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UPDATE

TIEA notices – where next?

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Following the Royal Court's decision in *Larsen & Volaw v Comptroller of Taxes* [2015] JRC 244, Justin Harvey-Hills and Mathew Cook, Jersey's leading experts in this field and counsel in the case, examine the merits and implications of the Royal Court's dismissal of the first full judicial review application of a TIEA notice issued under the amended Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008. They also explain why this case is headed for appeal.

On 27 November 2015, the Royal Court dismissed the first full application for judicial review of the issuance of nine TIEA notices under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 as amended in November 2013 (the **Regulations**) and of the validity of the Regulations themselves. In our view, there are some concerning aspects of the judgment and the notices should have been set aside and parts, at least, of the Regulations should have been quashed. The matter is now going on appeal to the Court of Appeal and to the Privy Council.

Following the threat by France to 'blacklist' Jersey in the autumn of 2013, the Regulations were amended with the aim of severely curtailing the right to challenge a notice. The principal changes were that the Comptroller was no longer required to act reasonably, the right to have reasons for the decision was removed, the mode of challenge was narrowed to judicial review from a full appeal, the time for appealing was restricted to 14 days and the Regulations purported to oust the jurisdiction of the Court of Appeal and require that any appeal from a decision of the Royal Court should be made to the Judicial Committee of the Privy Council.

In these cases, the Comptroller issued notices requiring the disclosure of wide-ranging information, without giving the affected parties any opportunity to make representations and without giving them any reasons for his decision. Furthermore, the Royal Court had held in an earlier decision in the proceedings ([2015] JRC 104) that there was no right for the applicants to have sight of the letters of request from the Norwegian Tax Authority.

In *Larsen & Volaw v Comptroller of Taxes* [2013] (2) JLR 499 (**Larsen 1**), the Court of Appeal said that it was a matter of 'elementary fairness' that a potential recipient of a notice should have the opportunity to make representations prior to the issuance of any notice. The Royal Court is bound by a dictum of the Court of Appeal. It distinguished that dictum and held that the Comptroller could invite representations but was not bound to do so. The basis was that the Comptroller had conceded the point in *Larsen 1* and that the legislation had changed. This is puzzling as in Larsen 1 the Court of Appeal's dictum appears to have been a statement of general principle. The requirement was not expressly stated in the Regulations as then enacted either. The Court of Appeal read the requirement into legislation that was far more generous in order to make that procedure fair. It is therefore difficult to see how legislation that is less generous can meet the requirement of procedural fairness without incorporating the ability to make representations. Indeed, as things stand currently, any judicial review is difficult as it requires the applicant 'to take blind shots against a hidden target' (Lord Bingham in *R (Roberts) v Parole Board* (2005)). In effect, the applicant has to guess why the foreign revenue authority might have made the request and show that there is no prospect at all of it having any liability to tax in the requesting state.

The Royal Court found that the removal of the requirement to give reasons or to allow representations and the substitution of judicial review for the right of appeal did not give rise to any procedural unfairness. Again, this is difficult to understand. Judicial review is a much narrower remedy than an appeal as it is simply a review of whether the decision of the public official was legal, procedurally fair and not unreasonable. An assessment of whether judicial review is a satisfactory remedy depends on an assessment of the procedure as a whole and, in particular, of the procedural safeguards that exist. The difficulty here is that there are virtually no procedural protections. The Royal Court did not seem to think that this amounted to a breach of Articles 6 or 8 of the European Convention on Human Rights (the Convention) but, in our view, the inevitable consequence is that the procedure is conspicuously unfair.

As the Comptroller had in the course of the proceedings disclosed the letters of request (but only to avoid an interlocutory appeal), the Royal Court went on to consider whether, if there had been a right to make representations, the representations that the applicants could have made would have made any difference. The Royal Court found that the Comptroller could have made the finding he did, notwithstanding the representations. In our view, the correct test (*R (Cotton) v Chief Constable of Thames Valley Police* (1990)) was whether the Comptroller would inevitably have reached the same decision. By applying the test that it did, the Royal Court arguably exceeded its jurisdiction in turning itself into the decision-maker rather than the reviewer of the decision made by the Comptroller.

