IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-001013
[2017] NZHC 3289

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision under the Tax Administration Act 1994
BETWEEN	CHATFIELD & CO LIMITED First Applicant
	CHATFIELD & CO Second Applicant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 28 September, 26-27 October and 1 December 2017

Appearances: R A Rose and L M Zwi for Applicants
P H Courtney and M J Bryant for Respondent

Judgment: 22 December 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 22 December 2017 at 10.30am
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
Bell Gully, Auckland
Crown Law, Wellington

Introduction

[1] The applicants, Chatfield & Co Limited and Chatfield & Co (jointly "Chatfield"), seek to review a decision made by the respondent, the Commissioner of Inland Revenue (the "Commissioner"), in October 2014 to issue 15 notices under s 17 of the Tax Administration Act 1994 (the "2014 notices"), requiring them to furnish information about 15 companies.

[2] The information is sought by the Commissioner pursuant to a request made by the Korean National Tax Service (the "NTS") under art 25 of the Double Taxation Relief (Republic of Korea) Order 1983 (the "DTA"). The NTS has requested the Commissioner to exchange the information once it is obtained in this country.

Background – the 2014 notices

[3] The NTS made the request to the Commissioner under the DTA in May 2014. The information requested related to 21 New Zealand taxpayers. Some of the information sought was able to be obtained from the Commissioner's existing records. Some of it could be obtained from the Companies Office and Land Information New Zealand, as well as other publicly available sources. By these means, information requested by the NTS about five of the taxpayers was able to be provided and it was then exchanged. However, to fully respond, it was thought necessary to take further steps.

[4] To this end, on 7 October 2014, the Commissioner exercised her discretion to issue the 2014 notices to Chatfield. They seek information about a company called KNC Construction Ltd and 14 affiliated companies. They were issued by Ms Forrest, an Investigation Team Leader, and they require Chatfield to produce various documents and records that it holds on behalf of the target companies. Some of the 2014 notices are relatively confined — for example, one seeks KNC Construction Ltd's 2013 financial statements. Others are more wide-ranging — for example one notice seeks the financial statements of KNC Construction and Engineering Ltd for the years 2003 – 2013, as well as copies of agreements for sale and purchase and settlement statements in relation to various properties. Documents sought from other

target companies include share documents, bank remittance certificates for share and property sales, and reasons for changes in the ownership of various properties.

[5] Each of the companies has its registered office in New Zealand. Chatfield is registered under s 34B of the Tax Administration Act as the tax agent for each of them.

[6] The Commissioner's sole purpose in issuing the 2014 notices was to obtain information requested by the NTS for possible exchange under art 25 of the DTA. No New Zealand tax revenue is in issue.

[7] The NTS has commenced a tax investigation in Korea into the affairs of Mr Jae Ho Huh. Mr Huh is the substantial owner of, and is associated with, the 15 companies the subject of the 2014 notices. He is a Korean national but he also has New Zealand residency. He has lived this country since approximately 2004.

Proceedings to date

[8] Chatfield had concerns about the legality of the 2014 notices. It discussed these concerns with its advisors and with the Commissioner, but was unable to reach a satisfactory resolution.

[9] As a result, in May 2015, Chatfield commenced these proceedings challenging the Commissioner's decision to issue the 2014 notices. The proceedings were issued on two broad grounds:

(a) it was alleged that the Commissioner's decision to issue the notices breached Chatfield's legitimate expectations arising from an operational statement known as OS 13/02[1] dealing, inter alia, with the issuance of s 17 notices; and

(b) it was further alleged that, in issuing the notices, the Commissioner failed to take into account three relevant considerations:

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[1] Graham Tubb *Operational Statement 13/02: Section 17 notices* (Inland Revenue, OS 13/02, 14 August 2013).

(i) OS 13/02;

(ii) the limited nature of information held by tax agents in New Zealand; and

(iii) the terms of the DTA.

[10] Chatfield also sought an order under s 10(2) of the Judicature Amendment Act 1972 seeking that the Commissioner should disclose and produce all relevant documents that had not at that point been produced. In particular, it sought the request made under the DTA by the NTS to the Commissioner and any and all exchanges between the Commissioner and the NTS relating to the request.

[11] The Commissioner refused to supply these documents. Rather, she sought an order under s 70 of the Evidence Act 2006 precluding disclosure on the ground that the documents relate to "matters of state".

[12] On 1 September 2015, Ellis J held that it is, in principle, possible to obtain disclosure of material exchanged between the Commissioner and the NTS, but that such disclosure is governed by s 81 of the Tax Administration Act.[2] She considered, however, that there was an evidential vacuum in the materials before her, and that the appropriate course was for the Commissioner to make enquiry of the NTS as to its views on disclosure of the documents sought. She indicated that if secrecy was sought to be maintained by the NTS, then the matter would need to be referred back to her. She directed the Commissioner to file and serve a memorandum advising the outcome of the enquiry to the NTS.

[13] The Commissioner made the appropriate enquiry, and then filed both an open and a closed memorandum. The open memorandum asserted as follows:

(a) NTS's request, and the information sought, was necessary for carrying out the provisions of the DTA and the domestic laws of Korea.

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2 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099, (2015) 27 NZTC 22-024.

(b) NTS's request was for information that is not obtainable in the normal course of tax administration in Korea.

(c) Korean legislation gives a taxpayer the right to request information necessary for the exercise of his, her or its rights, but tax officials are not required to provide information where an investigation is in progress, a decision on the appropriate tax assessment has not been made, and disclosure of information might affect the tax investigation. When the tax investigation is completed, tax officials must notify the taxpayer of the result. However, material obtained during the investigation is still not disclosed, unless a request is made. The taxpayer has various options to dispute the outcome of the investigation.

(d) The closed memorandum being filed contemporaneously was confidential to the Court. It had attached to it the response received from the NTS to the enquiry directed by the Court. The NTS was claiming confidentiality in respect of each document requested and it had given brief reasons for its claim to confidentiality.

I have not seen the closed memorandum.

[14] After calling for submissions, in June 2016 Ellis J issued a further judgment as an addendum to her earlier judgment. She held that the Commissioner was not required to disclose the requested documents pursuant to s 81 of the Tax Administration Act.[3]

[15] In early July 2016, Chatfield both appealed Ellis J's decision and filed an amended statement of claim. The Commissioner promptly filed a strike-out application.

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3 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 1234, (2016) 27 NZTC 22-053.

[16] The strike-out application came before Lang J on 21 September 2016, and he issued his decision on 27 September 2016.[4] He struck out Chatfield's legitimate expectations claim, but held that Chatfield's allegation that the Commissioner had decided to issue the 2014 notices without taking into account the terms of art 25, and in particular the exceptions contained in art 25(2), was reasonably arguable. He held that this part of the cause of action could remain on foot.

