Foreign trusts and information sharing

James Coleman, Barrister, Wellington, looks at the New Zealand position

The tax landscape is such that revenue authorities are increasingly exchanging information about private individuals with the revenue authorities of foreign states. This exchange of information has developed as governments have sought to combat global tax evasion. The United States was the first government to respond by enacting Foreign Account Tax Compliance Act (FATCA). The Organisation for Economic Co-operation and Development (OECD) was not far behind with the Common Reporting Standard (CRS).

New Zealand has also introduced laws as a result of the Shewan Report into foreign trusts, the point being to create a register of foreign trusts. The “go live” date was effectively 1 July 2017. New Zealand resident foreign trustees will be interested to know how much of the information they supply to Inland Revenue will be able to be released to foreign governments.

This article will explore the extent of any legal limitations on what Inland Revenue may provide to foreign revenue authorities.

# Background

The Organisation for Economic Co-operation and Development (OECD) has been working on solutions to concerns governments have about international tax evasion. One of the solutions that the OECD has come up with is the idea of multilateral agreements for the Automatic Exchange of Information (AEOI).

The OECD created CRS which serves as the “global standard” for AEOI. The Taxation (Business Tax, Exchange of Information, and Remedial Matters Bill) 2016 enacted legislation to enable New Zealand to meet its commitments under these multilateral agreements.

CRS will require New Zealand financial institutions (which are defined in the CRS) to conduct due diligence and carry out reporting to the IRD.

The legislation giving effect to CRS is contained in pt 11B of the Tax Administration Act 1994 (TAA): ss 185N to 185O. A schedule to the TAA was also enacted which make some modifications to the CRS standard to make it easier to operate in a New Zealand context. Those provisions took effect from 1 July 2017.

Secondly, following the Government’s acceptance of the recommendations in the Shewan Report on foreign trusts, a range of legislative provisions were enacted in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017 to facilitate the registration of foreign trusts. That Act made changes both to the Income Tax Act 2007 (ITA) and to the TAA. The main changes to the TAA in this regard are the enactment of ss 59B to 59E.

Under ss 59B and 59C, resident foreign trustees will need to apply for registration of their foreign trusts by 30 June 2017. Consequently, a large amount of information will be provided to Inland Revenue on or before 30 June 2017.

# New Zealand’s tax secrecy laws

New Zealand has secrecy obligations imposed on officers of the Inland Revenue Department with respect to the information provided to it by taxpayers: see s 81 of the TAA. So, the prima face legislative position is that no information provided to the Commissioner and her officers can be released or communicated to third parties.

However, there are exceptions to the general principle that secrecy must be maintained.

Section 81(4) contains a long list of exceptions to the principal obligation to maintain secrecy contained in s 81(1). Relevantly subs (k) provides:

… communicating any [information](javascript:void(0)) to any [authorised officer](javascript:void(0)) of the Government of any country or territory outside New Zealand where the application of a provision of any of the [Inland Revenue Acts](javascript:void(0)) affecting the incidence of [tax or duty](javascript:void(0)) is expressed to be conditional on the existence of a reciprocal law or concession in any such country or territory, or where under a provision in any of the [Inland Revenue Acts](javascript:void(0)) a reciprocal [arrangement](javascript:void(0)) has been made with the Government of any such country or territory affecting the incidence of [tax or duty](javascript:void(0)) …

Additionally, s 88 of the TAA provides:

Notwithstanding any obligation of secrecy imposed by any enactment, the Commissioner may disclose such information as is required to be disclosed under a double tax agreement or tax recovery agreement to a person authorised to receive such information under the law of the territory in relation to which the double tax agreement or tax recovery agreement has been made.

Therefore, the law in New Zealand is that no information can be provided to another tax authority or government unless it is provided under the terms of the Double Tax Agreement (DTA) or Tax Recovery Agreement or a Tax Information Exchange Agreement (TIEA). The wording of s BH 1(4) of the Income Tax Act 2007 does not alter this reasoning. This is because unless the information the Commissioner proposes to automatically or voluntarily release falls within the terms of a DTA, s BH 1(4) does not advance the matter.

