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The developing international framework and practice for the exchange of tax related information: evolution or change?

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Abstract

The areas of focus in this paper are: the increasing collaboration between Australia's domestic agencies when investigating tax minimisation that has an international

The first problem is that the general access power under s 263 relies on the documents or person being located in Australia, as does the Commissioner's power under s 264 to compel a person to submit to an oral examination. Therefore, they are inapplicable where the materials or persons are located offshore. Similar problems arose with the Commissioner's powers to compel production of documents under s 264. These powers are based on the presumption that the person served with a s 264 notice has control of the documents. Even though the High Court has held that s 264 "is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents"[6] it is often difficult to establish who has control in complex commercial structures.[7] However, it has been held that a s 264 notice can be effective in accessing information held domestically that relates to a foreign jurisdiction.[8]

The Full Federal Court has recently held that a bank was required to produce certain information, held in Australia, relating to clients' accounts in an offshore subsidiary and it was no defence to the validity of the notice that such disclosure may conflict with the bank secrecy laws of the foreign staodud3ough51 -3(h)13((e.T)-9(he)9(Th(r)-2(e)11(0v(c)-2

In conclusion, it can be seen that the domestic information gathering powers of the ATO under the *ITAA 1936* have remained unamended for a considerable time. Before exploring the more dynamic international environment the development of collaborative investigatory techniques within Australia is considered.

2.2. Wickenby: the collaborative present

Recently there has been an increased public profile of the Australian Taxation Commissioner's access and information gathering powers, with widespread media coverage of the ongoing cross agency taskforce: Project Wickenby that is led by ATO[12] and was established in 2006.[13] The stated overall objective of this project is to:

> "Make Australia unattractive for tax fraud and evasion, as both promoters and potential participants perceive the risk/benefit ratio as weighing heavily against them. To achieve this objective, four primary goals have been identified:
>
> a. Reduce international tax avoidance and evasion on the Australian taxation system.
> b. Enh

frustrated with the slow progress of the ACC.[22] As set out previously the ACC discontinued its investigations citing cross border complexities and it is reported that

> relevant rules of international law".[28] However, the extent to which the treaties limit the operation of such articles will depend upon their incorporation into Australian law.[29]

There are three fundamental principles which underlie the use of these articles: secrecy, necessity and reciprocity.[30] However, due to the undermining of these three fundamental principles by governments, practical limitations have historically arisen. In many jurisdictions revenue authorities' access powers can be extremely limited by domestic judicial restraint and/or their having a narrow scope (i.e. specific categories of information being exempted) and/or by local laws (i.e. bank secrecy and privacy laws).[31]

assessors and overseen by a 30 member Peer Review Group.[52] Considerable effort and resources have been devoted to this work since the Global Forum was restructured in 2009, with the following results:

- More than 1,100 exchange of information relationships have been established that provide for the exchange of information in tax matters to the international standard have been entered into since 2008;
- 126 peer reviews have been launched;
- 100

- identifying emerging trends and patterns to anticipate new abusive tax schemes; and
- improving knowledge of techniques used to promote cross-border abusive tax schemes.[57]

The ATO has invested considerable resources to its involvement in JITSIC and considers that "JITSIC participation is a key part of the Tax Office's overall strategy in dealing with aggressive tax planning."[58] By way of concrete example, in the 2010-11 year, the ATO worked with Canadian authorities via JITSIC to investigate a compliance issue with superannuation funds, uncovering $23.4 million in omitted tax.[59]

3.5. The outcomes of unilateral action: US *Foreign Account Tax Compliance Act* (FATCA)

FATCA was passed in March 2010 to improve compliance with US tax laws by imposing certain due diligence and reporting obligations on non-US financial institutions. The Act imposes a 30% withholding on US source payments to foreign financial institutions that do not participate/cooperate by supplying account information to the US Internal Revenue Service [IRS].

Intergovernmental agreements[60] (developed with France, Germany, Italy, Spain and the United Kingdom) may be entered into with the US in which the partner country agrees to require local financial institutions to report information on US account holders to local tax authorities. Under Model Agreements[61] local tax authorities will send information to the IRS *automatically*. If this is agreed financial institutions in the partner country are deemed compliant with FATCA and will not suffer nor make withholdings. To date there have been six such bilateral agreements signed by the US with the UK, Denmark, Mexico, Ireland, Switzerland and Norway.[62] The Treasurer has announced that Australia has entered into discussions with the US to negotiate an

[57] Commissioner of Taxation, "It's a small world after all - Australia's place in a Global Environment", Speech to the Australia Israel Chamber of Commerce, Melbourne, 5 July, 2012. Located at URL: http://www.ato.gov.au/corporate/distributor.aspx?menuid=0&doc=/content/00326002.htm&page=1#P89_19603 on 26 January 2013.