[17] Chatfield appealed both Ellis J's discovery decision and parts of Lang J's strike-out decision to the Court of Appeal. The Commissioner did not appeal either decision.

[18] The Court of Appeal dismissed both of Chatfield's appeals following separate hearings. Relevantly, it:

(a) held that the undisclosed documents were not relevant to Chatfield's amended statement of claim;[5]

(b) upheld Lang J's decision that OS 13/02 did not give rise to any legitimate expectation as contended for by Chatfield and that it was not reasonably arguable that, when exercising her s 17 power, the Commissioner was required to take OS 13/02 into account, or the limited relationship tax agents characteristically have with their clients.[6]

[19] Chatfield applied for leave to appeal both decisions to the Supreme Court. It also filed a second amended statement of claim on 8 June 2017[7] and the Commissioner filed an amended statement of defence in response on 22 June 2017.

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4 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289, (2016) 27 NZTC 22-072.

5 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC 22-084.

6 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZCA 148, (2017) 28 NZTC 23-015.

7 Although the Court of Appeal left it open to it to do so – *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 5, at [31] – insofar as I am aware Chatfield has not sought discovery in respect of its second amended statement of claim.

[20] The Supreme Court subsequently declined leave to appeal either decision made by the Court of Appeal.[8]

[21] In the course of the hearing before me, Mrs Courtney for the Commissioner sought to argue justiciability as an affirmative defence. That defence had not been pleaded and Ms Rose for Chatfield asserted that it was not open to the Court to consider the matter. After discussions in Court, Mrs Courtney sought leave to file an amended statement of defence. I granted her leave to do so, but delayed hearing Chatfield's submissions in reply, to give Ms Rose the opportunity to fully consider the matter, and so as to avoid any prejudice to her client.

The pleadings

[22] Chatfield's second amended statement of claim now contains only one cause of action — although the pleading still runs to some 86 paragraphs. No doubt because it has not seen the documents relevant to the decision it seeks to challenge, the pleading adopts what can best be described as a scatter-gun approach. Chatfield alleges that the Commissioner erred in law in issuing the 2014 notices, and broadly, that she:

(a) failed to fully and/or accurately evaluate the NTS's request and its consequences;

(b) had insufficient information to accurately assess the lawfulness of the request;

(c) purported to make an exchange of information decision where the relevant decision-maker was not a competent authority as defined in art 3(1)(i) of the DTA;

(d) did not take into account the terms of the DTA, and in particular, arts 2 and 25, various provisions in the Tax Administration Act, and the limitation period for tax investigations in Korea;

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8 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 48, (2017) 28 NZTC 23-010; *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 118.

(e) failed to take into account that some of the information sought is available in the ordinary course of administration in Korea;

(f) failed to take into account the need for the NTS to exhaust all local remedies; and

(g) failed to appreciate that some of the taxes in respect of which information is sought, may not be covered by the DTA.

Chatfield alleges that the notices were issued pursuant to mistakes of fact, that the Commissioner failed to apply independent judgment or independently exercise her discretion in issuing the notices, and that the decision to issue the notices was one that no reasonable Commissioner could properly make.

[23] The Commissioner's amended statement of defence denies that the Commissioner has erred in law in any of the respects alleged and contends that Chatfield has failed to establish that she exercised her statutory powers and duties unlawfully. She also advances the affirmative defence of justiciability. In oral argument, she asserted that the appropriate intensity of review only requires the Court to determine that the decision to issue the 2014 notices was valid on its face.

Section 17

[24] The 2014 notices were issued under s 17 of the Tax Administration Act. Relevantly it states:

> 17 **Information to be furnished on request of Commissioner**
>
> (1) Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner, and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.
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> …

[25] The discretionary power vested in the Commissioner pursuant to s 17 is one of considerable potency. It is, however, necessary in the public interest. The Courts have recognised that extensive powers of inquiry are a fundamental feature of revenue legislation, as information is generally in the hands of taxpayers, who may have an incentive to act secretively.[9] The Commissioner can seek information and documents that alert her to lines of inquiry.[10] It has been recognised that the rationale of taxation would break down, and that the burden of taxation would fall only on diligent and honest taxpayers, if the Commissioner could not obtain information about taxpayers who may be negligent or dishonest in respect of their tax obligations.[11]

[26] Here, the 2014 notices each advised that the information was requested pursuant to art 25 of the DTA.

DTAs – a brief overview

[27] The DTA is one of a number of tax treaties to which New Zealand is a party. The broad objective of these tax treaties is to avoid the double taxation of income and to prevent fiscal evasion. With globalisation making it increasingly easy to do business anywhere in the world, and with pressure on states to sustain the revenue they raise through taxes, states have cooperated to maintain the integrity of their respective tax systems. When taxpayers operate in multiple jurisdictions, not all of the information required to enable tax authorities to monitor any particular taxpayer's compliance with his, her or its tax obligations will necessarily be available in any one state. As a result, the tax treaties also seek to facilitate the exchange of information between states.

[28] New Zealand enters into international treaties — including tax treaties — through the executive branch of government, in the exercise of its prerogative power. The act of entering into a treaty, or of becoming a signatory to an international convention, involves relationships between states.

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9 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1990] 3 NZLR 333 (CA) at 336-337; approved by Privy Council in *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC) at 3 - 4.

10 *Smorgon v Federal Commissioner of Taxation* (1979) 23 ALR 480 (HCA).

11 *New Zealand Stock Exchange v Commissioner of Inland Revenue,* above n 9, at 4.

[29] DTAs are unusual amongst New Zealand's international treaties, because they have direct effect in New Zealand's domestic law, once they are given effect in this country by order in council.[12] Relevantly, s BH 1 of the Income Tax Act 2007 states as follows:

> **BH 1 Double tax agreements**
>
> *Meaning*
>
> (1) **Double tax agreement** means an agreement that—
>
> (a) has been negotiated for 1 or more of the purposes set out in subsection (2); and
>
> (b) has been agreed between—
>
> (i) 1 or more governments of territories outside New Zealand and the government of New Zealand; or
>
> (ii) …
>
> (c) has entered into force as a result of a declaration by the Governor-General by Order in Council under subsection (3).
>
> *Purposes*
>
> (2) The following are the purposes for which a double tax agreement may be negotiated:
>
> (a) to provide relief from double taxation:
>
> …
>
> (f) to prevent fiscal evasion:
>
> (g) to facilitate the exchange of information:
>
> …
>
> *Entry into force*
>
> (3) An agreement to which subsection (1)(a) and (b) apply comes into force as declared by the Governor-General by Order in Council and on the date determined under the agreement.
>
> *Overriding effect*
>
> (4) Despite anything in this Act, … a double tax agreement has effect in relation to—

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[12] And see *Lin v Commissioner of Inland Revenue* [2017] NZHC 969, (2017) 28 NZTC 23-016 at [24]; An appeal has been filed by the Commissioner. I am advised from the bar that it does not touch on this issue.

