

CAYMAN FINANCIAL REVIEW

Cayman's tax transparency regime as it currently stands: A practical guide

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The Cayman Islands are at the forefront of the global move towards tax transparency and cooperation in international tax matters. Since 2001, the Cayman Islands has signed 36 Tax Information Exchange Agreements (TIEAs) with various countries, 29 of which have already come into force. A further 15 are in the process of being negotiated. The Tax Information Authority Law applies for the purpose of giving effect to the terms of a scheduled Agreement/TIEA for the provision of information for tax purposes.

In 2015, the Cayman Islands joined more than 90 other countries by committing to the exchange of information for tax purposes on an automatic basis. Cayman is in the process of implementing the OECD Common Reporting Standard, with the first automatic information exchange due to take place in September 2017. In April 2016, the Cayman Islands government also committed to the provision to revenue and law enforcement authorities of information on the beneficial ownership of companies and other structures and signed a protocol with the government of the United Kingdom in respect of the sharing of beneficial ownership information which is due to come into effect no later than June 30, 2017. This will allow, for example, reporting of all companies in which a given individual has a significant interest, even though the companies may be managed by different service providers.

This article deals with the regime as it stands now in this ever evolving area of law and regulation and provides a brief background of the important things you need to know.

The TIEA regime

The TIEAs permit revenue authorities of other countries to make requests of the Cayman Islands for information relevant to the determination, assessment and collection of taxes in the requesting jurisdiction. Under the TIA Law, the request is made to the Cayman Islands Tax Information Authority (CITIA), which will usually then need to obtain the information from third parties, such as banks and service providers. For that purpose, having satisfied itself that the request complies with the relevant TIEA and the TIA Law, it may issue a notice in writing to any person requiring the production of documents or information.

Persons who receive a notice are required to comply with the notice within the time specified by the authority, usually 21 days. Failure to comply, without lawful excuse, is an offence liable on summary conviction to a fine of \$10,000 and to imprisonment for two years.

There has been a significant increase in the receipt of notices from the CITIA in recent times, along with a significant decrease in the level of information provided by the authority to the recipient. There is also only one decided case in the Cayman Islands where the release of confidential information has been challenged – two other cases have been commenced in the last 12 months – so there is little authority on which a recipient and its advisors can turn in determining a recipient's right to information and obligation to disclose.

When can CITIA issue a notice?

A request must have been made to the CITIA by the competent authority of the relevant country in compliance with a relevant TIEA. The TIEAs signed by different countries follow an OECD model and are broadly similar, although they are some important differences. They require the requesting authority to provide certain information to the Cayman Tax Information Authority, including the identity of the person under examination, grounds for believing the information is foreseeably relevant to tax matters in the relevant country, and grounds for believing the information is in the possession and control of someone in the Cayman Islands. The Cayman authority must determine whether the request is in compliance with the relevant TIEA and, if it is determined that there is compliance, execute the request in accordance with the relevant TIEA and the TIA Law.

If the CITIA considers it necessary to obtain specified information from any person to comply with the request, it must issue a notice in writing requiring the production of such information, which is listed in a schedule to the notice. In the case of information required for criminal proceedings in the territory of the requesting authority, the Tax Information Authority must first apply to a judge for an order to produce such information.

Is the recipient of a notice entitled to the information in the request?

The TIA Law currently contains no provision that entitles the recipient of the notice to the information in the request. However, in the only decision in the Cayman Islands challenging the disclosure of confidential information under the TIA Law, the court ordered disclosure of the request and any related documents as an interim order to a judicial review application.¹

Similarly, in numerous decisions in Bermuda, the court has found that both fairness and justice require that the recipient should be entitled to see the request, to the extent that its contents are relevant to the question of whether the requirements of the law were satisfied.² In a recent decision, the Court of Appeal for Bermuda,³ a jurisdiction which requires the tax authority to obtain a production order from the court, held that there was a fundamental right to disclosure of the material upon which an ex parte order was based and a right of that importance can only be abrogated by “crystal clear” statutory provisions. The statute in Bermuda was amended following the Court of Appeal decision but it remains to be seen whether the most recent amendments are sufficiently “crystal clear” to abrogate a recipient’s fundamental right to automatic disclosure.

