IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA78/2018
[2019] NZCA 73

BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
AND	CHATFIELD & CO LIMITED First Respondent
	CHATFIELD & CO Second Respondent

Hearing: 16 August 2018

Court: Asher, Brown and Gilbert JJ

Counsel: P H Courtney and L A Herbert for Appellant
R A Rose and L M Zwi for Respondent

Judgment: 28 March 2019 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Table of Contents

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Following a request made by the Korean National Tax Service (NTS) under art 25 of the New Zealand–Korea Double Tax Agreement (the DTA),[1] on 7 October 2014 the Commissioner of Inland Revenue issued notices (the 2014 notices) to Chatfield & Co (together with the first respondent, referred to as Chatfield) under s 17

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1 Convention Between the Government of New Zealand and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income 1773 UNTS 69 (signed 6 October 1981, entered into force 22 April 1983); see Double Taxation Relief (Republic of Korea) Order 1983.

of the Tax Administration Act 1994 (TAA) requiring the production of various documents and records of New Zealand taxpayer companies associated with a Korean national with New Zealand residency. In a review proceeding by Chatfield challenging the Commissioner's decision to issue the 2014 notices Wylie J granted a declaration that the decision was invalid and made an order quashing the 2014 notices.[2]

[2] The Commissioner appeals from that judgment. In addition she renews her contention rejected in the High Court that the decision to issue the 2014 notices was non-justiciable and in the alternative she challenges the finding that in the context a "correctness standard" of review should apply. The Judge's decision to decline to receive documents alone and without reference to Chatfield is also attacked on appeal.

The double tax agreement

[3] A double tax agreement is an international treaty between the New Zealand government and another state entered into for the purposes in s BH 1 of the Income Tax Act 2007 which materially states:

> **BH 1 Double tax agreements**
>
> …
>
> *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:
>
> …

[4] The overriding effect of a double tax agreement is stated in s BH 1(4):

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2 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZHC 3289, [2018] 2 NZLR 835 at [99] [High Court judgment].

Overriding effect

(4) Despite anything in this Act, … a double tax agreement has effect in relation to—

(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.

[5] Such treaties facilitate the exchange of information between states which contributes to the integrity of their respective tax systems by enabling tax authorities to monitor taxpayers operating in multiple jurisdictions. Double tax agreements are unusual amongst New Zealand international treaties because, once given effect to by Order-in-Council, they have direct application in New Zealand's domestic law.

[6] The DTA was incorporated into New Zealand law by the Double Taxation Relief (Republic of Korea) Order 1983. It largely follows the Organisation for Economic Cooperation and Development's model convention as it stood at the time.[3]

[7] The taxes to which the DTA applies are specified in art 2:

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");

…

[3] OECD *Model Double Taxation Convention on Income and Capital 1977* (OECD Publishing, Paris, 1977) at Annex I.

[8] Of particular relevance to this case is the provision relating to exchange of information which relevantly provides:

> 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) …

[9] Since 1 March 1994 the position as competent authority for New Zealand has been held by Mr J Nash, the Manager (International Revenue Strategy) at the Inland Revenue Department (IRD) who is responsible for exchanges of information with New Zealand's tax treaty partners.

Relevant background

The 2014 notices

[10] The NTS commenced a tax investigation in Korea into the affairs of Mr J H Huh, a Korean national with New Zealand residency, who was the substantial owner of several New Zealand companies. In May 2014 the NTS made a request to the Commissioner under art 25 of the DTA in relation to several New Zealand taxpayer

companies associated with Mr Huh. Although some of the information was able to be provided from existing records, to fully respond it was necessary for the Commissioner to take further steps.

[11] Consequently on 7 October 2014 the Commissioner exercised her power to issue to Chatfield 15 notices under s 17 of the TAA which relevantly 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.

[12] The notices issued by Ms Forrest, an IRD investigation team leader, required Chatfield to produce various documents and records which it held on behalf of KNC Construction Ltd and 14 affiliated companies. Each of the companies has its registered office in New Zealand and at the time of the request Chatfield was registered under s 34B of the TAA as the tax agent for each of them.

[13] The Commissioner's sole purpose in issuing the 2014 notices was to obtain information requested by the NTS for possible exchange under art 25. No New Zealand tax revenue was in issue. Although some of the 2014 notices were relatively confined, others were more wide-ranging. Thus the notice to Blue Pacific NZ Ltd simply sought copies of the financial statements for the 2010 to 2013 tax years while the notice to Victoria Tower Developments Co Ltd sought, in addition to the financial statements for 2003 to 2013, copies of several agreements for the sale and purchase of real estate and company shares.

[14] In May 2015 Chatfield commenced review proceedings challenging on two broad grounds the Commissioner's decision to issue the 2014 notices. First it was alleged that the decision breached Chatfield's legitimate expectations arising from an operational statement known as OS 13/02 dealing, inter alia with the issuance of s 17

notices.[4] Secondly, Chatfield contended that in issuing the notices the Commissioner failed to take into account three relevant considerations:

- OS 13/02;
- the limited nature of the tax agent/client relationship; and
- the terms of the DTA, in particular art 25.

Previous rulings

[15] This Court has previously had occasion to consider this litigation on two occasions, first in the context of disclosure and secondly concerning the scope of the pleading.

