

First appeal against a decision of the Jersey Comptroller for Taxes under the TIEA Regulations

Insights - 30/08/2013

First appeal against a decision of the Jersey Comptroller for Taxes under the TIEA Regulations

The case of *Volaw Trust & Corporate Services Limited and Larsen v Comptroller of Taxes [2013] JRC 095* is the first where the Royal Court of Jersey (the **Court**) has had to consider an appeal against a decision of the Jersey Comptroller for Taxes (the **Comptroller**) to serve a notice on a third party pursuant to the Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008 (the **Regulations**) following a request for information from a third country with whom Jersey has entered into a tax information exchange agreement.

Facts

In the case, the first appellant and third party was Volaw Trust & Corporate Services Limited (**Volaw**), the second appellant and person to whom the request for information related to was a Mr Larsen, and the third country with whom Jersey had entered into the Tax Information Exchange Agreement with (the **TIEA**) was Norway. The TIEA had come into force on the 7 October 2009 and the request for information relating to Mr Larsen's tax affairs was made on 26 February 2010 (the **Request**) by the Norwegian Tax Authority (the **Tax Authority**) (the competent authority for the purposes of the TIEA). The notice served on Volaw by the Comptroller was dated 28 May 2012 (the **Notice**).

The Tax Authority had been monitoring the income of Mr Larsen and the companies registered in Norway that were wholly or partially owned by him for some time and had grounds for suspecting that, inter alia, Mr Larsen had submitted incorrect information concerning his direct or indirect ownership of certain foreign companies. The Request concerned certain information on four companies for whom Volaw acted and related to the period covered by the tax years from 1 January 1996 to 31 December 2008. The Request specifically stated that it concerned "criminal tax

matters."

The appellants appealed on several grounds, the principal grounds being that:

(i) there was no power under the Regulations to require the production of information that pre-dates the entry into force of the TIEA (as the Notice did);

(ii) the threshold condition for the application of Regulation 3 was not satisfied because there were no "reasonable grounds", as required by paragraph 1 of that regulation, for believing that Mr Larsen may have failed to comply with the domestic law of Norway concerning income tax and that such failure had led or was likely to lead to serious prejudice to the proper assessment of tax; and

(iii) where disclosure was sought in relation to a "criminal tax matter" there was no power to require the production of information other than for the purposes of a criminal investigation/prosecution, whereas the true purpose of the Request was to enable the Tax Authority to make a civil assessment of Mr. Larsen's tax liability.

Production of information that pre-dates the entry into force of the TIEA

Article 10 of the TIEA provided that the TIEA:-

"shall have effect

(a) for all criminal tax matters on that date; and

(b) for all other matters covered in Article 1 on that date, but only in respect of any tax year beginning on or after the first day of January of the year next following that in which the Agreement enters into force or, where there is no tax year, all charges to tax arising on or after that date."

"Criminal tax matters" are defined in Article 3(1)(f) of the TIEA as *"tax matters involving intentional conduct whether before or after the entry into force of this Agreement, which is liable to prosecution under the criminal law of the requesting Party."*

The Court held that the wording of Article 10 of the TIEA was clear that in relation to "criminal tax matters" there was not any temporal limitation as to the tax year in respect of which information can be required to be produced. As the request by the Tax Authority concerned "criminal tax matters", information could be sought in relation to matters pre-dating the TIEA.

Whether there were "reasonable grounds for believing" that Mr Larsen may have failed to comply with the Norwegian law as regards income tax

Regulation 3(1) of the Regulations, which relates to the exercise of the Comptroller's powers in relation to a third party, provides that Regulation 3 applies:-

"if the Comptroller has reasonable grounds for believing (a) that a taxpayer may have failed to comply, or may fail to comply, with a domestic law of a third country concerning tax; and (b) that any such failure has led, or is likely to seriously prejudice the proper assessment or collection of tax."

If the criteria set out in Regulation 3(1) are satisfied, one must then consider Regulation 3(2) to determine the nature of the information that can be required:-

"If this Regulation [Regulation 3 as a whole] applies, the Comptroller may require any person other than the taxpayer to provide to the Comptroller a document or record in the person's possession that contains or in the reasonable opinion of the Comptroller may contain tax information that is relevant to: (a) a liability to tax to which the taxpayer is subject or may be subject; (b) the amount of any such liability; or (c) the taxpayer's residential status for the purposes of these 2008 Regulations."

On the facts, the Court held that there were reasonable grounds for the belief that Mr Larsen may have failed to comply with the domestic law of Norway concerning income tax and that such failure led or was likely to lead to serious prejudice to the proper assessment of tax. In coming to such a conclusion, the Court stated that the following principles are applicable when determining whether the Regulation 3(1) threshold has been met:

- (i) the Comptroller is entitled to have regard to the totality of the information made available to him and its sources or lack of sources;
- (ii) there is no requirement that such information must be verified by affidavit or take any particular form;
- (iii) the Comptroller is at liberty to ask the requesting authority for further information but is under no obligation to do so; and
- (iv) it is not for the Comptroller to reach any final conclusion as to whether the taxpayer has failed to comply with the laws of the country of the requesting authority, but to decide whether there are "reasonable grounds for believing" the two matters prescribed by the first paragraph of Regulation 3 and whether he can say in his "reasonable opinion" that the documents of which production is sought may contain information relevant to one or more of the matters listed in the second paragraph of that regulation.

"Criminal tax matter" and use to which information supplied may be put

Article 1 (Scope of the Agreement) of the TIEA provided that:-

"The Parties shall provide assistance through exchange of information that is foreseeably relevant to 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 such persons subject to such taxes, or to the investigation of tax matters or the criminal prosecution of tax matters in relation to such persons."

Article 4 (Exchange of Information upon Request) opens with the words:-

"The competent authority of the requested Party [Jersey] shall provide upon request by the requesting party [Norway] information for the purposes referred to in Article 1."

One of the key issues on this ground of appeal was whether Article 10 of the TIEA (recited above), which allows for information on "criminal tax matters" to be obtained from an earlier date than civil tax matters, operates as a restriction on use by the requesting party.

The Court held that there was nothing in the TIEA to the effect that, if information is obtained in relation to one or more of the purposes set out in Article 1, it cannot be used for any of the other purposes set out in Article 1, and therefore information requested in relation to a "criminal tax matter" could be used for any other of the purposes set out in Article 1 (which included a civil tax assessment).

Comment

The case is important as it sets out the principles which the Comptroller should adhere to when determining whether he or she has "reasonable grounds for believing" that a taxpayer may have failed to comply with the domestic tax laws of a third country and in doing so made clear that it is not the role of the Comptroller to resolve contentious issues of foreign tax law or come to definitive conclusions.

However, the Court also stated that any request for information should be carefully considered by the Comptroller and that the procedure was not to be used as a vehicle for a "fishing expedition" by the requesting party.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The

information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



[Edward Mackereth](#)

Global Managing Partner

[Jersey](#)

E: edward.mackereth@ogier.com

T: [+44 1534 514320](tel:+441534514320)

Key Contacts



[Nick Williams](#)

Partner

[Jersey](#)

E: nick.williams@ogier.com

T: [+44 1534 514318](tel:+441534514318)



James Campbell

Partner

Jersey

E: james.campbell@ogier.com

T: +44 1534 514230



Josephine Howe

Partner

Jersey

E: josephine.howe@ogier.com

T: +44 1534 514201

Related Services

Private Wealth

Dispute Resolution

Tax

Related Sectors

Trusts Advisory Group