(a) income tax:

(b) any other tax imposed by this Act:

(c) the exchange of information that relates to a tax, as defined in paragraphs (a)(i) to (v) of the definition of **tax** in section 3 of the Tax Administration Act 1994.

...

[30] As can be seen from the opening words of subs (4), if a DTA is inconsistent with the Inland Revenue Acts, the DTA prevails.

[31] DTAs have but rarely been required to be interpreted by New Zealand Courts,[13] and aspects of how they fall to be interpreted are still controversial.[14] Moreover as DTAs are instruments of international law, principles governing their interpretation are also found in the Vienna Convention on the Law of Treaties.[15] A further source of interpretation, unique to the DTA context, is the Organisation for Economic Cooperation and Development's ("OECD's") model commentary. The OECD commentary is regularly updated, whereas DTAs are not. More recent commentary may be used to interpret a DTA concluded earlier in time where the commentary can be "viewed not as recording an agreement about a new meaning but as reflecting a common view as to what the meaning is and always has been".[16] Otherwise relying upon more recent commentary risks retrospectivity.

The DTA at issue in this case

[32] The New Zealand-Korea DTA was incorporated into New Zealand law by the Double Taxation Relief (Republic of Korea) Order 1983. The DTA largely follows the OECD's model convention as it stood at the time.

[33] The first relevant article is art 2. Relevantly, it provides as follows:

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13 See, eg *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Commissioner of Inland Revenue v JFP Energy Inc* [1990] 3 NZLR 536 (CA); *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 2.

14 See Craig Elliffe *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015) at 6.5-6.7.

15 Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. See in particular pt III.

16 *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 2, at [62].

Article 2
Taxes covered

1. The taxes to which this Convention shall apply are:

(a) In the case of Korea:

(i) the income tax;

(ii) the corporation tax; and

(iii) the inhabitant tax (hereinafter referred to as "Korean tax");

…

[34] The other article at issue in this case is art 25. Relevantly, it provides as follows:

Article 25

Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention, as well as to prevent fiscal evasion. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) …

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) …

[35] The term "competent authority", used in the plural in art 25, is defined in art 3(1)(i). It means, in the case of New Zealand, the Commissioner or her authorised

representative. The authorised representative holding the position is Mr John Nash. Mr Nash holds the position of Manager (International Review Strategy) at the Inland Revenue Department. He has held the position as competent authority for New Zealand since 1 March 1994. As competent authority, he is responsible for exchanges of information with New Zealand's tax treaty partners.

Issues for determination

[36] The submissions for both parties were wide-ranging and they tended to focus on the legislative framework, rather than on the cause of action pleaded. For the reasons which follow, I do not consider it necessary to consider all of the very many matters traversed in the lengthy submissions advanced by counsel. I consider that the principal issues are as follows:

(a) Justiciability — is the Commissioner's decision to issue the 2014 notices susceptible to judicial review?

(b) Did Mr Nash as the competent authority for New Zealand under the DTA act lawfully? In particular, did he take steps to satisfy himself that:

(i) the request was made in respect of taxes covered by art 2 of the DTA?;

(ii) the information sought for exchange was "necessary" under art 25(1) of the DTA?; and

(iii) the exception set out in art 25(2)(b) of the DTA did not apply?

(c) Did Mr Nash make the impugned decision to issue the 2014 notices, and was he required to do so?

(d) If judicial review is available and one or other of the above grounds are made out, what is the appropriate intensity of review?

Justiciability

[37] Mrs Courtney contended that it is "simply not in the public interest for judicial review to be available in the circumstances of this case. She argued that the institution of the proceedings by Chatfield has undermined New Zealand's reputation internationally by delaying the provision of the requested information, contrary to the exchange of information provisions in the DTA. She further submitted that the subject matter of the Commissioner's decision to issue the 2014 notices, and the context in which that decision was made, involve relations between sovereign states, and occur through senior public servants designated as competent authorities. Such decisions are, in the Commissioner's submission, at the "apex of executive responsibility", and are inherently unsuitable for resolution by the Courts. She argued that collateral challenges which disrupt the process are undesirable, and that other safeguards are in place, including an international peer review system administered by the OECD.

[38] Ms Rose argued that non-justiciability is a narrowing concept, and that the Courts should not lightly accept that there are "Alsatias" where the executive can act free of judicial review.[17] She argued that judicial review operates as an important safeguard for taxpayers, and that the primary function of judicial review is to uphold the rule of law by ensuring that the public authorities, including the Commissioner, act in accordance with their statutory powers.

[39] I am not persuaded by the Commissioner's arguments. In my judgment, the Commissioner's decision to issue the 2014 notices is justiciable.

[40] There are a number of reasons for this conclusion:

(a) Chatfield's challenge does not call into question the executive's decision to enter into the DTA. It does not raise any comity issue between New Zealand and Korea, and it does not challenge any act of Korea as a foreign state. Rather, it puts in issue the exercise by the

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[17] A reference to an observation by Scrutton LJ that "there must be no Alsatia … where the king's writ does not run" — in *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 (CA) at 488.

Commissioner of the power available under domestic law to issue notices under s 17 of the Tax Administration Act.

(b) To the extent that Chatfield's application for review involves the interpretation of arts 2 and 25 of the DTA, the DTA is now part of New Zealand law. Interpretation of the Tax Administration Act, and of the DTA as part of New Zealand law, is within this Court's constitutional competence. The Courts in this country are responsible for determining questions of domestic law. In exercising this jurisdiction, the Courts do not unacceptably tread on or overstep any foreign state boundary.

(c) The matters at issue in this case are not matters of high policy. Nor are they politically fraught. All that is required is an assessment as to whether or not statutory requirements contained in domestic legislation have been met on the facts of this particular case.

(d) The legality of the Commissioner's actions in issuing notices under s 17 of the Tax Administration Act and its related provision, s 16, can be the subject of judicial review proceedings, for example, if the Commissioner exceeds or abuses her powers.[18] Prior authority in the DTA context is to the same effect.[19]

(e) Other checks and balances which apply to DTAs, and in particular the OECD's peer review regime, do not involve curial oversight. They do not focus on individual cases and they do not give remedies to individual taxpayers.