[16] Chatfield sought an order under s 10(2) of the Judicature Amendment Act 1972 seeking that the Commissioner should disclose and produce relevant documents, in particular the request made under the DTA by the NTS to the Commissioner and all exchanges relating to that request. The Commissioner refused to supply the documents and sought an order under s 70 of the Evidence Act 2006 precluding disclosure on the ground that the documents related to matters of state.

[17] On 1 September 2015 Ellis J held that, in principle, it is possible to obtain disclosure of material exchanged between the Commissioner and the NTS but that such disclosure was governed by s 81 of the TAA.[5] There being an evidential vacuum in the materials before her the Judge considered that the appropriate course was for the Commissioner to make inquiry of the NTS as to its views on disclosure of the documents sought.[6] Having made that inquiry the Commissioner then filed two memoranda, one open and the other confidential to the Court, and advised that the NTS claimed confidentiality in respect of each document requested.

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

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

6 At [79].

[18] After receiving further submissions Ellis J issued a further judgment in June 2016 holding that the Commissioner was not required to disclose the request of documents pursuant to s 81.[7]

[19] Chatfield's appeal from that decision was dismissed by this Court which held that the undisclosed documents were not relevant to Chatfield's amended statement of claim.[8] Leave to appeal to the Supreme Court was declined.[9]

[20] On the Commissioner's application to strike out Chatfield's amended statement of claim Lang J made an order striking out the legitimate expectation claim and striking out the second cause of action other than the allegation that the Commissioner had decided to issue the 2014 notices without taking into account the terms of art 25, in particular the exceptions contained in art 25(2).[10] Chatfield's appeal to this Court was dismissed.[11] Leave to appeal to the Supreme Court was declined.[12]

[21] On 8 June 2017 Chatfield filed a second amended statement of claim which very significantly expanded the allegations against the Commissioner to include contentions that the relevant decision-maker was not the Competent Authority, mistakes of fact, a failure to exercise independent judgment before issuing the 2014 notices, breaches of several provisions of the TAA and that the decision to issue the 2014 notices was unreasonable.

The High Court judgment

[22] The Judge commenced by noting that although only one cause of action remained, the pleading adopted what could best be described as a scattergun approach, for the perceived reason that Chatfield had not seen the documents relevant to the

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

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

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

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

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

12 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 118, (2017) 28 NZTC 23-025.

challenged decision.[13] The judgment recorded that in the course of the hearing the Commissioner sought to argue justiciability as an affirmative defence and leave was granted to file an amended statement of defence notwithstanding Chatfield's opposition.[14] The Judge further noted that in oral argument Mrs Courtney for the Commissioner contended that the appropriate intensity of review only required the Court to determine that the decision to issue the 2014 notices was valid on its face.[15]

Justiciability

[23] The Judge rejected the Commissioner's justiciability argument for several reasons:[16]

> (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 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. Prior authority in the DTA context is to the same effect.

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13 High Court judgment, above n 2, at [22].
14 At [21].
15 At [23].
16 At [40].

(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.

(Footnotes omitted).

Lawful action by competent authority

[24] It was common ground that the Commissioner exercised the powers available under s 17 for the purposes of gathering information for exchange with a foreign state pursuant to a DTA but that Mr Nash, as the competent authority for New Zealand, on receipt of a 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 New Zealand's tax laws.

[25] The Judge ruled that the word "necessary" in art 25 required Mr Nash 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, inhabitant tax or fiscal evasion and that the NTS had been unable to obtain the information in Korea.[17]

[26] Affidavits were filed by Mr Nash and by Ms Forrest. After a close review of those affidavits the Judge described them as being "long on generalities but short on specifics".[18] The Judge said that Mr Nash's evidence suggested there had been no "hard inquiry" into the necessity for any exchange of information with NTS and therefore the need to request the documents in the first place.[19] He observed that the difficulty in dealing with the case had been 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 had not been disclosed to the Court.[20] The Judge recorded in detail his exchanges with Mrs Courtney with reference to his concern[21]

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17 At [78].
18 At [62].
19 At [80].
20 At [63].
21 At [65]–[73] to which we refer below at [60].

emphasising that the Commissioner had ultimately elected to run her case without reference to the background documents.[22]

[27] The Judge considered that he was left with nothing more than Mr Nash's say-so that he satisfied himself that the request was in terms of the DTA and New Zealand'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.[23] He commented that the days when a court will accept an official's simple assertion that a power has been exercised lawfully are long over, referring to *Liversidge v Anderson*, in particular the dissenting judgment of Lord Atkin.[24]

[28] The Judge concluded in this way:

> [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, and particularly where the Court has to determine whether the relevant facts on which the exercise of the power in issue turn, did or did not exist.
>
> [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. 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.
>
> [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. 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. In my view, the Commissioner has not been as candid in her conduct of this case as might have been expected.
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> [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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22 At [73].
23 At [84].
24 At [85], citing *Liversidge v Anderson* [1942] AC 206 (HL) per Lord Atkin from 225–247.

(Footnotes omitted).

Intensity of review

[29] The Judge agreed with Chatfield's submission there was no proper basis for constrained review in this case noting that it involved a relatively straightforward analysis of the provisions of the DTA, which was part of New Zealand's domestic law, and s 17 of the TAA, stating:[25]

> 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.

