIEA are examined, although it remains the case that the scope of information that can be obtained under each TIEA and the relevant procedure are broadly the same. These are discussed below.

The BVI and TIEAs

The BVI has to date entered into over 25 TIEAs with foreign governments. These include: Poland; Japan; Canada; The Netherlands; The Czech Republic; Sweden; India; the USA; the UK; Australia; Denmark; Finland; The Faroes; Greenland; Iceland; Norway; New Zealand; Netherlands Antilles; Aruba; China; Ireland; France; Germany; and Portugal.

In the BVI, each TIEA is brought into effect in accordance with the provisions of the Mutual Legal Assistance (Tax Matters) Act, 2003 (**Act**). Under the Act, requests made in pursuance of a TIEA can only be made once that TIEA has come into force and cannot be made retrospectively. There are strict criteria that have to be met in order for any request to be made under a TIEA. These criteria ensure that there are no 'fishing expeditions' being carried out by a foreign government. Information is not simply handed over once a request has been made. Further, in addition to the actual TIEA, the BVI has, in some cases, negotiated a Memorandum of Understanding, which explicitly states that countries will not engage in fishing expeditions, or request information which has little or nothing to do with the tax affairs of a taxpayer of the requesting country. Information requested must be relevant to:

- the administration and enforcement of the domestic laws of the relevant parties concerning the taxes covered by the TIEA; and
- the determination, assessment, enforcement or collection of tax or to the investigation of tax matters or prosecution of criminal tax matters.

Each request is sent to the competent authorities of the respective countries. In the BVI, the relevant authority is the BVI International Tax Authority (under the auspices of the Ministry of Finance) (**BVI ITA**).

The competent authority of the requesting party must provide the following information to the BVI ITA:

- the identity of the person under examination or investigation;
- the period for which the information is requested;
- the nature and type of the information requested, including a description of the specific evidence sought and the form in which the requesting party would prefer to receive the information;
- the tax purposes for which the information is sought and the reasons why the information requested is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting party;
- the grounds for believing that the information requested is present in the territory of the requested party, or is in the possession or control of a person subject to the jurisdiction of the requested party;
- to the extent known, the name and address of any person believed to be in possession or control of the information requested;
- a declaration that the request is in conformity with the relevant TIEA and the laws and administrative practices of the requesting party, and that if the requested information was within the jurisdiction of the requesting party, the competent authority of the requesting party would be able to obtain the information under the laws of the requesting party, or in the normal course of administrative practice; and
- a statement that the requesting party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

Declining a Request

Once the BVI ITA receives a request under a TIEA it can decline to assist:

- where the request is not made in conformity with the relevant TIEA;
- where the requesting party has not pursued all means available to it in its own territory; or
- where the disclosure of the information requested would be contrary to public policy.

The provisions of a TIEA will also normally exclude any information that may disclose any trade, business, industrial, commercial or professional secret or trade process.

'Fishing expeditions' are not permitted. This usually occurs where a foreign government cannot provide any reasonable basis for believing that the person subject to any tax investigation will have any useful information to assist with that investigation.

Requesting an individual to comply and limitations on scope of information permitted to be requested

Once the BVI ITA has determined that a request does comply with the terms of the TIEA, it will issue a Notice to Produce Documents (**Notice**) under the Act to the individual concerned. However, such a Notice may only be issued if the information requested is:

- information held by a bank or other financial institution, or any person acting in an agency or fiduciary capacity, including a nominee or trustee; or
- information regarding the beneficial ownership of a company, partnership or other person (section 5(1)(b) of the Act).

Therefore, in essence, the amount of information that an individual can be compelled to disclose is relatively limited.

If the individual does not produce the information within the time frame specified, an application may be made to a Magistrate for a search warrant to comply with the request. Further, it is an offence not to comply with a notice to produce the relevant information and such an individual may be liable on summary conviction to a fine not exceeding US\$5000, or imprisonment not exceeding two years, or both.

Confidentiality

All details of a Notice must be kept confidential. This includes details of the requesting foreign government, any reason that may be given as to why the request has been made, the nature of the information requested and all subsequent correspondence. A result of the confidentiality requirements means that any application to court that may be made should be sealed as a precautionary measure.

What recourse do individuals served with Notices have?

The individual concerned will not be consulted before a decision is made by the BVI ITA as to whether or not the request from a foreign government complies with the relevant TIEA. By the time the Notice is served on the individual, the BVI ITA will have decided that the request does comply with the relevant provisions of the TIEA. Therefore, a recipient of a Notice can either comply with it or apply to have the decision to issue the Notice judicially reviewed. However, judicial review is not as of right; leave to commence any such proceedings is first required. Under the Public Authorities Act – CAP 62, section 2(a), any action for judicial review must be made within six months of the issuing of the Notice. This limitation period is met provided that the application for leave is made within the period – ie it is not necessary for the substantive application for judicial review to have been made.

Conclusion

The amount of TIEAs that the BVI has formally entered into continues to grow. It naturally follows that foreign governments will utilize such agreements to correctly assess tax due from those of its residents that may hold assets in the BVI and to aid in investigating those individuals' tax affairs. It is important to remember that an individual or company served with a Notice may be able to challenge the validity of such a Notice if it can be shown that the correct procedure under the relevant TIEA has not been followed, or the type of information being requested falls outside the scope of the TIEA and the Act.

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