# Double Tax Agreements

DTAs do not provide a basis for automatic and/or the voluntary provision of information to foreign tax administrations.

Except for United States of America there are three categories of provision. First are those which authorise the exchange of information upon a request being received from the foreign jurisdiction. This wording is contained in the following TIEAs: Anguilla, the Bahamas, the British Virgin Islands, Cayman Islands, Cook Islands, Dominica, Gibraltar, Guernsey, Isle of Man, Jersey, Marshall Islands, Neverland Antilles, Niue, St Christopher and Nevis, St Vincent and Grenadines, Turks and Caicos Islands and Vanuatu.

Second are those with old-style wording “*…* as is necessary for carrying out the provisions of…”. In this category are the following DTAs: Belgium, Republic of Chile, China, Denmark, Fiji, Finland, French Republic, Federal Republic of Germany, India, Indonesia, Ireland, Italy, Republic of Korea, Netherlands, Norway, Republic of the Philippines, Russian Federation, Republic of South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand and United Arab Emirates.

Third are those with the modern wording “…as is foreseeably relevant for carrying out the provisions of*…*”. In this category are the following DTAs: Australia, Austria, Canada, Czech Republic, Hong Kong, Japan, Malaysia, Mexico, New Guinea, Poland, Samoa, Singapore, Turkey, United Kingdom, and Vietnam.

There is New Zealand case law at the Court of Appeal level strongly suggesting that the Commissioner may not voluntarily (and that would include, by necessary implication, “automatically”) exchange information under the old-style wording: *Avowal v CIR* (2010) 24 NZTC 24,252. At [60] of that judgment, the Court of Appeal made the following comment (emphasis added):

We record that the Commissioner also supported his position by arguing that art 26(2)(b) provided only that there was not an obligation to supply information coming within that provision, but did not prevent the Commission from doing so voluntarily. We accept that that is so. But that begs the issue raised by Mr Clews that s [81](javascript:void(0)) would prevent such disclosure. *On the face of it, s**[81(1)](javascript:void(0)) requires secrecy and s**[88](javascript:void(0)) applies only to information which the Commissioner is required to provide under the DTA, not to information which he chooses to provide voluntarily.* However, as our conclusion above makes it unnecessary for us to deal with this argument in detail, we express only these tentative views and do not deal with it further.

There is nothing in the old-style DTAs requiring the Commissioner to provide the information pertaining to new trustees with respect to situations where the resident foreign trustee ceases to be trustee of the foreign trust prior to 30 June 2017. On that basis, any disclosure to a country with an old DTA would not be authorised by s 88 of the TAA. Any such communication would therefore be in breach of s 81 of the TAA.

With respect to the modern DTAs, information about new trustees of what used to be foreign trusts prior to 30 June 2017 is not foreseeably relevant to the carrying out of the provisions of the DTAs, nor to the domestic enforcement of the counter-parties’ tax laws.

Without more:

* the name of the New Zealand foreign trust; and
* the full name of the former New Zealand resident trustee; and
* the date when the New Zealand resident trustee retired; and
* confirmation that after that date there was no New Zealand resident trustee; and
* that the new trustee is not a New Zealand resident; and
* details of the new trustee including their name, email address and physical address

is not foreseeably relevant information.

The position may be different if there was additional information available to the New Zealand Commissioner on which it could be reasonably concluded that there was evasion of tax occurring in the counter-party jurisdiction. However, without such additional information being present in relation to the particular case, the information in the categories listed in the bullet points above does not provide a basis to meet the foreseeably relevant test.

Consequently, any information automatically or voluntarily provided to a foreign tax authority of a bulk nature would fall outside the permission provided in s 88 of the TAA and therefore be in breach of s 81.

Where any information is provided in breach of s 81 it has been provided unlawfully.

# Tax Information Exchange AgreementS

The TIEAs do not provide a lawful basis for automatic and/or the voluntary exchange of information with those countries.