Issues

[30] An agreed list of issues was filed in the following terms:

> 1 Is the decision of the Commissioner of Inland Revenue (the Commissioner) to issue 15 Notices to Furnish Information (the 2014 notices) under s 17 of the Tax Administration Act 1994 (TAA) as a result of an exchange of information (EOI) request under the Double Taxation Relief (Republic of Korea) Order 1983 (NZ-Korea DTA) justiciable?
>
> 2 If the decision to issue the 2014 notices is justiciable:
>
> 2.1 what is the appropriate intensity of review in the context of an EOI request under the NZ-Korea DTA;
>
> 2.2 did the High Court correctly identify and apply the relevant review standard; and
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> 2.3 whether the High Court correctly identified what the Competent Authority is required to do in order to be satisfied with the EOI request.

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25 At [98].

3 Whether the High Court erred, either as a matter of law or in failing to take account of relevant considerations (including issue estoppel) when exercising its discretion as to how evidence should come before the Court on review, and whether it was appropriate for the Court alone to view documents to determine lawfulness without appointing an amicus.

4 Did Mr John Nash (as the Commissioner's representative and New Zealand's Competent Authority) act lawfully under the NZ-Korea DTA? In particular, did Mr Nash have sufficient information or take steps to satisfy himself:

4.1 That the EOI request was made in respect of taxes covered by art 2 of the NZ-Korea DTA;

4.2 That the information sought for exchange was "necessary" under art 25(1) of the NZ-Korea DTA; and

4.3 Whether any of the factors in article 25(2)(b) of the NZ-Korea DTA applied.

5 Whether there was a sound evidential foundation for the three facts the High Court relied on to support the finding at [90] of the Judgment that the Competent Authority did not undertake appropriate inquiries.

6 To the extent the OECD Commentaries are considered relevant in the present case, did the High Court adopt the correct approach to interpretation of the NZ-Korea DTA.

[31] The Commissioner's submissions proceeded on the footing that, as all of the remedies available under the Judicature Amendment Act 1972[26] are discretionary, it was necessary for the Commissioner to show that the Judge had acted on a wrong principle, had failed to take into account some relevant matter, took into account some irrelevant matter or was plainly wrong.[27] However we consider that, save for the exercise of discretion specifically with reference to the ultimate grant or refusal of relief, the appeal is governed by the principles in *Austin, Nichols & Co Inc v Stichting Lodestar*.[28]

Issue 1: Justiciability of decision to issue the 2014 notices

[32] The starting point for the Commissioner's argument is the observation of Elias CJ and Arnold J in *Ririnui v Landcorp Farming Ltd*:[29]

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26 Section 23(2) of the Judicial Review Procedure Act 2016 provided that the review was to be continued and completed under the Judicature Amendment Act 1972.

27 *May v May* (1982) 1 NZFLR 165 (CA) at 170.

28 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

29 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

> [89] While the modern view is that courts have the power to review all exercises of public power whatever their source, the courts accept that some exercises of public power are not suitable for judicial review because of their subject matter. Decisions about the allocation of national resources or involving issues of national defence or national security or involving national political or policy considerations have been held to be not reviewable by the courts, although courts in recent times have been more willing to review decisions in areas previously regarded as inappropriate for review, the most obvious example being decisions in relation to national security. …
>
> (Footnotes omitted).

[33] It was Mrs Courtney's submission that it is possible to identify various principles that by analogy influence a court as to where the line as to justiciability should be drawn and whether the court should intervene, namely:

(a) Where the subject-matter of the decision and the role of the decision-maker is within the customary sphere of an area where courts are not well-equipped to weigh the considerations involved.

(b) Where there are constitutional constraints on judicial involvement such that the public policies involved are so significant and appropriate for weighing by those entrusted with making the decision, the courts are less equipped to reweigh the considerations involved.

(c) Where there is no satisfactory legal yardstick by which the issue can be resolved.

(d) For reasons of comity between the courts and Parliament (and by analogy between the courts and another State).

[34] She submitted that, contrary to the High Court's conclusion, the decision-making by a competent authority relating to a request and exchange of information falls within at least one of those four categories for the following reasons:

(a) It is important to observe the international and constitutional law boundaries associated with sovereign States.

(b) The high content of judgement and discretion involved in such decisions make them inherently unsuitable for resolution by the courts.

(c) It is undesirable to allow a collateral challenge of the nature that has occurred in respect of this proceeding as it compromises the efficacy of the exchange of information regimes.

[35] Chatfield responded that in the context of seeking information solely for her own purposes or for both her own purposes and the benefit of the foreign state, it is well established that the Commissioner's decisions under s 17 are justiciable and reviewable. It submitted that the fact that the Commissioner did not seek the information identified in the 2014 notices for any of her own purposes and has instead sought it only further to a foreign state's request cannot alter the justiciability position in the way the Commissioner suggests. Indeed it contended that the fact that the information identified in the 2014 notices was sought solely for the benefit of a foreign state should give rise to heightened scrutiny of the Commissioner's exercise of discretion.

[36] As we explain below, in our view Chatfield's responses to the Commissioner's criticism of the High Court's reasoning on the justiciability issue are sound and should be accepted.

[37] Drawing attention to the High Court's conclusion that the competent authority was required "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 or other action being taken by the NTS against a Korean taxpayer, the Commissioner challenged the proposition that no comity issue was involved. She contended that the competent authority and the Court on review would be involved at an operational level in interrogating the legal systems and administrative processes of New Zealand's DTA partners. That could only be achieved by carrying out a mini trial investigating matters of Korean law, potentially involving witnesses. It was said that would unacceptably overstep the appropriate boundaries between New

Zealand and other sovereign states. It was also said to be contrary to what courts of high authority in other jurisdictions have considered is required.[30]

[38] In response Chatfield submitted, correctly in our view, that the case does not involve:

- any challenge to the executive's decision to enter into the DTA;
- the interpretation of any statutory rules other than s 17 of the TAA 1994 and arts 2 and 25 of the DTA;
- comity issues or challenges to the truthfulness of any act by a foreign state.