[58] ATO website, "Joint International Tax Shelter Information Centre (JITSIC)". Located at URL: http://www.ato.gov.au/atp/content.aspx?doc=/content/00103300.htm&mnu=49276&mfp=001 on 26 January 2013.

[59] Commissioner of Taxation, (5 July 2012) "It's a small world after all - Australia's place in a Global Environment", above n 57.

[60] US Treasury, "Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden", Press Release 26 July 2012 located at URL: http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx on 26 January 2013.

[61] There are two types of Model Intergovernmental Agreement: Reciprocal and Non-Reciprocal and they are located respectively on the US Treasury website at URLs: http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf and http://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf on 26 January 2013.

[62] The US Treasury, FACTA Treaty Resource Center website at URL: http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx located on 26 April 2013 contains links to these agreements. The UK agreement was entered into on 12 September 2012 followed by: Denmark (19 November 2012), Mexico (19 November 2012), Ireland (23 January 2013), Switzerland (14 February 2013) and Norway (15 April 2013).

Intergovernmental Agreement.[63] Under the negotiated UK/US agreement and the Model Agreements there is a commitment to enhance and expand automatic exchange of information.

respect of enhancing exchange of information between tax authorities has had a long history.

In 2002 the CFA undertook a comprehensive review of the exchange of information Article: 26. Both the Model Agreement on Information Exchange on Tax Matters[66] (TIEA agreements) and the 2000 report on the ideal standard of access to bank information[67] were used by the Working Party on Tax Evasion and Avoidance as a basis for revising Article 26. A new Article 26 was adopted on 15 July 2005.[68]

The new Article attempts to enable the exchange of information to the widest possible extent adopting a foreseeable relevance test, allowing for the exchange of third party information and allowing the exchange of information outside the taxes dealt with by the convention (i.e. includes indirect taxes). To provide practical assistance to officials dealing with exchange of information for tax purposes the CFA approved a new Manual on Information Exchange on 11 May 2006. The Manual, developed with the input of both member and non-member countries, is also intended to assist in designing or revising national manuals.[69]

4.1.2. Article 26 of the OECD Model Convention

As well as entering TIEAs, the Australian government has placed an increased priority on exchange of information arrangements when negotiating DTAs. Currently Australia has 44 comprehensive DTAs and the special treaty with East Timor (governing activities in the Timor Sea).[70]

The revised Article 26[71] has been generally adopted in the 2009 DTA with New Zealand (that carried forward the 2005 amended provisions), Norway, France and Finland in 2006, Japan and South Africa in 2008, Belgium and Singapore in 2009, Chile, Malaysia and Turkey in 2010 and India 2011. As mentioned above the new article encourages the automatic exchange of information overcoming the short comings of the former Article 26. Further, the scope of the information that can potentially be exchanged under the new Article 26 is wide and includes GST

[66] The Model Agreement is available on the OECD website at URL: http://www.oecd.org/dataoecd/15/43/2082215.pdf at 26 January 2013.
[67] OECD, *Improving Access to bank information for tax purposes* (2000). Located at URL: http://www.oecd.org/tax/exchangeofinformation/2497487.pdf on 26 January 2013.
[68] OECD, *The 2005 Update to the Model Tax Convention*

enthusiastic in its exchange of information under DTAs. In fact some of Australia's major treaty exchange partners had presented the ATO with a series of "meritorious achievement" awards.[80] In the same speech the Commissioner referred to the use of

also been made to the *Taxation Administration Act* to ensure that such disclosures are not a breach. These amendments apply to requests for exchange of information made from 15 September 2006, provided the relevant international agreement under which the request was made has entered into force.[90]

4.2. Convention on Mutual Administrative Assistance in Tax Matters

A major development outside of the Model Convention occurred in the late 1980's, when the OECD and the Council of Europe jointly developed a Convention on Mutual Administrative Assistance in Tax Matters.[91] The Convention was opened for signature on 25 January 1988 and entered into force in 1995. It covers all taxes and allows exchange of information, multilateral simultaneous tax examinations and assistance in tax collection. It provides extensive safeguards to protect the confidentiality of the information exchanged.