[41] I cite the observations of Lord Scarman in the *Fleet Street Casuals* case.[20]

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18 *New Zealand Stock Exchange v Commissioner of Inland* Revenue (PC), above n 9, at 6-7; *Lupton v Commissioner of Inland Revenue* (2007) 23 NZTC 21,204 (HC) at [21]; *Mason v Commissioner of Inland Revenue* (2006) 22 NZTC 19,775 (HC) at [17]; *Green v Housden* [1993] 2 NZLR 273 (CA) at 283-284; *Tauber v Commissioner of Inland Revenue* (2011) 25 NZTC 20-071 (HC); upheld on appeal in *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549.

19 See, *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2008] 1 NZLR 675 (HC) at [24], dealing with s 16 of the Tax Administration Act.

20 *R v Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 652.

> The courts have a role, long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant role.

In my judgment, these comments are apposite to the present case and I adopt them.

[42] Given this conclusion, I do not need to go on to consider Chatfield's alternative submission that justiciability has already been decided in these proceedings, and that it is res judicata as between the parties.

[43] I reject the Commissioner's argument that the Commissioner's decision to issue the 2014 notices in this case is not justiciable.

Did the Commissioner's officer designated as the competent authority under the DTA act lawfully?

(i) Common ground

[44] Section 17 is set out above at [24]. It permits the Commissioner to require the production of any information she considers necessary or relevant for any purpose relating to the administration of the Inland Revenue Acts or for any purpose relating to the administration of any matter arising from or connected with any other function lawfully conferred on her.

[45] Given that the DTA is part of New Zealand's revenue Acts,[21] it is clear that the Commissioner may exercise the powers available under s 17 for the purposes of gathering information for exchange with a foreign state pursuant to a DTA, and Chatfield did not assert to the contrary.

[46] Article 25 is also set out above at [34]. It provides for the exchange by competent authorities of the contracting states of such information as is "necessary" for carrying out the provisions of the DTA or of the domestic laws of the contracting states concerning taxes covered by the DTA, as well as to prevent fiscal evasion.

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[21] See [29] above and Income Tax Act 2007, s BH 1(4).

[47] Chatfield asserted, and the Commissioner accepted, that Mr Nash, as the competent authority for New Zealand, faced with the request for the exchange of information from the NTS, needed to satisfy himself that the information sought came within the terms of the DTA and this country's tax laws, that the nature of the information sought was (or at the least appeared to be) consistent with the grounds for the request, and that the type of information sought was broadly what would be expected to be necessary for or relevant to any inquiry of the nature indicated.

[48] In its terms, art 25 deals with the exchange of information, but it is clear from the affidavits filed that obtaining information — in this case from Chatfield — is a prelude to its exchange. Once obtained, exchange is not, however, inevitable. The competent authority, Mr Nash, has deposed that he is still to make the decision about what further information the Commissioner will exchange with the NTS in this case, but clearly he can only make that decision after the Commissioner has received the information sought in the 2014 notices. Both parties proceeded, at least implicitly, on the basis that Mr Nash had to be satisfied that the information sought could be exchanged once it is obtained under the 2014 notices. This seems to me a sensible way to approach the matter, and I follow the same course.

(ii) Chatfield's arguments

[49] Shorn of irrelevancies and repetition, Chatfield asserts that Mr Nash, as the competent authority, can only exchange (and therefore request) such information as is "necessary" for the purposes set out in art 25. Chatfield argues that the word "necessary" used in art 25(1) is a jurisdictional gateway which Mr Nash must be satisfied of before the Commissioner can respond to a request under the DTA.[22] Chatfield submits that it was incumbent on Mr Nash to be satisfied, by clear and specific evidence, that all of the information requested by the NTS was necessary for an investigation, or other action, being undertaken by the NTS against a Korean taxpayer regarding one or more of the taxes covered by the DTA, namely, income tax, corporation tax or inhabitant tax, or to prevent fiscal evasion in relation to the same taxes.

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[22] Relying on *Comptroller of Income Tax* v *AZP* [2012] SGHC 112, (2012) 14 ITLR 1155 at [10]; E Reimer and A Rust (eds) *Klaus Vogel on Double Taxation Conventions* (4th ed, Kluwer Law International, Alphen aan den Rijn, 2015) at 1406.

[50] Chatfield says that there is no evidence that Mr Nash sought or obtained confirmation from Korea that each item of information sought relates to a tax covered by the DTA. Chatfield further says that there is no evidence that Mr Nash has checked that the information sought, once exchanged, will only be used for the purpose of recovering one or other of these taxes.

[51] It was submitted that, if the 2014 notices seek material that is outside the parameters of the taxes stipulated in art 2 of the DTA, then the 2014 notices are necessarily invalid and unlawful. In this regard, it points to an affidavit filed by Mr Seo, who is a director of Chatfield & Co Ltd and a partner in Chatfield & Co, which suggests that the NTS is investigating a Korean company called Dae Ju Constructions Co Ltd in relation to alleged exchange control breaches involving KNC Construction and Engineering Co Ltd and Christie Property Holdings Ltd — both New Zealand companies, and both target companies under two of the 2014 notices. Chatfield argues that possible exchange control breaches are not covered by the DTA, and the Commissioner has no jurisdiction to seek information under s 17 in respect of these alleged breaches.

[52] Chatfield also argues — relying on art 25(2)(b) — that there is no obligation on New Zealand to exchange information obtained under a s 17 notice if Korea could have obtained the information under its own laws in the normal course of the administration of those laws. It notes that Mr Seo has filed an affidavit advising that Mr Huh's ex-partner, Mrs Sewon Hwang, has received an information production request from the NTS in Korea. Mrs Hwang is a Korean citizen and tax resident, and Mr Seo deposes that the information request sent to her sought material the NTS has also sought from Chatfield via the 2014 notices.[23] Chatfield asserts that there is no evidence suggesting that Mr Nash sought or obtained confirmation from the NTS that it had exhausted all local remedies before making the DTA request.

[53] Mr Seo has also deposed that Mr Huh received a notice from the NTS in Seoul. The notice has been exhibited. It is under the subject line "Notification of Suspension

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[23] Strictly Mr Seo's assertions in this regard are hearsay. The Commissioner did not, however, take this point. I was also told from the bar that Mrs Hwang is a director of six of the target companies, a shareholder in five of those six, and a shareholder in three of the other target companies. This information was not set out in any of the supporting affidavits however.

of Tax Investigation" and it inter alia records that the original planned period of investigation was 3 April 2014 to 2 January 2017, that the investigation is suspended from 31 December 2016 to 31 December 2017, and that the adjusted period of investigation is now from 3 April 2014 to 2 January 2018. The reason for suspension is recorded as follows: "to collect information from overseas sources". The notice records that after the suspension period is over, the NTS will resume the tax investigation.