While it is untested in Cayman – other than in the application for judicial review referred to above – these cases suggest that a recipient should be entitled to the information in the request to enable it to determine whether there has been compliance with the TIA Law and the relevant TIEA before complying. Although the TIA law provides extensive indemnities from civil suit for anyone providing information to the CITIA, a service provider that simply complies with what proves to be an obviously invalid request without seeking the information necessary to check its validity could well find itself facing at least embarrassment with its client, possible reputational damage and, in an extreme case, even claims.

Do you have to comply with the notice?

You are required to comply with a notice issued by the CITIA. Failure to comply, without lawful excuse, is an offense liable on summary conviction to a fine of \$10,000 and to imprisonment for two years. Compliance is deemed not to be an offense under the Confidential Relationships (Preservation) Law.

However, you should seek legal advice about your obligation to comply in any of the following instances: (i) you do not hold the documents referred to in the notice; (ii) you protest that the terms of the notice are too wide or its requirements too onerous or expensive; (iii) you dispute that the notice was served on the correct entity; (iv) you assert that the information requested could not be relevant to a tax enquiry; or (v) you assert the information is (or could be) subject to legal privilege.

What information do you have to provide?

Nothing in the TIA Law requires the provision of information in relation to a taxation matter that arose prior to the date of commencement of the TIA Law, except where the terms of a TIEA otherwise so provide. This is important to note, as the obligation to produce will depend upon which country made the request and which TIEA applies. For example, a request from the United States can relate to information and documents without regard to the taxable period to which the request relates, i.e. from any date. By contrast, a request from Argentina can only relate to taxable periods beginning, at the earliest, after the date the TIEA between Argentina and the Cayman Islands came into force, i.e., Aug. 31, 2012. The position is different for each of the 36 countries with agreements in force and the CITIA does not always disclose the jurisdiction which made the request in the notice.

If the notice requires the production of information relating to a time period outside the scope of the relevant TIEA, then there is no requirement to provide the information. More importantly, the information should not be provided as there is a risk that such disclosure would not be protected by the TIA Law and, therefore, in breach of the Confidential Relationships (Preservation) Law. The information requested must also be foreseeably relevant to tax matters in the requesting country. “Fishing expeditions” are not permitted and, although the Tax Information Authority should decline to assist where the request is not made in conformity with a TIEA, that is unfortunately not always the case, as proven in the MH Investments decision.

Can you tell your client about the notice?

The particulars of and all matters relating to a request must be treated as confidential, and no person who is notified of a request may disclose the fact of the receipt of such request or any of the particulars required or documents produced or information supplied to any other person, except that person's attorney and such other persons as the CITIA may authorize. This provision is also binding on the attorney of any person to whom the above applies as if he were that person. A person who contravenes this requirement commits an offense and is liable on summary conviction to a fine of \$1,000 and to imprisonment for six months.

The consequence of this if you are a service provider is that you cannot tell your client about the notice. The problem with not being able to tell your client about the notice is that you may not be able to find out whether your client is even a taxpayer or has any dealings in the jurisdiction of the requesting authority and, therefore, whether you are responding to a valid request.

In Jersey, for example, the relevant authority is required, except in excluding circumstances, to send a copy of the third party notice to the taxpayer to whom a third party notice relates. There is no similar provision in the Cayman legislation. A taxpayer will often not know that a service provider has disclosed documents to the CITIA, which then forwards them to the requesting authority, until some time after the production.