Two aspects of this part of the Royal Court's decision are concerning. First, the Comptroller had based his decision to issue notices in respect of two Jersey trusts on a finding made by the Norwegian court that both trusts were shams, notwithstanding that the Norwegian court had not applied Jersey law of sham. Despite its clear relevance, the Royal Court sidestepped Article 9 of the Trusts (Jersey) Law 1984 on the tenuous ground that the Comptroller had not been 'giving effect' to the Norwegian judgment but rather to the request of the Norwegian Tax Authority (which relied wholesale on the judgment).

Secondly, notices were issued to Jersey companies on the basis that the Norwegian court had found that certain Jersey companies (with Jersey resident boards) were Norwegian tax resident. The Norwegian court had applied Norwegian company law and held that, where the board did not have specialist expertise in the company's business activity and consequently relied on its shareholders who did have this expertise, the board was a mere cypher and the decision makers were the shareholders. Thus, the companies were tax resident in Norway. Jersey law applies the OECD standard which is that a company is tax resident where the board meets save where the board has been bypassed or usurped. Notwithstanding this, the Royal Court found that the Norwegian court had not considered the matter in a way that was inconsistent with Jersey law. In our view, this is surprising. This was a criminal tax matter, which required suspicion of intentional conduct on the part of the directors. It is difficult to see how there could be a reasonable basis for suspicion when under Jersey law the companies were clearly tax resident in Jersey.

The Royal Court also considered whether the primary legislation, the Taxation (Implementation) (Jersey) Law 2004, gave the power to make the Regulations (delegated legislation). Notwithstanding that the wording of the 2004 Law was in general terms, the Regulations clearly sought to override fundamental rights. While the legislature can authorise this through primary legislation, it can only do so by using clear and express language. This is known as the principle of legality. It is a democratic principle which requires the legislature to confront squarely the political cost of what it is doing. The Royal Court found that the principle applied in Jersey but that the fact that the Regulations had been passed by the States satisfied the principle of legality. However, the principle of legality is a principle of construction of the primary legislation. It is difficult to see how the procedure used to pass the delegated legislation can affect the construction of the primary legislation and therefore whether there was power to pass the delegated legislation at all.

Regulation 14 purports to limit the time for judicial review applications to 14 days from the date of issuance of the notice (the usual time for judicial review being three months). Regulation 14A purports to oust the jurisdiction of the Court of Appeal and restrict any appeal from the Royal Court to the Privy Council. One of the difficulties is that they apply to the recipient of the notice and the taxpayer but not to any affected third party. This is of particular relevance to Jersey service providers since the notice is usually provided to the service provider rather than to any company they administer. Discriminatory provisions would normally amount to a breach of Article 14 of the Convention. The Royal Court circumvented this by finding that Regulations 14 and 14A should be construed as applying to third parties as well, notwithstanding that there was no evidence to suggest that the legislature had ever turned its mind to the question. In our view, the Royal Court crossed the boundary into legislating itself.

And so, where next? The short answer is the appeal court. But to which one? The answer is to both the Court of Appeal and to the Privy Council. The Court of Appeal should have jurisdiction to determine its own jurisdiction to determine an appeal. It also should have jurisdiction to determine the legality of the Regulations. The Court of Appeal may also have jurisdiction to determine the entire case. In practice, the Privy Council is likely to allow the Court of Appeal to determine these matters before it considers the matter. However, it will also have to consider the Regulations' attempts to interfere with the Privy Council's appeals procedure which the Royal Court upheld. This conclusion gives rise to difficulty, given that the Privy Council's procedures are set out in UK legislation which there is no power to amend.

A number of important legal issues have arisen in these judicial review proceedings and the proceedings are far from over. Next stop the Court of Appeal and, depending on what happens there, the Privy Council.

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