[54] There was also a concern raised about limitation periods. The Commissioner has advised the Court that the limitation period for the recovery of taxes in Korea is five years for income tax and corporate tax, but that there is a 10-year limitation period where evasion or fraud is suspected. Concern is expressed that some of the material sought in the 2014 notices appears to fall outside either the five or 10-year window, and that there is no information supplied to determine which limitation applies to each of the 2014 notices.

(iii) The Commissioner's Response

[55] The Commissioner relies primarily on Mr Nash's affidavits. Mr Nash has confirmed that the request at issue in this case was made under art 25 of the DTA. He acknowledges that it is his responsibility to ensure that requests contain sufficient particularity and specificity to ensure that an effective and efficient response can be made. He says that whenever he considers a request under a DTA, including making a decision to exchange information the Commissioner considers is relevant, he does so within the framework of art 26 of the OECD model DTA and the equivalent provision in the relevant DTA.

[56] Mr Nash says that each request is considered on an individual basis, and that requests should include relevant background context to enable the treaty partner to understand that the information sought concerns a tax covered by the DTA, the nature of the underlying audit/inquiry, and to establish that the request is in good faith.

[57] Mr Nash sets out his understanding of the principles relevant to requests and the subsequent exchange of information as follows:

(a) There is a mandatory requirement for exchange, because of the use of the word "shall" in art 25, provided the competent authority is satisfied about the scope of the request and the availability of the information sought.

(b) Information exchanged is to be treated as secret in the receiving state in the same manner as information obtained under the domestic laws of that state.

(c) The requested state is not obliged to carry out measures in obtaining information requested that are at variance with the laws and administrative practices of either contracting state. The Commissioner has an operational discretion to decide what information she considers necessary or relevant, and how it is to be obtained. In the absence of anything to the contrary, the competent authority can rely on the accuracy of the content of the request, and is not obliged to second guess the competent state of another country.

(d) The requested state may refuse to provide information where the requesting state would be precluded by law from obtaining and providing the information or where the requesting state's administrative practices result in the lack of reciprocity. Reciprocity should be interpreted in a broad and pragmatic manner.

(e) The requested state is not obliged to supply information that is not obtainable under the laws, or in the normal course of administration of either contracting state.

[58] Mr Nash then goes on to discuss the process which he generally follows when an information request is received by the Commissioner. He states as follows:

> 34. When a Request comes in I perform a control check to determine whether the Request conforms with the relevant DTA and whether the information requested can be retrieved without the assistance of Inland Revenue investigating officers.

35. I assess the source of the request. I consider whether the requesting State is one that is a trusted partner; or is it a State that we need to be more cautious of in our dealings. In that case, any such request would likely require more intense scrutiny, including as to its context and details.

36. However, as Korea does not come within that category, it is not necessary to discuss that any further.

37. Korea is a trusted partner, both in terms of the requests they make and the processes they use in making those requests. They have a good record internationally in relation to the carrying out of their obligations in relation to requests they make and requests made of them. I have had the opportunity to form this assessment from my experience of dealing with them; and through reading the peer review evaluation for which they received a rating of compliant.

38. … On occasion, it has been necessary to ask for additional details to clarify issues raised, but in general their requests are to the required quality by international standards.

39. Consequently, when we receive a request from Korea there is no reason to believe that the request has been made in an unorthodox manner (ie, outside the international framework for the exchange of information and/or outside NTS internal processes).

…

40. If we are satisfied that the request is one which falls under the relevant DTA, the next step is to consider the issue of equivalence of laws and reciprocity.

41. The Commentary to Article 26 of the OECD Model DTA highlights that the goal is exchange of information to the widest possible extent. From previous case law and the Commentary to the OECD Model DTA we do not understand that it is necessary for the tax laws or administrative practices of each State to match exactly – as long as the information comes within the DTA (in this case Articles 1 and 2 of the NZ-Korea DTA), and is obtainable under the law of the other State through a broadly analogous process, that is sufficient.

42. We satisfy ourselves that the requesting State is not gaming the system, eg, attempting to get information from New Zealand that it cannot usually get at home.

…

45. It is not possible for every Competent Authority and their staff to be experts in all other tax systems. The mutual assistance treaties are therefore formulated and operate in good faith.

46. If I have a concern about the veracity of any request, or the use of any information provided pursuant to a request, I would pursue that through requiring further details to satisfy myself as to the bona fides of the request. If a response was not satisfactory, then a serious matter

> of this nature may be elevated to respective Commissioners of IRD and the NTS. If the NTS asked for information it was not entitled to, or used such information improperly, potentially that could put the NZ-Korea DTA at risk. …

[59] Mr Nash then goes on to discuss his involvement in this case specifically. He states:

> 49. The NTS initiated the exchange of information process in May 2014. In my role I had ultimate responsibility for accepting the request and what information was exchanged, and maintained oversight of the case. I discussed the Request and the actions we considered were necessary to comply with it, provided instructions as required, and supervised as appropriate, my exchange of information staff (principally Michael Nugent and Margaret Wallace) who had competent authority delegations. They in turn worked with other IRD investigators who had previously been involved in an audit involving one of the parties related to the Request in making the specific requests for information.
>
> 50. Article 170 of the Republic of Korea's Income Tax Act allows any public official engaged in business concerning income tax to investigate including ordering them to present relevant books, documents and things. That provision is broadly analogous to s 17 of the Tax Administration Act 1994. …
>
> 51. It is the responsibility of the Competent Authority to determine what information is to be exchanged with the requesting state. Even though information is collected it is not inevitable that an exchange of information will occur. I make the final decision on that, taking into account what I understand to be New Zealand's obligation under the relevant DTA, having regard to the terms of the Request, and the nature of the information collected.
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> …
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> 54. In respect of each Request, in my role as the Competent Authority, I satisfy myself that there are good grounds for the request; and the nature of the information sought to be exchanged is broadly what would be expected to be necessary or relevant to an inquiry of the nature indicated. Beyond that, I understand that the Competent Authority is entitled to accept at face value the factual assertions underlying the Request, and that the requesting State is entitled under its own law to make the Request, based on a broad understanding that the information sought comes within the DTA and about the equivalent law in each State.
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> …
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> 79. The Commissioner does not blindly accept exchange of information requests. The Competent Authority needs to be satisfied that the Request is in accordance with the DTA; and does seek clarification where that is considered necessary and also rejects requests. A request

> must proceed through a central gateway and be accepted by a senior officer with appropriate delegation (ie, the Competent Authority). Furthermore, nothing has come to the Commissioner's attention to suggest that the NTS has poor or inadequate exchange practices. To the contrary, the Global Forum has given Korea a rating of "compliant" which is the highest rating possible.
>
> 80. I am satisfied that both the information requested and exchanged, and the additional information sought under the 2014 Notices, are in accordance with the NZ-Korea DTA and the taxation laws of New Zealand.

