

*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*

## BVI Court protects basic rights of persons subject to tax investigations

Jonathan Addo, Counsel  
Aki Corsoni-Husain, Partner

The recent case of *Quiver Inc. & Friar Tuck Limited v International Tax Authority* in the BVI Administrative Division of the High Court has confirmed 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.

This case, decided in March 2017, represents a fundamental protection for those who invest in or hold interests in the BVI. The decision demonstrates the importance the BVI courts attach to the Rule of Law by delicately balancing the Territory's international obligations under tax information exchange agreements (**TIEAs**) with the need to appropriately protect the rights of those who live or invest in the BVI.

Harneys are considering the impact of this case on other on-going regulatory initiatives in the BVI and we will publish further articles on this fast-developing topic, in the future.

### The development of TIEAs globally

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 are relied upon by a tax authority seeking to obtain further information about a domestic taxpayer which they believe to be held overseas.

The Government of the BVI has succeeded in recent years in signing and implementing 25 bilateral TIEAs with jurisdictions such as China, the UK and the USA.

### The TIEA framework in the BVI

In the BVI the International Tax Authority (the **ITA**) is designated as the competent authority in the BVI for the purposes of the Mutual Legal Assistance (Tax Matters) Act 2003 (the **MLAT**). The ITA routinely issues notices requiring companies under pain of criminal sanction, to

Jonathan Addo  
+1 284 852 2576  
[jonathan.addo@harneys.com](mailto:jonathan.addo@harneys.com)  
British Virgin Islands

Aki Corsoni-Husain  
+357 2584 4326  
[aki.corsoni-husain@harneys.com](mailto:aki.corsoni-husain@harneys.com)  
Cyprus

provide extensive and highly sensitive financial information to foreign tax authorities to '*aid in the investigation of tax matters*'.

The TIEA mechanism is not an arbitrary power, nevertheless it has become open to abuse in an environment where tax authorities have sought to circumvent procedural safeguards and instead sought information on their tax residents through the TIEA framework.

Indeed at first sight, the BVI TIEA framework in the form of the MLAT is silent in relation to procedural safeguards including judicial scrutiny. The coercive nature of the 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 including the requesting state; the nature of the underlying investigation; the identity of the taxpayer involved; the tax period concerned and the foreign tax laws said to be applicable. The ITA relied on the shield of state-to-state secrecy to prevent the disclosure of any information to a recipient of a notice.

We first wrote in October 2016 about TIEAs and the issues of opacity that existed in the BVI domestic regime of coercive disclosure to foreign authorities. Today's article updates our previous analysis and in particular examines the Court's ruling in *Quiver & Friar Tuck*, a decision in which Harneys' clients were entirely successful in establishing that 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 for the purposes of a TIEA notice and request.

### ***Quiver Inc & Friar Tuck Limited***

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**). In these notices, the ITA failed to provide the contents of the Request and in particular the ITA did not disclose the requesting state; the identity of the relevant taxpayer involved, or the tax years under investigation.

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; unconstitutional and liable to Judicial Review. Leave to judicially review the Notices was granted in February 2016 and a two-day trial took place in March 2017.

During the trial Harneys successfully argued that procedural fairness requires that if the recipient of a TIEA notice is to have an obligation to comply with a notice, under pain of criminal penalties, they are also entitled to such information that would allow the recipient to challenge its validity where appropriate.

Harneys' legal position was vindicated by Ellis J. who handed down a verbal judgment as follows:

- 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

- 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
- 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

The key point of general principle made by Ellis J. was succinct and unarguable.

Her Ladyship stated plainly that: *“The Court finds that procedural fairness demands that the ITA provide a sufficient level and degree of information to enable representations to be made as to the lawfulness of the Notices or indeed the Requests.”*

The judgment closely followed long established public law precedent in England and Wales and recent case law from Bermuda.

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.

## Conclusion

Whilst the temptation is to say that the Court's decision in *Quiver & Friar Tuck* merely confirms the common law duty of procedural fairness in the BVI, in fact this decision affirms the basic common law principle that statutory requests and notices issued under 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 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.

Ellis J. was very alive to the clear line of principle commenting in her judgment at trial that:

*“These cases demonstrate that the relevant agencies have for the most part arrived at a full appreciation of the fact that some level of disclosure may be necessary having regard to the particular circumstances of the case and the interests of justice and fairness.”*

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

As such, the Court has recognised that there are clear and sacrosanct checks and balances to protect BVI persons and their interests. This is an entirely proportionate decision designed to prevent the arbitrary use of executive power in providing information to authorities outside of the jurisdiction.

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