[39] Chatfield acknowledged that the DTA represents a carefully negotiated compromise and that the implementation decision is entirely one for Parliament. However once implemented treaties do not attract any higher order status than any other provision of New Zealand's domestic law. Interpretation of a domestic statute giving effect to a treaty is wholly within a New Zealand court's constitutional competence and creates no separation of powers issue.

[40] The Commissioner countered that the constitutional competence of the courts does not resolve the concern that the so-called mini trial has the potential to infringe sovereignty. She submitted that the EOI regimes under New Zealand's DTAs would fail to work effectively in practice and sovereign jurisdictions would refuse to cooperate with New Zealand.

[41] Chatfield acknowledged the determination of its challenge may involve an examination of what information the Commissioner sought or received from Korea and what she made of the relevant information before she issued the 2014 notices. However consideration of such information at face value to determine whether it satisfies the requirements of New Zealand domestic law is a different exercise from consideration of an allegation that information supplied by the NTS is untrue.[31]

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30 Citing *AXY v Comptroller of Income Tax* [2018] SGCA 23, (2018) 20 ITLR 723 at 748 and 759.

31 Contrasting the present situation to that described in *AXY v Comptroller of Income Tax* [2015] SGHC 291, [2016] 1 SLR 616 at [29].

[42] We accept Chatfield's submission that this case does not involve a challenge to the substance or truthfulness of any act of or decision made by the NTS. Rather the review requires determinations only about whether, before making her decision to issue the 2014 notices to Chatfield, the Commissioner satisfied herself about all relevant requirements of s 17 of the TAA and arts 2 and 25 of the DTA.

[43] We agree with the Judge's conclusion that the matters at issue in this case are not matters of higher policy or politically fraught.[32] While, as Chatfield acknowledged, the DTA is a carefully calibrated and negotiated regime, it does not contain any inbuilt level of political flexibility. That contrasts with the overseas investment regime where there is the scope for the government to direct the Commissioner about matters of the day of concern to government.[33]

[44] As this case demonstrates, the availability of review may have a significant impact on the timeliness for responses to double tax agreement requests. However that can afford no principled basis for treating the competent authority as immune from review. Furthermore the significance of delay as a factor may be capable of being addressed by a more pragmatic response as discussed below. Nor do we consider that the OECD peer review regime is a material factor.[34] It is not the equivalent of a judicial body. As the Commissioner acknowledges it does not provide relief to individual taxpayers but monitors the regime as a whole compared to best practice and produces in-depth review reports of members assigning ratings on EOI effectiveness.

[45] For these reasons we reject the Commissioner's challenge to the High Court's conclusion that the Commissioner's decision to issue the 2014 notices was justiciable.

Issue 2: Intensity of review

[46] In *R (Daly) v Home Secretary* Lord Cooke of Thorndon observed that the depth of judicial review and the deference due to administrative discretion vary with the

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32 High Court judgment, above n 2, at [40(c)]; set out above at [23].
33 See s 34 of the Overseas Investment Act 2005, dealing with Ministerial directives.
34 Carried out by the Global Forum on Transparency and Exchange of Information for Tax Purposes.

subject matter.[35] Cases on the spectrum[36] from correctness to tolerance are usefully collected by Matthew Smith in *The New Zealand Judicial Review Handbook*.[37] The Commissioner here contended that the High Court erred in concluding that in the context of this case review should be hard-edged,[38] submitting that a more deferential approach than the correctness standard was appropriate.

[47] The contention that the intensity of review should be constrained was said to be justified because of:

- the importance of observing the constitutional boundaries between states;
- the high content of judgement and discretion in the decisions exercised by the competent authorities (both in New Zealand and Korea);
- the undesirability of collateral challenge that may disrupt the process; and
- the availability of other mechanisms for accountability of decisions.

[48] Reflecting the staged structure of agreed issue 2, the Commissioner's written submissions addressed intensity of review and the scope of the competent authority's function together. We will address the latter point in greater detail in the context of issue 4. For present purposes it suffices to note that the Commissioner accepted that in evaluating a request the competent authority needs to satisfy himself or herself that:

- sufficient details supporting the request had been provided by the requesting state;

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35 *R (Daly) v Home Secretary* [2001] UKHL 26, [2001] 2 AC 532 (HL) at [32]. The House of Lords was there focused on the proposition that intensity of review was somewhat greater under the proportionality approach.

36 In *Mihos v Attorney-General* [2008] NZAR 177 (HC) at [98] Baragwanath J adopted Professor Taggart's metaphor of a rainbow of variable intensity of review in Michael Taggart "Administrative Law" [2006] NZ L Rev 75 at 82.

37 M Smith *The New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at chs 38–40.

38 At [29] above.

- the nature of the information sought is broadly what would be expected to be necessary to an inquiry/investigation of the nature indicated;

whereupon it is for the competent authority to determine what information meets the terms of the request and should be exchanged.