[60] Mr Nash states that he was unaware that exchange control breaches had been identified as a matter of potential concern in Korea until that issue was raised by Chatfield. In relation to the limitation period point, he asserts that just because information relates to a year in respect of which an assessment can no longer be made or amended, it does not mean information cannot be exchanged; information relating to earlier years may assist in understanding the position in later years that are still open for assessment or amendment. He says that earlier information can assist in putting together a complete picture of a taxpayer's financial and taxation affairs.

[61] An affidavit has also been filed by Ms Forrest. She is an Investigations Team Leader with the Commissioner. She has held that position since approximately 2002. She records her team's involvement in collating the information sought by the NTS that was available from public sources, and then her involvement in discussions with the Commissioner's delegates as to how the balance of the information requested by the NTS could be obtained. She says that it was decided that the information sought should be requested from Chatfield as the tax agent of the targeted taxpayers. She says that it was decided that notices under s 17 should be issued, and that accordingly she issued the 2014 notices on 7 October 2014. She records that she holds the delegated authority to issue such notices. She notes that the notices state that the information is required under s 17, and that they are issued pursuant to art 25 of the DTA. She refers to correspondence she had with Chatfield and their legal advisors, and to a letter she sent to Chatfield on 3 December 2014. In that letter, she asserted that the notices were validly issued under s 17, and that the information requested in the notices was necessary while enforcing the Inland Revenue Acts. She also stated that the information requested was sought as a result of sch 1, art 25, of the DTA.

[62] As can be seen, the affidavits filed by the Commissioner are long on generalities but short on specifics. Nevertheless, it was the Commissioner's case that I should confine myself to Mr Nash's affidavits, and ask myself simply whether there are any errors of a material or substantive nature evident from them. Mrs Courtney put it to me that I am entitled to rely on Mr Nash's assurances and to infer that he considered all that he was required to consider in relation to the request from the NTS.

(iv) Documents before the Court

[63] The difficulty in dealing with this case is exacerbated by the fact that the relevant background papers, in particular the request from the NTS, file notes that Mr Nash may have made, and any correspondence that may have passed between Mr Nash and the NTS regarding the request, have not been disclosed to the Court.

[64] I have already summarised above Chatfield's unsuccessful attempts to obtain copies of the background documents.[24]

[65] When the hearing before me commenced, Mrs Courtney advised that she proposed that she would make available to me the relevant background documents, but on a confidential basis, and that she would ask me to clear the Court (including Chatfield's representatives and its counsel), so that she could address me directly in relation to them.

[66] I indicated to Mrs Courtney that this proposal was not satisfactory to me. Because Chatfield and its counsel would not be present, Chatfield would not have the opportunity to respond, and there would be no-one to test such arguments as the Commissioner might advance based on the background documents. I indicated that in my view, the Commissioner's proposal was contrary to the rules of natural justice, and that it would place the Court in a difficult position when giving a reasoned judgment.

[67] I asked Mrs Courtney whether the Commissioner was prepared to agree to the background documents being made available to the applicants' counsel, on the basis

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[24] See above at [10] to [20].

of appropriate undertakings as to confidentiality. Mrs Courtney advised that she would seek instructions. Subsequently she advised that this proposal was not acceptable to the Commissioner.

[68] I then explored with counsel whether an amicus could be appointed, who could acquaint himself or herself with the applicants' arguments, inspect the relevant background documents, and then address me in relation to them. The Commissioner initially agreed to this proposal, and there were discussions about the appointment of an appropriate amicus. Subsequently, the Commissioner resiled from this position and Mrs Courtney advised me that the Commissioner was happy that the case should proceed without me seeing the relevant background documents at all.

[69] I expressly queried this stance with Mrs Courtney. It seemed to me that it potentially placed the Court in a difficult position, requiring it to make a decision when it did not have all relevant materials before it. I asked Mrs Courtney to take further advice from the NTS as to whether it was prepared to agree to the documents being released to an amicus, on the basis that the amicus would be subject to appropriate undertakings.

[70] When the hearing resumed before me on 1 December 2017, Mrs Courtney advised me that the NTS had advised that it was not prepared to have the documents released to an amicus, and that the Commissioner was still happy to proceed without me seeing, or being given access to, the relevant background documents. I expressly discussed with Mrs Courtney the risks that course involved for the Commissioner. She nevertheless elected to proceed on this basis.

[71] I record my surprise at the Commissioner's stance. It is clear from the closing sentence of art 25(1) of the DTA, that documents exchanged may be disclosed by officials in the contracting states in public Court proceedings or in judicial decisions. Strictly that provision does not extend to the request made, or to documents generated as a result of a request. Nevertheless, it was Mr Nash's view, by reference to the OECD commentary on the equivalent provisions the current model DTA, that, if Court proceedings under the domestic law of the requested state necessitate the disclosure of the letter of request to the competent authority, the competent authority of the

requested state can disclose that letter, unless the requesting state otherwise specifies. He states that it was for this reason that copies of the request letter and documents exchanged were provided confidentially to Ellis J when the matter was before her, to allow her to satisfy herself about the confidentiality orders sought by the Commissioner.[25]

[72] The appointment of an amicus to advise the Court in relation to confidential material received is a not uncommon step, and is designed to ensure that the Court is properly informed and that the rules of natural justice are observed. Such an approach was proposed in an earlier tax case dealing with similar issues.[26] There is precedent for the appointment of amici in cases involving matters of state.[27] In other complex tax cases, amici have been appointed without issue.[28] Why the Commissioner was not prepared to agree to such appointment in this case is not clear — at least to me.

[73] I record that the Commissioner was not even prepared to make available to me the response from the NTS advising why it was opposed to the documents being disclosed to an amicus, unless I was prepared to receive that letter in confidence, without disclosing it to the applicants. I, for my part, was not prepared to accommodate this request. The end result is that the Commissioner has elected to run her case without reference to the background documents. I proceed accordingly.

(v) Analysis – lawfulness of Mr Nash's actions

[74] As I have noted,[29] it was common ground that Mr Nash, as the competent authority, needed to satisfy himself that the information sought by the NTS came within the terms of the DTA, and his country's tax laws.

