

# **CROSS BORDER INFORMATION: CARIBBEAN PERSPECTIVE**

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**Trinidad & Tobago**

# OVERVIEW

- ◆ The position of Trinidad & Tobago
- ◆ Caribbean perspective
- ◆ Case Law

# GENERAL PRINCIPLE

- The income tax legislation of the countries of the Commonwealth Caribbean confers extensive and broad powers on the Revenue to demand information from taxpayers and to conduct wide-ranging investigations into their affairs
- Such legislation is similar to existing provisions in the UK; Australia; Canada and New Zealand and is no less expansive in scope

# PURPOSE OF INVESTIGATIVE PROVISIONS

- The purpose of such legislation is to facilitate the Revenue in discharging its statutory duty to assess and recover income tax on the taxable income of taxpayers as well as to discover all relevant information for the implementation and administration of income tax legislation

# LAW ON PROVIDING INFORMATION: SECTION 117 (1), T&T INCOME TAX ACT

- The Board may for any purpose related to the administration or enforcement of this Act require any person, except a person engaged in confidential professional relationship with such person, to give it information in such manner and detail and at such time as the Board may from time to time require by notice in writing with respect to his income or assessment or assets or the income or assessment or assets of any other person or to permit it or any person duly authorised by it in writing to inspect any record of any moneys, funds or other assets held by that person on his own behalf or which may be held by him for, or any moneys due by him to, any other person.

# LIMITATION TO THE REVENUE'S POWERS

- In the Commonwealth Caribbean, according to Denbow, 2013, the central issue is to determine what limitations are to be placed on the Revenue's exercise of its statutory powers in this regard
- There are common judicial approaches which have been utilised to determine the scope of such powers

# JUDICIAL APPROACHES TO REVIEWING THE REVENUE'S POWERS OF INQUIRY

1. The Court's are reluctant to restrict the scope of such powers by reading into their interpretation any implied limitations from other statutory provisions of the Income Tax Act: *Barclays Bank Int'l v Attorney General of Guyana (Guyana, 1972)*; *Navarro v Board of Inland Revenue (Trinidad, 1980)*

# JUDICIAL APPROACHES TO REVIEWING THE REVENUE'S POWERS OF INQUIRY

2. Confidentiality provisions which attach to special relationship such as banker-customer are overridden by statutory provisions which empower the Revenue to obtain information from any person

3. There is no objection to the Revenue engaging in a roving enquiry or 'fishing expedition' by requesting information from third parties about the income of an unidentified class of taxpayers



# JUDICIAL APPROACHES TO REVIEWING THE REVENUE'S POWERS OF INQUIRY

4. The courts can judicially review the exercise of any powers by the Revenue which go beyond the requirement to comply with the discharge of its statutory duties or the particulars required are oppressive or burdensome

# INFORMATION AND THE BANKING SECTOR

- Amongst the countries of the Commonwealth Caribbean, only Trinidad and Tobago and St. Lucia have legislation which makes express reference to information being required to be provided by a bank
- However, the absence of such express reference to a statutory obligation to provide such confidential information does not restrict or disentitle the Revenue from invoking such powers against a commercial bank (Denbow, 2013)

## **LAW ON PROVIDING INFORMATION: SECTION 117 (2), T&T INCOME TAX ACT**

(2) Notwithstanding any rule of law to the contrary, but subject to this section, the Board may, for the purpose of determining any objection to an assessment, require by writing any bank or any officer thereof to furnish information in writing or may summon any such officer to appear before it to give evidence respecting the assessment or to furnish statements of accounts and affairs verified in the manner specified by it, and the Board may examine such officer on oath or otherwise.

# CARICOM PERSPECTIVE

- Several jurisdictions that are part of the Caribbean community (CARICOM) are moving toward information transparency in regard to tax matters. Many of them have an agreement in substance to comply with the Foreign Account Tax Compliance Act ([FATCA](#)).
- According to FTSE Global Markets, as of June 2014 five CARICOM states [have completed negotiations](#) with the U.S. and plan to sign formal intergovernmental agreements (IGAs), including:
  - St. Vincent and the Grenadines
  - St. Kitts & Nevis
  - St. Lucia
  - Antigua

# THE BAHAMAS & THE CAYMAN ISLANDS

- Other Caribbean states have already had an agreement in substance. The Bahamas, for example, formally [announced its intentions](#) to comply with FATCA regulations on April 17 2014, according to the U.S. Treasury Department. The Cayman Islands has a Model 1 IGA with the U.S., which has been in effect since November 2013.
- This jurisdiction has further demonstrated its commitment to preventing cross-border tax evasion by recently signing a [tax information exchange agreement](#) (TIEA) with Columbia, according to the Insurance Managers Association of Cayman. This TIEA will be the Cayman Islands' 36th, and negotiations are currently underway with 14 other nations.

# CAYMAN ISLANDS CASE

- 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.

# CAYMAN ISLANDS CASE

- 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]".

# CAYMAN ISLANDS CASE

- 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**).



# CAYMAN ISLANDS CASE

- 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.

# DECISION

- 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.

# RATIONALE FOR COURT'S DECISION

- The Court 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 did not apply in this case since the TIA between Cayman and Australia deems that any exchanged information will be held confidentially by the recipient.

# COURT ORDERS

- 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.

# CONCLUSION

- A notice from the Revenue pursuant to its statutory power to provide information about a taxpayer whose affairs are under investigation may be resisted if the notice is vague or uncertain and lacking in particularity
- Failure to refer to a particular statutory provision would not in itself render the notice invalid as was held in *Smorgon v Australia (1976)*

# CONCLUSION

- Trinidad & Tobago is unique among Commonwealth Caribbean countries in providing special statutory protection for the confidential professional relationship against the disclosure of information and documents made compulsory in response to the Revenue's exercise of its statutory powers in that regard: *S.117(1), Income Tax Act, T & T*