[49] It appeared to be the Commissioner's view that the application of a correctness standard of review could require the competent authority, and the High Court on review, to undertake a mini trial potentially involving witnesses and the determination of questions of foreign law. Challenging that proposition Chatfield submitted that the discharge of the decision-maker's compliance with the statutory obligations did not require any "going behind" the content of the letter of request or other material, noting that there was no challenge by Chatfield to the content of the request letter as opposed to what its content (taken at face value) meant in terms of the Commissioner's lawful exercise of her s 17 power.

[50] Ms Rose submitted that the key questions which the Judge was required to and did decide were:

- Did the Commissioner/Mr Nash misinterpret and/or misapply arts 2 or 25 of the DTA?

- Did the Commissioner/Mr Nash scrutinise the NTS's request for compliance with arts 2 and 25 or did she/he simply act more like an automaton?

- What would a reasonably competent and diligent Commissioner/competent authority do?

[51] She further submitted that in a modern review environment courts have no difficulty reviewing for correctness and/or reasonableness even "high policy" decisions citing as examples *Tiroa E and Te Hape B Trusts v Chief Executive of Land*

Information New Zealand,[39] *Thomson v Minister for Climate Change Issues*[40] and Cabinet's ex gratia payment decision in *Pora v Attorney-General.*[41]

[52] We agree with Ms Rose's analysis of the questions which the Judge was required to decide. The Commissioner and the competent authority must interpret and apply New Zealand law correctly. If they do otherwise then their actions will be unlawful. We do not consider that there is any basis for criticism of the approach applied by the Judge that the intensity of review in the context of the issues raised in this case should be the correctness standard.

Issue 3: Amicus vs court alone review

[53] This ground of appeal involved two issues:

- the alleged failure by the High Court to recognise that issue estoppel applied in respect of certain documents which had not been provided to Chatfield;

- the Court's refusal to consider the documents alone without consideration of them by an amicus.

[54] To better understand the Commissioner's argument on this matter, which Chatfield described as perplexing, it will be convenient to briefly recite the relevant sequence of events.

21 September 2017	The Commissioner's submissions on the cause of action which had survived the strike out did not seek to rely on the undisclosed documents.[42] However the Commissioner indicated that if the Court wished to review the undisclosed

[39] *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZCA 355, [2012] 3 NZLR 808 (CA).

[40] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [134].

[41] *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [89]–[92].

[42] The undisclosed documents comprise the NTS request, the documents provided in response to the 2014 notices and the information contained in the closed memorandum provided to Ellis J referred to at [17] above.

	documents they would be made available to the Court alone.
25 September 2017	Chatfield sought a direction that the Commissioner be required to disclose to Chatfield the undisclosed documents.
26 September 2017	The Commissioner's memorandum reiterated her offer to make the undisclosed documents available only to the Judge and advanced five reasons in opposition to Chatfield's request that it be provided with the undisclosed documents.
28 September 2017	The judicial review hearing commenced. It appears that the Judge expressed concern about the undisclosed documents being provided to him alone. He directed that a telephone conference be scheduled to determine the issue. The hearing was adjourned part heard.
17 October 2017	A telephone conference was held. A subsequent minute recorded that the undisclosed documents which had previously been held to be not relevant to the then pleadings were "now relevant".[43] The Commissioner's proposal to refer the documents to the Court in a closed hearing, where Chatfield and its counsel would not be present, was not considered by the Judge to be satisfactory. The Judge suggested the appointment of an amicus to consider the undisclosed documents and directed the parties to file a joint memorandum.
20 October 2017	The Commissioner's memorandum contended that a decision whether the undisclosed documents needed to be

[43] *Chatfield & Co Ltd v The Commissioner of Inland Revenue* HC Auckland CIV-2015-404-1013, 17 October 2017.

	reviewed to allow the Court to determine the case could be left until the parties had completed their legal arguments at the resumed hearing, making the point that the Commissioner's primary submissions regarding justiciability and intensity of review did not rely on the documents. Chatfield's memorandum requested the appointment of one from a number of counsel it identified. It requested that the further hearing for 26–27 October 2017 be vacated to allow the amicus adequate time to consider the issues.
24 October 2017	A telephone conference was held followed by the release of a minute in which the Judge recorded his view that an amicus should be appointed and that the further hearing should be adjourned to give the amicus time to prepare.[44] Counsel for the Commissioner then took the position that the undisclosed documents were not relevant and would not be relied upon. Consequently the hearing could proceed without an amicus. The Judge cautioned the Commissioner that that course could have adverse implications. The minute recorded that the Commissioner would abandon any reliance on the confidential information and that she would not put it before the Court.
26 October 2017	The appointment of an amicus was again discussed. The Judge indicated that he would consider and determine for himself whether he needed to see the undisclosed documents and that he would appoint an amicus if he decided to look at them. The hearing was adjourned to 1 December 2017.

[44] *Chatfield & Co Ltd v The Commissioner of Inland Revenue* HC Auckland CIV-2015-404-1013, 24 October 2017.

30 October 2017	The Judge issued a minute directing the Commissioner to ascertain the position of the NTS to the confidential materials being made available to an amicus, stating how the Judge proposed the process would work and noting that, while the views of the NTS would be taken into account, they would not necessarily be determinative.[45]
1 December 2017	At the recommencement of the hearing counsel for the Commissioner advised the Court the NTS maintained its position that the Court should decide the proceeding only on the basis of the open information but that if the Court considered that it needed to review the confidential information the Court should do so alone. The NTS did not wish the documents to be provided to an amicus.