This is because the wording of the art 5 clauses in those TIEAs requires an information request to come from the counter-party jurisdiction.

Moreover, the wording of the TIEAs strongly implies that the information request is to be with respect to a particular taxpayer rather than a generic fishing expedition type of request.

# Foreign Account Information Sharing agreements

Section BH 1(4) of theITA provides that despite anything in the ITA or the TAA, a DTA has effect in relation to income tax and the exchange of information relates to tax as defined in subs 3(a)(i) to (v) of the TAA.

Section BH 1(4) is explicitly subject to subs (5B) which says a foreign account information sharing agreement is subject to pt 11B of the TAA.

From 1 July 2014 through to 1 July 2017 the phrase “foreign account information sharing agreement” was defined in section YA 1 as:

… a double tax agreement that facilitates the exchange of information named Agreement between the Government of the United States of America and the Government of New Zealand to Improve International Tax Compliance and to Implement FATCA.

Part 11B of the TAA was enacted also with effect from 1 July 2014. The purpose of that part is to give effect to and implement foreign account information sharing agreements: s 185E. The primary purpose of that part, between 1 July 2014 and 1 July 2017, is to impose obligations on New Zealand residents so that the FATCA obligations can be met.

Sections 185N and 185O relate to the requirements imposed with respect to the CRS applied standard, but they did not take effect until 1 July 2017. Again, those sections in pt 11B are focused on imposing obligations on New Zealand residents to enable compliance with CRS.

Critically, the focus of foreign account information sharing agreements is on precisely the sharing of information about holders of foreign accounts and the assets held there. That is quite a different thing to the foreign trust information being discussed here.

# Mutual Administrative Assistance

Finally, reference needs to be made to the Double Tax Agreements (Mutual Administrative Assistance) Order 2013. This order brought into New Zealand law the Convention on Mutual Administrative Assistance in tax matters protocol (the convention). It came into force on 1 March 2014.

The convention applies to the parties to it. Article 4 of the convention provides (emphasis added):

The parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant to the administration or enforcement of their domestic laws concerning the taxes covered by this Convention.

The use of the “foreseeably relevant” test raises the same issues in this context as have been addressed earlier in this paper. Moreover, the information covered by art 4 may be provided when requested by the other State: see art 5. Self-evidently neither art 4 nor art 5 provides a basis for automatic or voluntary dissemination of the foreign trust information to other States.

Article 6 permits the automatic exchange of information, however that must be done in accordance with the procedures which the two states should determine by agreement. FACTA and CRS are two such agreements. They do not cover the foreign trust information which is the subject of this paper. Therefore, art 6 does not provide a lawful basis for the release of the foreign trust information to the revenue authorities of other States.

Article 7 allows a party, without prior consent, to forward to another party information of which it has knowledge. However, it can only do this in certain circumstances, namely where:

* the Commissioner has grounds for supposing that there may be a loss of tax on the other country; or
* a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned party which would give rise to an increase in tax or to liability to tax in the other party; or
* business dealings between a person liable to tax in a party and a person liable to tax in another party are conducted through one or more countries in such a way that a saving in tax may result in one or the other party or in both; or
* a party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; or
* information forwarded to the first-mentioned party by the other party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter party.

The foreign trust information does not provide grounds for supposing there may be tax loss in another country. It does not provide a basis for concluding that there is transfer pricing issues in the business dealings of a person. It does not enable a conclusion that the information may be relevant in assessing liability to tax in another country. It does not provide a basis for concluding that a person obtains a reduction from tax from one country which would give rise to an increase in tax liability in another.

In other words, the foreign trust information is not the sort of information that objectively allows the Commissioner to form an opinion that art 7 applies to permit spontaneous release.

Finally, art 21 specifically says that nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practices of the requested State. In this context that means that nothing in this Convention shall affect the rights of people protected by the New Zealand revenue Acts.

# Conclusion

It is not lawful for the Commissioner to release foreign trust information on an automatic and/or voluntary basis to other revenue authorities.