[75] Article 25 of the DTA requires that the information requested is "necessary" for carrying out the provisions of the DTA, or of the domestic laws of the contracting states concerning taxes, as well as to prevent fiscal evasion. The word "necessary" is

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25 See above at [13].
26 *Avowal Administrative Attorneys Ltd v District Court at North Shore,* above n 19.
27 *Dotcom v Attorney-General* [2013] NZHC 695 at [2]. See also *Dotcom v Attorney-General* [2017] NZHC 1621 at [7].
28 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2009] NZCA 373, (2009) 24 NZTC 23,750.
29 See above at [48].

not defined in the DTA, nor in the OECD's model convention or in the commentaries. It is an ordinary English word, the meaning of which is well understood. Something is necessary if it is required or needed. Necessity requires more than simple expediency or desirability.

[76] One tax commentator suggests that information is necessary if:[30]

(a) it is … "relevant in law to taxation by the contracting state requesting it, ie relevant to carrying out the provisions of the DTA or … relevant to carrying out the provisions of its domestic law"; and

(b) the relevant contracting state is "unable to procure such information by means of inquiries of its own within its own territory".

[77] Counsel advised that in 2005, the OECD model convention replaced the word "necessary" with the words "foreseeably relevant". That change has not been carried through in the DTA at issue in this case.

[78] I am satisfied that the word "necessary" used in art 25 required Mr Nash as New Zealand's competent authority to satisfy himself, by clear and specific evidence, that all of the information requested by the NTS was needed or required in relation to an investigation into, or other action being taken by the NTS against a Korean taxpayer, and that the information was in regard to income tax, corporation tax, or inhabitant tax, or fiscal evasion. Mr Nash also had to be satisfied that any information exchanged under the DTA would only be used in relation to those taxes, and that the NTS had been unable to obtain the information in Korea.

[79] As I have noted, some concerns have been raised by Chatfield. I note those concerns as follows:

(a) Did the NTS exhaust its domestic options – could it have sought at least some of the information from Mrs Hwang?

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30 E Reimer and A Rust (eds) *Klaus Vogel on Double Taxation Conventions*, above n 22, at 1406.

(b) What relevance does the exchange control investigation into two of the target companies have? Is the information sought to advance that investigation?

(c) What effect does the limitation period in Korea have? Is more information being sought than is needed?

(d) What effect does the suspension of the investigation by the NTS have?

[80] Understandably, given that it has not seen the background documents, Chatfield cannot comment on what Mr Nash did or did not do. There are, however, further concerns arising from both Ms Forrest's and Mr Nash's affidavits:

(a) Ms Forrest says that the 2014 notices were issued because the requested information "could not be obtained from the Commissioner's records or was not otherwise publicly available". This of itself is not a justification for a finding of necessity under art 25.

(b) Mr Nash's account of the reasons for issuing the 2014 notices lacks particularity, and he does not say what he thinks "necessary" in art 25 means. I agree with Ms Rose's submission that the closest Mr Nash gets to explaining why the Commissioner has issued the notices is as follows:

(i) The information requested in the 2014 notices was "required to obtain the full picture of offshore dealings such as details of investments in New Zealand companies and properties. Much will be unknown and subject to further inquiry at the time a request is made".

(ii) The information sought would "assist with filling in any gaps to enable the [NTS] to obtain a more accurate picture".

(iii) The information "could also provide negative assurance regarding any lack of activity in respect of those assets and/or income".

With respect to Mr Nash, this is all relatively vague and it suggests there has been no hard inquiry into the necessity for any exchange, and therefore the need to request the documents in the first place.

[81] The Commissioner filed a memorandum with the Court dated 14 October 2015, which asserted that the information requested is "information which is not obtainable in the normal course of the administration of Korea". However, there is nothing in the affidavits filed to back up that assertion. Indeed such evidence as there is points to a different conclusion. Mrs Hwang, as Mr Huh's former partner, and as a director of some of the target companies, would presumably either have, or be entitled to obtain access to, at least some of the documents sought. She is a Korean resident.

[82] There was one particular assertion made by Mr Nash in his affidavits which troubled me — namely his assertion that the NTS, and the revenue authorities in Korea, have trusted partner status and a good reputation, with the result that when the Commissioner receives a request under the DTA from Korea, there is generally no reason to believe that the request has been made in an unorthodox manner.

[83] With respect to Mr Nash, I query this assumption. It depends on a very large number of matters, for example, that there has been no change of policy in Korea, or even that the individuals requesting the information on each occasion are the same. There is no evidence of this. Further, there is no warrant at law for the "hands off" approach applied to Korea in either the DTA or in the Tax Administration Act, and in my judgment, it was unwarranted. Any request made under a DTA, from whatever country, should receive the same high level of scrutiny.

[84] I am left with nothing more than Mr Nash's say-so that he satisfied himself that the request was in terms of the DTA and this country's tax laws, that the nature of the information sought by the NTS was consistent with the grounds for the request, and

that the information is of a sort which would broadly be expected to be necessary or relevant to any inquiry of the nature indicated in the request.

[85] The days when a Court will accept an official's simple assertion that a power had been exercised lawfully are long over. They reached their peak in the well-known decision of *Liversidge v Anderson*.[31] In that case, the statutory provisions in issue gave the Secretary of State power to make various orders if he had "reasonable cause to believe". The majority — through Viscount Maughan — held that, despite the prima facia meaning of these words, they might have a different subjective meaning if the thing to be believed was essentially something within the knowledge of the Secretary of State and a matter for his exclusive discretion. In a powerful dissent, Lord Atkin asserted that the words had only one meaning, and that they had never been used in the sense imputed to them by the majority. He protested against the strained construction put on the words which had the effect of giving an uncontrolled power to the Secretary of State, and denied that the words "if a man has" could ever mean "if a man thinks he has".

[86] The majority's view in *Liversidge v Anderson* has now been held to be a "very peculiar decision".[32] Lord Diplock has more recently acknowledged that the decision of the majority was wrong, and that Lord Atkin, in his dissent, was right.[33] As the law now stands, if language is objective, the public authority whose decision is impugned will have to be prepared to show that the condition is fulfilled in a way which satisfies the Court.[34]

[87] An applicant for judicial review bears the burden of proof, on the balance of probabilities, but the evidential burden is relatively low where the facts are within the knowledge of the other party,[35] and particularly where the Court has to determine

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31 *Liversidge v Anderson* [1942] AC 206 (HL) – but see dissenting judgment of Lord Atkin.

32 *Ridge & Baldwin* [1964] AC 40 (HL) at 73.

33 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952 (HL) at 1011.