Issue estoppel

[55] The Commissioner contended that the High Court erred in failing to rule in response to Chatfield's 25 September 2017 memorandum that issue estoppel applied so as to preclude disclosure of the undisclosed documents to Chatfield. That issue turns on a correct analysis of the disclosure decisions earlier referred to.[46]

[56] Ms Rose submitted that no question of issue estoppel arose given the basis of the Court of Appeal's earlier decision on Chatfield's request for discovery. Her point was that the Court of Appeal did not rule that the undisclosed documents were relevant but did not need to be disclosed. Rather the Court ruled that the documents were not demonstrated to be relevant.

[57] This Court's reasoning accords with Ms Rose's submission:[47]

> [31] The fundamental point to be made, however, is that the pleading as it stands makes an assertion that is apparently incorrect on its face since it is

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45 *Chatfield & Co Ltd v The Commissioner of Inland Revenue* HC Auckland CIV-2015-404-1013, 30 October 2017.

46 At [16]–[19] above.

47 *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 8.

> clear that the Commissioner did take art 25 into account. If there are particular respects in which it could be said she did not do so (and these particulars make an order for discovery appropriate) they have not been pleaded. Either way, we can see no basis in the pleading as it currently stands to justify the making of a discretionary order for discovery under s 10.
>
> [32] We accept, as Ms Rose submitted, that there are important issues at stake when the Court is asked to order discovery in a case involving a request made by a foreign state under a double taxation agreement. But those issues are not addressed in a vacuum. The extent to which discovery may be obtained must be governed by the pleading and in New Zealand, where an application for review may be filed as of right without any requirement for leave, we see no reason why any application for discovery should not be assessed according to the issues made relevant by the pleading. Here it is plain that, when examined against the surviving pleaded cause of action, the documents for which discovery is sought have not been shown to be relied on by Chatfield, or to adversely affect its case or to adversely affect or support another party's case.
>
> (Footnote omitted).

[58] Subsequently the pleading was amended in the manner described at [21] above. As a consequence of that amended pleading Wylie J considered that the undisclosed documents had become relevant, as was made clear in his minute of 17 October 2017:

> Justice Ellis earlier determined, on the basis of the pleadings as they then stood, that the Commissioner was not required to discover the confidential documents. Her judgment was upheld by the Court of Appeal, essentially on the basis that the documents were not relevant to the then pleadings.
>
> It appears that the confidential documents are now relevant. The Commissioner is proposing to refer me to the same, in a closed hearing, where the applicants and their counsel will not be present. The Commissioner says that they vindicate the position she has taken in this matter.

[59] Given that change in circumstances in our view no question of issue estoppel arose.

The Court's refusal to consider the documents alone

[60] The Judge observed that the difficulty in dealing with the case was 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, had not been disclosed to the Court.[48] He then recorded the way in which the present issue evolved:

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[48] High Court judgment, above n 2, at [63].

> [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 indicted 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 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.

[61] Mrs Courtney submitted that the High Court was wrong to consider that the court-alone review process, which would have enabled the Judge to view the request so as to consider whether it was lawful to seek the information requested in the 2014 notices, was contrary to the rules of natural justice. She drew attention to the observation by McGrath J in *Dotcom v United States of America* that the content of the right to natural justice under s 27 of the New Zealand Bill of Rights Act 1990 is

always contextual, the question being what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation.[49]

[62] Mrs Courtney referred to a number of cases where it was said a court-alone review process has been viewed as acceptable by New Zealand courts.

- *Tauber v Commissioner of Inland Revenue* where this Court considered an unredacted version of an affidavit without disclosure to the opposing party.[50]

- *Avowal Administrative Attorneys Ltd v District Court at North Shore* where the High Court reviewed certain secret documents and declined to order discovery of them.[51]

- Cases where judges have exercised the power conferred by r 8.25(2) of the High Court Rules 2016 to inspect documents for the purposes of determining the validity of claims to privilege or confidentiality.[52]

- A line of authority in the Human Rights Review Tribunal where a closed court process has been developed so that the Tribunal itself can receive and review information for the purpose of determining whether a claim for privilege or confidentiality applies.[53]

[63] In response Ms Rose made seven points, the last of which we consider is the most significant, namely that the right to know and effectively challenge the opposing case is a fundamental feature of the judicial process as long recognised by the common law. As Woodhouse P observed in *Minister of Foreign Affairs v Benipal*:[54]

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49 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

50 *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [51]–[76]; see [23]–[25] for the Court's explanation of the context concerning the review.

51 *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2008] 1 NZLR 675 (HC).

52 *Seamar Holdings Ltd v Kupe Group Ltd* [1995] 2 NZLR 274 (CA), where the Court was discussing r 311 of the then High Court Rules (the second schedule to the Judicature Act 1908); and *Bain v Ministry of Justice* [2013] NZHC 2123, [2014] NZAR 892.

53 See *Dijkstra v Police* (2006) 8 HRNZ 339 (NZHRRT); *Reid v New Zealand Fire Service Commission* [2008] NZHRRT 8; *NG v Commissioner of Police* [2010] NZHRRT 16; and *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10.

54 *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758 (CA) at 763–764.

