

1. M.H. Investments, 2. J.H. Investments v the Cayman Islands Tax Information Authority - Cause No. G391/2012

September 2013

In a notable and detailed decision of the Grand Court of the Cayman Islands dated 13 September 2013, Hon. Justice Quin issued an order for Certiorari quashing the decisions of the Cayman Islands Tax Information Authority ("CITIA") to provide information to the Australian Tax Office ("ATO") pursuant to four requests ostensibly made under the Tax Information Exchange Agreement between the Government of Australia and the Government of the Cayman Islands ("TIEA"). This TIEA follows the model OECD form now entered into between the Cayman Islands and thirty one jurisdictions.

The remedies granted by the Court included a direction that CITIA should forthwith write to the ATO (a) formally revoking its consent to the divulging of the Applicants' documents in tax court proceedings in Australia, (b) seeking the ATO's undertaking that it would not divulge the Applicants' documents in such proceedings in Australia, and (c) demanding the immediate return and destruction of copies of the Applicants' documents as the same had been unlawfully provided by CITIA. Without the benefit of an enabling provision under the TIEA, the provisions of the Confidential Relationships (Preservation) Law continued to apply to protect the information from improper disclosure.

Of particular interest in the finding was the Court's determination, following *Axis International Ltd v The Civil Aviation Authority of the Cayman Islands and Cayman Islands Helicopters Limited* (CN56/2012), that the Cayman Islands Bill of Rights which came into force on 6 November 2012 must lead the Court to apply "a more anxious level of scrutiny and standard of review, just as the Human Rights Act influenced the approach adopted by the courts in England and Wales". Article 7 of the Cayman Islands Bill of Rights states:

"Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time."

Further, Article 9 states:

- "(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.*
- (2) Except with his or her own consent or as permitted under subsection (3), no person shall be subjected to the search of his or her person or his or her property or the entry of persons on his or her premises.*
- (3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any other property in such a manner as to promote the public benefit."*

In quashing the decisions of CITIA in relation to the four requests of the ATO, the Court determined that the first and second request of the ATO to provide a "real time review" of the Australian tax payers "over a number of years to the present" for the Australian financial year ending 30 June 2011 were inconsistent with Section 3 of the TIEA law. Section 3 states in clear terms that no information could be provided under the TIEA in relation to any taxation matter that arose prior to 1 July 2010. The inconsistency was such that, given the heightened standard of enquiry required by the Bill of Rights, CITIA should have asked whether there existed a definition under Australian tax legislation of the meaning of "real time review". In fact, no such definition existed and in any event, the TIEA could only apply to information required in connection with the Applicants' tax liabilities following 30 June 2011. Secondly, CITIA should have understood or enquired and ascertained that proceedings were extant in Australia in which event Section 8(4)(a) of the TIEA required CITIA to make application to the Court prior to disclosure of any information. The Court found that Articles 7 and 9 of the Bill of Rights establishing the rights to a fair and public hearing and to privacy were therefore breached.

The third request of the ATO sought the consent of CITIA to disclose the information obtained to the United Kingdom Tax Authority, HMRC. This request was more simply dealt with by the Court on the ground of Section 21(2) of the TIEA which stated in clear terms *“Before the Authority gives consent in relation to testimony provided or an order issued under Section 8, the Authority shall apply to a Judge for directions”*. CITIA had simply failed to make the appropriate applications to the Court for directions under Section 21 of the TIEA and the Court found that the Applicants’ rights under Articles 7 and 9 of the Bill of Rights were again infringed.

The fourth request of the ATO had sought consent *“notwithstanding the terms of the treaty”* to disclose the information obtained pursuant to the TIEA in current court proceedings in Australia in respect of taxable periods prior to entry into force of the TIEA. Somewhat surprisingly, CITIA indicated that it had *“no objection to the disclosure of the information to the Australian courts for the purposes identified”*. The Court found CITIA had acted in clear breach of its authority under the TIEA in providing the Applicants’ information without first applying to the Court for directions as required.

Further, CITIA had not assisted itself by failing to serve the required notice of the ATO requests upon the Applicants in good time as required by Section 17 of the TIEA. This would have enabled a preventative application to the Court by the Applicants and prior to any disclosure by CITIA of the confidential information to the ATO.

In applying the heightened level of scrutiny with regard to rights to matters of confidentiality established by the Bill of Rights, this case gives a clear indication that CITIA is under a duty to make all due enquiry in relation to requests made pursuant to the TIEA to enable it properly to discharge its obligations and that compliance with the TIEA will be construed strictly. Absent strict compliance by CITIA with the terms of the TIEA and after all due and proper enquiries by the CITIA, information will continue to be protected by the provisions of the Confidential Relationships (Preservation) Law.

Anthony Travers

Senior Partner

Travers Thorp Alberga

Tel: +1 345 949 0699

Fax: +1 345 949 8171

atravers@traversthorpalberga.com

www.traversthorpalberga.com

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