34 HWR Wade and CF Forsyth *Administrative Law* (5th ed, Oxford University Press, Oxford, 2014) at 365.

35 *T v Jones* [2007] 2 NZLR 192 (CA) at [77]; *Tindall v Far North District Council* HC Auckland CIV-2003-488-135, 20 October 2006 at [138]; *Brady v Northland Regional Council* [2008] NZAR 505 (HC) at [41].

whether the relevant facts on which the exercise of the power in issue turn, did or did not exist.[36]

[88] When the actions of public authorities are in issue, there is an expectation that public authority defendants will explain themselves, and disclose all relevant documents. The defendant authority can be expected to satisfy the Court, and if it does not do so, the claimant can, in appropriate cases, get the benefit of any doubt.[37] Similarly, where facts lie peculiarly within the knowledge of one party, very slight evidence can be sufficient to discharge the burden of proof resting on the opposing party.[38]

[89] In my judgment, this is one such case. Chatfield has been able to raise relatively little, but the little it has raised rings alarm bells, albeit quietly. Those bells ring a little louder given the vague affidavits of Ms Forrest and Mr Nash. There is a high duty on public authority respondents to assist the Court with full and accurate explanations and to give the Court all the facts relevant to the matter in issue.[39] Here, the relevant facts and the supporting documents are in the possession of the Commissioner. It should have been a relatively straightforward matter for the Commissioner to produce them but they have not been produced. Rather, I am left with the non-specific evidence of the officer responsible for undertaking the necessary inquiries.[40] In my view, the Commissioner has not been as candid in her conduct of this case as might have been expected.

[90] On the very limited materials available to me, I am not satisfied that the appropriate inquiries were undertaken by Mr Nash.

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36 Graham Taylor *Judicial Review – A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at [10.30].

37 Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at [42.2].

38 *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 183 and 209; *Reid v Rowley* [1977] 2 NZLR 472 (CA) at 478; *Huata v Prebble* [2004] 3 NZLR 359 (CA) at [136].

39 *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2002] EWCA Civ 1409 at [50].

40 *CREEDNZ Inc v Governor General*, above n 38, at [82].

Delegation

[91] As noted, the 2014 notices were signed by Ms Forrest, and it seems from her affidavit that she was involved in the decision to try to obtain the additional information using s 17 notices.

[92] Chatfield asserts that Ms Forrest is not a competent authority, as that term is defined in the DTA, and that she does not have authority to make a decision under art 25 of the DTA. It accepts that some delegation by Mr Nash may be permissible, but only if it is in accordance with s 41 of the State Services Act 1998, and that there is no evidence in this case that such further delegation took place.

[93] The Commissioner points to the fact that Ms Forrest deposes that she has delegated authority to issue notices under s 17, and that the DTA does not require Mr Nash as competent authority to take all steps necessary to obtain the requested information. It argues that it is Mr Nash's role to ensure compliance by the Commissioner with requests made under the DTA, including the taking of steps to obtain the requested information, but that it is not necessary for all actions relating to requests for information to be undertaken by Mr Nash personally.

[94] In my judgment, Chatfield's arguments are misconceived in regard to this issue. It is Mr Nash's task, as the designated competent authority, to make decisions on exchange, once the information has been acquired. Mr Nash accepts in his affidavit that he is responsible for making that decision. There is nothing, however, in the DTA, or in the Tax Administration Act, which requires that Mr Nash personally take the necessary administrative steps to procure the information. Ms Forrest's role in issuing the 2014 notices was taken under delegated authority and under supervision from others, including by Mr Nash. She was simply undertaking what was, in the context of this case, an essentially administrative task — to assist in obtaining information Mr Nash considered was necessary to respond to the request, so that he could later consider, under art 25, whether or not to exchange it with the NTS.

[95] This aspect of the cause of action is not made out.

Intensity of review

[96] As a fall-back to its justiciability argument, the Commissioner argued that the Court should only intervene if it determines that the nature of the information sought in the 2014 notices is such that it could not potentially be necessary to an investigation in respect of one or more of the taxes which comes within art 2 of the DTA. It argued that the Court, and indeed Mr Nash as the competent authority, cannot be expected to inquire into the factual assertions underlying the request, nor as to what is required under the law in South Korea. Mrs Courtney suggested that there is a real risk that the Court would be asked to conduct a mini trial, involving witnesses and the determination of potentially difficult questions of foreign law, and that the Court would be stepping into the shoes of the executive which has responsibility for entering into and enforcing international agreements, including tax treaties.

[97] Chatfield argued that arguments as to the intensity of review are not consistently regarded as particularly helpful, and that the issue is closely related to justiciability. Ms Rose noted the Commissioner's acceptance that Mr Nash as the competent authority had to satisfy himself that the information sought came within the terms of the DTA and New Zealand tax laws, and that that is essentially a domestic issue. She submitted that there is no proper basis for constrained review in this case.

[98] I agree with Chatfield's submissions. Administrative decisions, including decisions made by the Commissioner or her delegates, must be made in accordance with the law. As I have already noted, this case involves a relatively straightforward analysis of the provisions of the DTA — which is part of domestic law — and s 17 of the Tax Administration Act. The power to make the decision to invoke the s 17 power is conferred by the legislation onto the Commissioner, and the Commissioner, when exercising that power, must exercise it properly, and in accordance with the law. There is no need for deference to the Commissioner as the decision-maker when inquiring what either the Tax Administration Act, or the DTA, require. Review in this context can and should be hard-edged, and a "correctness standard" should apply. The question is simply whether or not the Court can be satisfied that Mr Nash — as the decision-maker — did what he was required to do by law. There is, in my judgment, nothing in the facts of the present case which compels the conclusion that a light touch,

or a deferential review, is either required or appropriate. If the Court is not satisfied that Mr Nash correctly interpreted or applied either art 2 or art 25 of the DTA, or that he properly scrutinised the NTS's request as required by law, then it is appropriate to grant judicial review, and there is no warrant for a less intensive standard of review than would otherwise be the case.

Result

[99] In my judgment, Chatfield is entitled to the relief it seeks. I grant a declaration that the Commissioner's decision to issue the 2014 notices against Chatfield is invalid, and make an order quashing the 2014 notices.

Costs

[100] Chatfield is entitled to its costs and reasonable disbursements incidental to this proceeding. I would request counsel to liaise to see whether agreement can be reached. If not, then I make the following directions:

(a) Chatfield is to file a memorandum claiming costs, and its reasonable disbursements, within 15 working days of the date of this decision;

(b) the Commissioner is to respond within a further 15 working days;

(c) memoranda as to costs are not to exceed 5 pages.

I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J