> The whole purpose of a Court of justice is to provide a forum where the opposing points of view of those in contention can be brought forward by them and then be weighed judicially the one against the other. When that is done the answer will be accepted as a judicial decision, not because it is the product of judicial wisdom or experience or knowledge but because it is a decision which has been judicially arrived at. That process and that objective are inseparable. It is in no way procedural in any ordinary sense. It is the central aspect of a system of justice which will not accept subjective conclusions affected by personal investigations of the Judge or the influence of impressions he has gained from only one side. Because of its significance in the rapidly developing field of administrative law the audi alteram partem principle is constantly referred to and accepted in that context as fundamental to the achievement of a fair result. It most certainly applies a fortiori to the Courts from which it is derived.

[64] While no further authority is required, we note that well-known statements to like effect by Lord Denning in *Kanda v Government of the Federation of Malaya*[55] and Upjohn LJ in *Re K (Infants)*[56] have been referred to in New Zealand cases on this issue.[57]

[65] In our view the Judge was plainly correct to decline to receive documents which were not disclosed to Chatfield. To the extent that the request or other documents contained information which was confidential, then we can see no reason why recourse could not have been made to the process in r 8.25(2) to which Mrs Courtney referred.

[66] On that matter the Judge pertinently observed:[58]

> 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 [in] 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

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55 *Kanda v Government of the Federation of Malaya* [1962] AC 322 (HL) at 337–338.

56 *Re K (Infants)* [1963] Ch 381 (CA) at 405–406.

57 For example *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [92]; *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC) at 463; *Minister of Foreign Affairs v Benipal*, above n 54, at 764–765; *Amtec Engineering Group Ltd v Marsden Machinery Ltd* CA182/95, 24 October 1995 at 8; and *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA) at [44].

58 At [71].

> Ellis J when the matter was before her, to allow her to satisfy herself about the confidentiality orders sought by the Commissioner.

[67] The implications of a refusal of consent by a requesting state were recognised by the Royal Court in *Haskell v Comptroller of Taxes*:[59]

> I have no doubt that the commentary to Article 26 of the OECD Model Tax Convention was not intended to express any suggestion that the competent authority of a requested state should be able to ignore an order of its competent court and accordingly the court must reserve to itself the power to order disclosure of the letter, whether the requesting state signifies its consent or not. If it came to such a position, no doubt the requesting state would have a decision to make as to whether it maintained its request, or was prepared to disclose the letter of request; and if it decided against the latter, then the practical consequence would probably be that the proceedings before the court would become otiose.

[68] In any event plainly some aspects of the request ceased to be confidential (if they were originally) once the 2014 notices were issued, namely the documentation required to be produced.[60] Similarly the general format of the request, comprising what might be termed the boilerplate clauses, could readily have been disclosed. While that might appear at first glance to be of no moment, in fact it would likely have removed at least some of the areas of dispute in this case because it would have served to confirm (or otherwise) that the request was compliant with the particular strictures of the DTA which is confined to information which is "necessary" and relates only to the taxes stipulated in art 2 of the DTA.

[69] For the future we see no reason why a suitably redacted copy of the request should not be made available to the court and to the recipient of a notice who brings a judicial review challenge.

Issue 4: Did Mr Nash lawfully discharge his obligations as competent authority?

[70] In the High Court Chatfield submitted 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.[61]

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59 *Haskell v Comptroller of Taxes* [2017] JRC 88 (RC) at [15].
60 See [13] above.
61 High Court judgment, above n 2, at [49].

That expression appears to have been derived from *Comptroller of Income Tax v AZP* where Choo Han Teck J was describing the connection which the request needed to demonstrate between the information sought and the enforcement of the requesting state's tax laws.[62] Wylie J not only accepted that submission but, after noting that Mr Nash did not state what he considered "necessary" in art 25 meant, he described aspects of Mr Nash's evidence as relatively vague and suggestive of there having been "no hard inquiry" into the necessity for any exchange.[63] The Judge proceeded to reflect both on Mr Nash's affidavit and the relevance of *Liversidge v Anderson* as noted at [27]–[28] above.

[71] In its written submissions on appeal Chatfield supported without reservation the approach of the Judge, submitting that:

> 53.12 nothing in any of the Commissioner's affidavits confirms that, as part of the request or at any other time before issuing the 2014 Notices, the NTS confirmed that each piece of information sought in the Request:
>
> (a) relates to tax/es covered by Art 2 of the DTA;
>
> (b) will only be used by Korea regarding tax/es covered by Art 2;
>
> (c) is "necessary" for carrying out the DTA's provisions or Korea's domestic laws concerning taxes covered by the DTA insofar as the taxation thereunder is not contrary to the DTA, as well as to prevent fiscal evasion and is not a fishing expedition;
>
> (d) is not available in Korea or that attempts have been made to obtain it or that doing so would create disproportionate difficulties; and
>
> (e) does not breach any of the Art 25(2) exceptions.
>
> 53.13 likewise, none of the Commissioner's affidavits confirm that, at any point before issuing the 2014 Notices, she:
>
> (a) independently satisfied herself by "clear and specific evidence" or otherwise conducted any "hard inquiry" that each piece of information sought in the Request was "necessary"; or
>
> (b) sought and/or obtained any further information from Korea regarding the Request's compliance with Art 25.

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62 *Comptroller of Income Tax v AZP* [2012] SGHC 112, 14 ITLR 1155 at [10].
63 At [80].