In April 2009, the G20 called for action "to make it easier for developing countries to secure the benefits of the new cooperative tax environment, including a multilateral approach for the exchange of information."[92] In response, the OECD and the Council of Europe developed a Protocol that came into effect on 1 June 2011[93] amending the multilateral Convention on Mutual Administrative Assistance in Tax Matters. The Protocol made the Convention consistent with the international standard on exchange of information for tax purposes developed by the Global Forum and opened it up to all countries (previously membership was limited to members of the OECD and of the Council of Europe).[94]

Australia has become a signatory to the Convention on Mutual Administrative Assistance in Tax Matters. It has lodged its instrument of ratification with OECD with the Convention to enter into force for Australia on 1 December 2012.[95]

considered "tax havens" (now referred to as "low taxing jurisdictions"), but there may be a significant economic importance of TIEAs to Australia. For example, in 2004 Bermuda was the fourth leading investor into Australia investing $A2.2 billion.[103] In a recent speech the ATO Commissioner noted that in the 2010-11 financial year, funds leaving Australia to low taxing jurisdictions had decreased since 2007-08 by 22%,[104] the first TIEAs came into force in 2007.

As at 21 December 2009 only two out of the 11 TIEAs then signed had come into force and those were between Australia and Bermuda and the Netherlands Antilles.[105] As at 28 April 2013 only one signed TIEA was yet to come into force: Uruguay (signed 10 December 2012)).[106] TIEAs have not been given domestic force by legislation and it is unclear whether such legislation is required. This is despite the Joint Standing Committee on Treaties having recommended in February 2006 and again on 13 June 2007 that binding treaty action should be undertaken.[107]

Legislation is required to give effect to the ABAs.[108] Even though ABA's are not part of the information exchange of a TIEA they are an integrated part of the TIEA negotiation process.[109] ABA's generally cover the allocation of taxing rights over certain income derived by retirees, government employees and students and provide a mechanism to help resolve transfer pricing disputes.[110] Australia negotiated these types of agreements alongside the TIEAs in more than half (seven) of those 11 signed to December 2009, but very few ABAs were negotiated after that with nine in total at September 2012.[111] This change of approach has not been explained but may be linked to the Australian government being less inclined to provide benefits to other countries in more stringent economic circumstances post 2009.

- relevant to investigation or prosecution of tax matters; and
- treated confidentially by all parties.

Countries cannot engage in fishing expeditions or request information that is unlikely to be relevant to the tax affairs of the specific taxpayer. However, it is irrelevant whether the conduct being investigated is a crime under the domestic law of each treaty partner. Where the information available is insufficient to enable compliance with the request, each partner must use all relevant information gathering methods to furnish details to the other, even where it is not needed for domestic tax purposes.

The TIEAs Australia has negotiated are with states with which Australia does not have DTAs, most of which are considered low taxing jurisdictions. After this initial phase of negotiating and bringing most the TIEAs into force there is evidence they are being used. As at 1 July 2012 the ATO had made 53 exchange of information requests to 13 different TIEA jurisdictions, with several leading to significant assessments being issued by the ATO.[112] The Commissioner has also expressed the view that:

> In the majority of cases our TIEA partners have shown a high level of co-operation including providing additional information relevant to the request and in processing requests promptly.[113]

To date there is no reported litigation related to the garnering of tax information through TIEA requests.

It is apparent from the foregoing that the evolving cooperation between the various tax authorities has led to internationalised, as well as institutionalised, responses to tax evasion focussed on transparency and tax information exchange. As discussed, these initiatives are relatively recent and their effectiveness in protecting the revenue and influencing taxpayer behaviour will, in part, depend on how robust the information exchange measures are when challenged. The Australian domestic experience detailed in section 1 of this paper suggests that such challenges will often arise.

5. CONCLUSION

5.1 The Domestic perspective

Australia's domestic laws as regards ATO information gathering have not significantly changed in recent times. Sections 263 and 264 of the *ITAA 1936* have not been subject to significant revision for over 60 years.[114] Section 264A has been the subject of some

The significant domestic response to accessing tax related information in an internationalised commercial environment has been inter-agency cooperation. Project Wickenby has been deemed a success by government and its continued funding in the 2012 federal budget suggests it will have a permanent presence. This brings with it the tensions of coordination and cooperation between agencies detailed at 2.2 in this paper as well as increased avenues of legal challenge as demonstrated by the Paul Hogan litigation. There have been more recent legal challenges relating to the ATO's accessing international tax information, some of which have been considered in thiss