

31 March 2017's significant decision in the BVI Administrative Court creates new law in the BVI, confirming that public bodies must strike a balance when discharging their international obligations in the mutual exchange of information by ensuring that procedural fairness safeguards for BVI persons are observed in the performance of those obligations.

TIEAs and your company's right to information: new court guidance

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31 March 2017's significant decision in the cases of *Quiver Inc. & Friar Tuck Limited v International Tax Authority* in the BVI Administrative Court confirms that public bodies must strike a balance when discharging their international obligations in the mutual exchange of information by ensuring that procedural fairness safeguards for BVI persons are observed in the performance of those obligations.

In practical terms, this means that public bodies must disclose to the recipient sufficient information about the request to enable the recipient to challenge its validity where appropriate.

Background

Since the G20 London Summit of April 2009, tax authorities the world over including in the BVI, have been working tirelessly to enter into as many tax information exchange agreements (**TIEAs**) as possible with each other with the aim of promoting transparency. TIEAs seek to enhance cooperation between states by exchanging information and documentation in tax matters in accordance with OECD principles. In practice they provide for 'on-request' exchange of information between tax authorities and would be most relevant where a tax authority seeks to obtain further evidence against a domestic taxpayer under investigation by reference to information held overseas.

In the BVI the International Tax Authority (the **ITA**) is a public body with functions under the Mutual Legal Assistance (Tax Matters) Act 2003 (the **MLAT**). These notices are routinely issued by the ITA, and require companies, under pain of criminal sanction, to provide extensive and highly sensitive financial information to onshore authorities to 'aid in the investigation of tax matters'.

The coercive nature of these powers as exercised by the ITA is compounded by the fact that for many years, the ITA's practice has been to deny a recipient of a notice basic information as to the underlying request; the requesting state; the nature of the underlying investigation; the taxpayer involved; the tax period concerned and the foreign tax laws said to be applicable. The ITA has used the shield of state-to-state secrecy to prevent the disclosure of any information to a recipient of a notice.

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The present case(s)

Harneys were instructed in late 2015 to seek leave and, if obtained, to challenge through Judicial Review the ITA's decisions to issue two BVI companies (the **Companies**) with notices pursuant to section 5(1) of the MLAT to produce information for the purpose of the BVI complying with a request from another State under a TIEA (the **Notices**).

Harneys advised the Companies that the ITA's practice of issuing notices without information as to the underlying request denied the basic right of procedural fairness, was unfair, was unconstitutional and was liable to Judicial Review. Leave to judicially review the Notices was granted in February 2016 and a two-day trial took place 20-21 March 2017.

The judgment

Harneys' legal position was vindicated on 31 March 2017 by Ellis J. handing down judgment in the BVI Administrative Court as follows:

1. there is at common law a duty of procedural fairness to which public bodies like the ITA are subject, particularly when exercising functions with a power of compulsion
2. the Learned Judge found that procedural fairness requires that the ITA furnish the Companies with sufficient information to enable them to determine whether the Notices were lawfully issued (and therefore comply) or were unlawful and therefore liable to challenge and susceptible to being quashed
3. in agreeing with the Companies' submissions, Ellis J. expressly rejected the ITA's argument that the duty of confidentiality to which they are subject prevails over common law rights of procedural fairness

Ellis J. made an order of *mandamus*. This is a public law remedy requiring that the ITA disclose to the Companies sufficient material pertaining to the request so as to enable the Companies to perform an assessment of whether or not the Request is valid.

While the temptation is to say that this decision merely confirms the common law duty of procedural fairness in the BVI, in fact this decision creates new law in the BVI.

Notwithstanding the unique international treaty obligations in the TIEA framework that protect state-to-state correspondence, this decision establishes that statutory requests and notices issued pursuant to the MLAT regime are subject to the same principles of fairness as any other decision or act made by a functionary of a public body.

It further confirms that a duty of confidentiality cannot and does not (on its own) eclipse the fundamental right of procedural fairness to which BVI persons are entitled. It also most importantly confirms that this fundamental constitutional protection is extended to all BVI companies subject to such requests.

A further update will be provided including implications for recipients of notices including Directors, Registered Agents and Proxies.

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