Notification to individuals

An individual who is the subject of a request for information solely in relation to a matter which is not a criminal matter, must if his whereabouts or address in the Cayman Islands is made known to the Tax Information Authority, be served with a notice by the CITIA advising of the existence of a request specifying that individual, the jurisdiction making the request and the general nature of the information sought. An individual so notified may within fifteen days from the date of receipt of the notice, make a written submission to the CITIA specifying the grounds which he wishes the authority to consider in making its determination as to whether or not the request is in compliance with the TIA Law, including any assertions that the information requested is subject to legal privilege.

This only applies to natural persons. It does not apply to corporations. Although, if the taxpayer under investigation is an individual, a corporation served with a notice may want to check that the Tax Information Authority has served notice on the relevant individual and given them an opportunity to challenge the request before complying. Again, this does not always happen as evidenced in the MH Investments decision.

Restrictions on use of information provided

All information provided and received by CITIA and the requesting authority must be kept confidential, and can only be disclosed to persons or authorities officially concerned with the administration and enforcement of the laws concerning taxes. The requesting authority shall not, without the prior written consent of the CITIA, transmit or use information or evidence provided under the TIA Law for the purposes, investigations or proceedings other than those within the scope of the TIEA. Before the CITIA gives such consent, it must apply to a judge for directions.

Conclusion

Although there is not a lot of scope to challenge a notice issued by the Tax Information Authority, service providers may want to be careful that they do more than just blindly comply. If the notice is found to be defective, they could be the subject of, at best, well-founded complaints by their clients, potentially leading to loss of business.

Individuals who wish to avail themselves of the limited right to be informed, or at least have a basis for challenge when it is ignored, may wish to provide the authority with an address in the Cayman Islands at which they can be served with notice. Perhaps the strangest feature of the system, based as it is on OECD principles and relatively standard treaties, is how differently countries have implemented it. There is surely scope for a more consistent approach to an international issue.

What the future looks like

Even with automatic exchange being introduced, it is anticipated that requests under the TIA Law will increase rather than decrease. When it is implemented, foreign authorities will automatically be provided with information about their taxpaying citizens that they may not already have, for example, entities at which funds are held and the sum held. That will then give the foreign authority a basis for making a request to the CITIA so that the foreign authority can fully investigate any matters of interests.

The same applies to the provision of beneficial ownership information, which will operate outside of the TIEA regime. Limited information will be provided under the beneficial ownership protocol, but it will give foreign authorities a sufficient basis to then make a request under the TIA law for further information for matters of interest. The Cayman Islands government has committed to ensuring that those interested in or

connected with the entities concerned are not informed that a search for beneficial ownership information is in progress or has been conducted. For the time being, the same does not apply in relation to notices under the TIA Law and the Tax Information Authority is still required to notify individuals who are the subject of an investigation that a request has been made.

The Cayman Islands government has also committed to participation in the development of a new global standard for the exchange of beneficial ownership information. However, as Premier Alden McLaughlin pointed out at the recent anti-corruption summit in London, a global standard requires the participation of all major countries. Since some of those do not yet even ask for the necessary information, far less ensure that it is verified and recorded, as Cayman has been doing for many years, there is clearly some way to go before this can become a reality. But in the current climate it would be unwise to expect anything other than continual movement in that direction.

ENDNOTES

1. M.H. Investments & Anor v The Cayman Islands Tax Information Authority (Unreported decision of Quin J, 24 January 2013 in Cause No. G391/2012) and (Unreported decision of Quin J, 30 August 2013 in Cause No. G391/2012). See Appleby article: Cayman Decision on Tax Information Exchange: Transparency undermined or rule of law upheld?
2. See Lewis & Ness v Minister of Finance [2004] Bda L.R. 66 and more recently, Minister of Finance v AD [2014] SC (Bda) 10 Civ (27 January 2015)
3. The Minister of Finance v AD [2015] CA (Bda) 18 Civ (12 June 2015)

N.B.

*This article was drafted prior to the Confidential Information Disclosure Law, 2016 coming into force. That law repeals the Confidential Relationships (Preservation) Law, meaning disclosure of confidential information is no longer a criminal offence. The disclosure requirements under the Tax Information Authority Law set out in this article have not changed.