

Challenge to disclosure of information under a Tax Information Exchange Agreement (Cayman Islands)

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In the judgement *MH Investments and JA Investments v Cayman Islands Tax Information Authority* dated 13 September 2013, the Cayman Islands court overturned a decision of the Cayman Islands Tax Information Authority (**Cayman Authority**) to provide documents in response to several requests from the Australian Tax Office (**Australian Authority**). The judge went on to order (i) the Cayman Authority to revoke its consent to the use of information obtained in respect of two Cayman entities; (ii) the return of all documents; and (iii) to seek an assurance that the Australian Authority would not use the documents in court proceedings against the Cayman entities nor share the information with any other jurisdiction.

The Cayman Authority was established to implement the Tax Information Agreement Law (**TIA Law**). Since 2001 the government of the Cayman Islands has signed thirty-one bilateral agreements and arrangements in respect of tax information exchange, with twenty-six such arrangements currently in force. These arrangements aim to promote the Cayman Islands as an internationally co-operative jurisdiction on tax matters.

On 30 March 2010 the governments of the Cayman Islands and Australia entered into an agreement to exchange information with respect to taxes by signing a Tax Information Sharing Agreement (**TIA**). The agreement came into force on 14 February 2011. Pursuant to Article 1 of the TIA the two countries would share information "in respect of taxable periods beginning on or after [1 July 2010]".

Pursuant to the TIA, the Australian Authority, between 23 February 2011 and 13 February 2013, made four requests to the Cayman Authority in connection with an active investigation into the Australian taxation affairs relating to two Cayman Islands entities - MH Investments and JA Investments Ltd. (the **Applicants**). The Australian Authority requested that the Cayman Authority provide, "documents belonging to, and/or containing information relating to [the Applicants]", to provide consent to using the disclosed information "for the purposes of judicial proceedings currently before the Australian Courts", and for permission to disclose the documents obtained to Her Majesty's Revenue and Customs in the United Kingdom (**HMRC**).

The requests, according to the Australian Authority, were made in the context of an active investigation, "over a number of years to the present, including a 'real time review' of the current Australian financial year ending the 30th June 2011", and so that, "it could make an Assessment of the taxable income derived in that year or any part of it", and determine the income tax payable, "for the taxable period commencing the 1st July 2010".

The Applicants applied to the Grand Court of the Cayman Islands (the **Court**) seeking Judicial Review of the actions of Cayman Authority, and seeking several declarations. These declarations were (i) that the Cayman Authority acted outside of the powers conferred upon it by the TIA Law, (ii) that the information was unlawfully obtained and unlawfully divulged to the Australian Authority, (iii) that consent was unlawfully given to the Australian Authority to share information with another jurisdiction, (iv) that consent to use the documents in court proceedings in Australia was unlawfully provided; and (v) that the information divulged

related to a taxable period outside of that covered by the TIA.

The Court agreed with the Applicants and held that the Cayman Authority acted in contravention of section 21(1) of the TIA Law and in contravention of Articles 1 and 8 of the TIA when it failed to seek directions from the Grand Court on how to process the requests to share the information with HMRC, by giving consent for the Australian Authority to use the documents in court proceedings and providing information for a tax period prior to 1 July 2010. Furthermore, the Cayman Authority should have ascertained from the Australian Authority the "definition under Australian tax legislation for 'real time' review" in order to establish what was meant by that term. The Court also held that the Cayman Authority had infringed the applicant's rights to privacy and a fair hearing pursuant to sections 7 and 9 of the Cayman Islands Bill of Rights (which came into effect on 6 November 2012) respectively by failing to provide notice to the Applicants. In addition, the Court considered that Cayman Authority was in breach of its duties by failing to request further information from the Australian Authority.

The Court also relied on section 4 of the Confidential Relationships (Preservation) Law (**CRP Law**) which "requires an application be made to the courts whenever confidential information is to be given in guidance in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority within or without the [Cayman] Islands". The disapplication of section 4 of the CRP Law by section 19 of the TIA Law does not apply in this case, since the TIA between Cayman and Australia deems that any exchanged information will be held confidentially by the recipient.

The Cayman Authority was ordered to (i) formally revoke its consent to the Australian Authority using the documents in court proceedings, (ii) formally revoke its consent to share the information with HMRC, and (iii) to demand that the Australian Authority return all documents unlawfully provided to it by the Cayman Authority.

Since this judgment was handed down, and despite the Orders of the Cayman Islands Court, Australia's Federal Court has labelled the Cayman Islands proceeding as a domestic matter of the Cayman Islands and has given the Australian Authority the authority to continue to use the information obtained from the Cayman Authority in court proceedings in Australia.

There have also been recent changes to the TIA Law which will make it harder for future requests for information to be challenged in the Cayman Islands courts.

This important decision of the Court provides guidance on how in practice the Cayman Authority should treat requests for information under TIAs, and the application and applicability of the TIA Law and the CRP Law when assessing such requests. Whilst the Cayman Authority should not ignore its duty to "do everything it can to assist the [Australian Authority]" the Court remarked that, "in doing so it must also ensure that the rights of the Applicants are not infringed and that there is compliance with the TIA Law and the TIA". In future cases, it is likely that the Cayman Authority will take care to ensure that they are acting only within the scope of the TIA Law, and the other relevant laws of the Cayman Islands.

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Key Contacts



Simon Davies
Partner
Guernsey
simon.davies@ogier.com
T+44 1481 737175
M+44 7839 257234



Marcus Leese
Partner
Guernsey, Hong Kong
marcus.leese@ogier.com
T+44 1481 737152
M+44 7797 819856



Mathew Newman
Partner
Guernsey
mathew.newman@ogier.com
T+44 1481 752253
M+44 7797 819901



Edward Mackereth
Global Managing Partner
Jersey
edward.mackereth@ogier.com
T+44 1534 514320
M+44 7797 734377



Steve Meiklejohn
Partner
Jersey
steve.meiklejohn@ogier.com
T+44 1534 514462
M+44 7797 747110



Simon Dinning
Partner
Jersey, London
simon.dinning@ogier.com
T+44 1534 514251
M+44 7797 788331

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Nick Williams
Partner
Jersey
nick.williams@ogier.com
T+44 1534 514318
M+44 7829 700500



Rachael Reynolds QC
Global Senior Partner
Cayman Islands
rachael.reynolds@ogier.com
T+1 345 815 1865
M+1 345 516 2001



Giorgio Subiotto
Partner
Cayman Islands
giorgio.subiotto@ogier.com
T+1 345 815 1872
M+1 345 516 9071

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