Exchange of information: disputes multiply

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Some four years ago in this blog, I wrote about problems that would start to emerge as exchange of information between tax administrations became more routine and extensive. If nothing else, the number of disputes in this area was bound to increase. See also Exchange of Information: bumps in the road. 2019 has already seen its fair share of cases. Disputes about exchange of information occur most frequently in the requested state where objection is made to the provision of information to the requesting state.

Judicial review in the requested state

Kotton v FTT (TC) & HMRC [2019] EWHC 1327 (Admin) involved a Swedish citizen and an international businessman. The Swedish Skatteverket (Tax Authority) requested assistance from the UK tax authority (HMRC) in obtaining detains of Mr Kotton's American Express card transactions from American Express in the UK pursuant to EU Directive 2011/16/EU and article 24 of the Sweden- UK double tax treaty. UK domestic law authorises the issue of a demand for information from third parties if the information is "reasonably required" for "checking the tax position" of a person.

Mr Kotton unsuccessfully sought a judicial review of the demand on the grounds that the information was not "reasonably required". The case is curious in that no arguments were made, nor was there any analysis of the EU Directive or treaty provisions. Under each instrument, the obligation to assist applies to information that is "foreseeably relevant". In addition, the information must be obtainable under the domestic law of the requested state. While it is clear that there is considerable overlap between the two concepts and that information that is foreseeably relevant under the directive and treaty is also likely to be reasonably required, the two steps should be analysed separately. In particular, the requirement that information must be obtainable under the domestic law of the requested state should require the question: would the information be obtainable if the requested state was seeking it for its own purposes?

The court upheld the information demand on the basis that the information was reasonably required for Swedish tax purposes. To this extent, the court applied the wrong test. The distinction between the two steps would be more obvious if another aspect of the domestic law regulating information powers were engaged or if other provisions of the directive or treaty precluded provision of the information.

On the facts presented to the court, the HMRC official clearly considered whether the information was reasonably required (or possibly foreseeably relevant), having firstly rejected the request for assistance and asked for further information and clarification before taking any action.

In *CIR v Chatfield* [2019] NZCA 73 the New Zealand courts examined a request for information by the Korean tax authorities pursuant to article 25 of the Korea-New Zealand tax treaty. This authorised the exchange of information that was "necessary" for the administration of the tax laws of the contracting states. This language predates the introduction of the "foreseeably relevant" standard in the OECD Model in 2005. The term "necessary" meant that the competent authority of the requested state had to satisfy itself by clear and specific evidence that all of the information requested was needed or required.

The New Zealand Court of Appeal ruled that the standard had changed and that an application of the "foreseeably relevant" standard was incorrect. Unlike the competent authority in Kotton, little evidence was provided other than an assertion of having undertaken the necessary steps to see that the relevant standard was met. As a result, the court concluded conclude that the New Zealand competent authority's assessment of the request for information was not lawful by reference to the requirements of art 25.

Judicial review in the requesting state

R (o a o JJ Management LLP) v HMRC [2019] EWHC 2006 (Admin) concerns the other end of the process. In this case, the taxpayer sought to prevent HMRC from obtaining information from the Spanish and Portuguese tax authorities pursuant to the EU directive and UK treaties with those states. The question arose in the context of wider UK domestic issues about the ability of the tax authority to open an "informal investigation" after the time limit for enquiring into tax returns had expired. The court concluded that there was nothing to stop HMRC from asking a taxpayer to answer questions or provide documents on a voluntary basis.

The tax treaty arguments turned on the exception to the obligation to provide information which is not obtainable under the laws or in the normal course of administration of either contracting state in article 26(3)(b) of the OECD and UN Model treaties and in the UK treaties with Spain and Portugal. The court rejected the argument that this provision meant that because the UK tax authorities could not obtain information about the Spanish and Portuguese companies in the UK, that meant it could not request it under the treaties either. Instead, the court ruled that it meant that the requested state was not required to obtain that information from its nationals and provided to a requesting state if the requesting state could not itself obtain the information from its own nationals. This, the court said gave the Spanish authorities the option to decline to provide the information.

The conclusion that the requested state has an option to decline the request is inaccurate. If there is a duty of confidentiality on the tax administration of the requested state, then it cannot provide information that it is not under a duty to disclose. The case also raises difficulties about giving effect to the restrictions on exchanging information in article 26. Plainly, whether a tax administration should disclose information will, in principle be subject to judicial supervision by the courts of the state of that tax administration. Can a state request information that it is not entitled to obtain under its own laws?

In *JJ Management*, the court declined to decide whether in fact the information was obtainable under UK law, while hinting that it might be. The answer to this may lie in article 26 of the Vienna Convention on the Law of Treaties, namely, that treaties must be adhered to in good faith. On this basis, the courts in the requesting state may prevent such requests. This is of particular importance where there is no remedy in the requested state. This will frequently be the case where the information is already in the possession of the tax authorities in the requested state and there is no procedure by which the action of that tax authority can be tested in that state.

EU Mutual Assistance Directive

EU Directive 2011/16/EU received little attention by the court in *JJ Management*. Recital (9) to the Directive which distinguishes between the standard of foreseeable relevance and a fishing expedition was referred to. An analysis of that difference seems essential in such a case. The court decided that since the HMRC investigation was not unlawful, they were entitled to request further information from other member states. The taxpayer also referred to the requirement in article 17(1) that the requesting authority have exhausted its sources of information. In order to decide this requirement has been fulfilled it is necessary for the court to determine conclusively whether information is obtainable. The decision seems inconsistent in this respect. Since article 1(1) requires the competent authorities to cooperate with each other, the obligation to submit only requests that comply with the requirements of the directive should form part of such an obligation. This may also provide a basis for judicial supervision of requests in the requesting state.