

New Zealand – Courts consider challenge to information requests issued at request of foreign tax authority

1. In a number of recent decisions, the New Zealand courts have considered a challenge to the validity of requests for information made by the New Zealand Inland Revenue at the request of Korea's National Tax Service ("Korea"). The background to these decisions was that Korea had sought certain information from New Zealand pursuant to Article 25 of the New Zealand-Korea double tax agreement. The information sought related to some 21 companies under investigation by Korea. The New Zealand Inland Revenue consequently issued notices to Chatfield & Co, a tax agent for the companies, requiring that Chatfield provide information about the companies to Inland Revenue, so that it may be passed on to Korea.
2. Chatfield challenged, by way of an application for judicial review, Inland Revenue's decision to issue the information request notices. Initially, Chatfield advanced several grounds of challenge. These included that Inland Revenue had not adequately considered:
 - a. its published guidance regarding requests for information (which stated that Inland Revenue would generally not seek information about taxpayers from a tax agent without first seeking the information directly from the taxpayer);
 - b. the limitations on the role of and information held by a tax agent;
 - c. the terms of Article 25 of the double tax agreement.
3. Inland Revenue successfully applied to strike out all but one of the taxpayer's grounds for review. The one ground not struck out was that Inland Revenue failed to take into account Article 25 of the double tax agreement. This ground for review has given rise to separate decisions of the courts regarding discovery.
4. Chatfield sought discovery of documents exchanged between Korea and New Zealand, which Chatfield said might reveal the reasons for Korea's request, Inland Revenue's decision to issue the information requests, and processes followed. The Court at first instance rejected the request, ultimately because it found that the confidentiality of communications passing between the two countries outweighed the desirability of placing before the Court evidence relevant to Chatfield's application for review.
5. The Court of Appeal upheld this decision (that the documents were not to be discovered) although for different reasons. The Court of Appeal appears to have concluded that the allegation Chatfield relied on to support its request for discovery (that Inland Revenue had

failed to consider the double tax agreement, and in particular, Article 25) was incorrect on its face. The Court found that Inland Revenue must have considered Article 25 as it was the basis for issuing the information requests to Chatfield. Given the lack of further particulars supplied by Chatfield, the Court decided that the request for discovery amounted to "fishing" rather than having the level of specificity required of an application for discovery in the context of a judicial review proceeding.

6. The Supreme Court has dismissed the taxpayer's application for leave to appeal the Court of Appeal's decision on discovery. It is not known what further litigation may occur, and in particular whether the taxpayer will seek leave to appeal to the Supreme Court in respect of the grounds of review that the High Court and Court of Appeal have struck out.
7. The decisions highlight the practical difficulties faced in testing the legality of requests for information made on behalf of a foreign revenue authority. In future cases, it may be that taxpayers will, instead of alleging that Inland Revenue has failed to consider the exchange of information Article in the relevant double tax agreement, challenge whether the information requested is within the scope of the Article (since an allegation to that effect should put in issue the scope and potentially the reasons for the foreign revenue authority's information request). Even then, it remains to be seen whether a New Zealand court would order discovery of communications between the two tax authorities.

Contributed by Brendan Brown and Rhonda Gregory

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