[72] As noted in the context of issue 2 above, the Commissioner accepted that the competent authority needed to satisfy himself that:

- information of the nature sought came within the terms of the DTA and New Zealand's tax laws;

- the nature of the information sought appeared to be consistent with the grounds for the request;

- information of that sort was broadly what would be expected to be necessary to an inquiry of the nature indicated.

[73] The Commissioner submitted that neither the competent authority, nor the Court on review, could be expected to inquire into the factual assertions underlying the request, nor as to the law in the other jurisdiction. Furthermore, where a competent authority did not consider there to be any lack of clarity or the presence of doubt raising a question about the validity of the request, it was sufficient for the validity of the request to be determined on its face.

[74] We are in general agreement with the Commissioner's analysis which finds support in authorities such as *Haskell*:[64]

> The duty of candour therefore is such that the first respondent must set out sufficient information as to why it considered the request which it had received fell within the terms of the TIEA, but there is a presumption of regularity on which it is entitled to rely, and, in the absence of some specific reason that would make such a course appropriate, it is not required to provide the letter of request or other documents within its possession. This is a matter of domestic administrative law, not because there is or may be any international standard to that effect. It is also not required to conduct a full audit of the procedures of the requesting state. The purpose of the legislation would be too easily defeated if there were a possibility of litigating in our domestic courts the propriety of the procedures of the requesting state under foreign law. Until there is evidence to the contrary, the Royal Court is entitled to proceed on a presumption of regularity by the competent authority of the requesting state.

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64 *Haskell v Comptroller of Taxes*, above n 59, at [30]. See also *ABU v Comptroller of Income Tax* [2015] SGCA 4, [2015] 2 SLR 420 at [40].

[75] We consider that the nature of the task which Chatfield appears to contemplate by the expression "clear and specific evidence" and the Judge by his reference to "hard inquiry" overstates the obligation on the competent authority on receipt of a request under the DTA. When this issue was explored in the course of argument Ms Rose agreed that provided the competent authority was not put on inquiry as to some irregularity, then Mr Nash was entitled to take the statements in the request letter at face value.

[76] Furthermore, while maintaining the argument that the Commissioner was required to have confirmation that each piece of requested information was necessary for one of the purposes set out in art 25, Ms Rose acknowledged that the clear and specific evidence could simply take the form of an email to that effect. Indeed, in response to the proposition that an unsubstantiated assertion in the request letter would be sufficient, Ms Rose replied:

> I am not suggesting sir that we can or should be going behind so yes. If there is a confirmation there that says Mr So-and-So with Korea confirm[s] that this is all necessary for an investigation into a tax covered by the convention — tickety-boo.

However Ms Rose submitted that Mr Nash's affidavit came nowhere near to so stating. We turn now to consider his evidence.

[77] Mr Nash's second affidavit described among other things the actions which he took, and the actions taken under his supervision, in responding to the NTS request. He noted that the request was made under the DTA and not under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[65]

[78] The difference between the two is significant, as Ms Rose observed, because the DTA requires that the information requested be "necessary" whereas under the Multilateral Convention the requirement is that the requested information be "foreseeably relevant".

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[65] In the schedule to the Double Tax Agreements (Mutual Administrative Assistance) Order 2013.

[79] Emphasising that international case law consistently requires compliance with the relevant standard, Ms Rose drew attention to the following observation in the Singapore Court of Appeal's decision in *ABU v Comptroller of Income Tax*:[66]

> First, the touchstone for the exchange of information under the EOI Standard is whether the requested information is "foreseeably relevant" for carrying out the provisions of the relevant tax treaty or the enforcement of the domestic tax laws of the requesting state. This is unlike the earlier incarnation of the EOI Standard, which Singapore previously implemented in its tax treaties, which required the information to be "necessary" for those purposes instead.

Ms Rose submitted that if Korea had wanted the benefit of the "foreseeable relevance" standard then it could have used the Multilateral Convention for its request but elected not to do so.

[80] Had Mr Nash's affidavit been unambiguous in his references to the threshold which he had applied there may not have been a difficulty. However, as we explain below, Mr Nash variously referred both to the necessary threshold and to the relevance threshold as having apparent application in this case.

[81] Having recited art 25, Mr Nash noted that the OECD Committee on Fiscal Affairs had stated that a qualified ambulatory approach is preferable in interpreting and applying double tax agreements as changes in wording from earlier versions of a double tax agreement are intended to clarify rather than change the meaning of articles or commentaries. We discuss this issue below in the context of issue 6. He explained that in exchanging information with treaty partners under double tax agreements he pays close attention to the exchange of information provision in the relevant agreement and to the OECD model commentary on art 26 which deals specifically with the exchange of information. With reference to that commentary he said:

> In terms of relevancy of requests, the following guidance from the OECD Model Commentary on Article 26 is especially pertinent:
>
> > In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be *relevant*; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing

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66 *ABU v Comptroller of Income Tax*, above n 64, at [26(a)].

> investigation can only be made following receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the *foreseeable relevance* of requested information are not clear to the requested State.
>
> (Emphasis added).

[82] In discussing the exceptions which apply under art 25(2), Mr Nash made the point that the requested state retains a discretion about how to proceed, stating:

> As DTAs are enacted into New Zealand law, Parliament has enabled the Commissioner using any of her powers to requisition information, which are contained in ss 16 to 21 of the Tax Administration Act 1994. The Commissioner has an operational discretion to decide what information she considers *necessary or relevant*, and how that is to be obtained. In the absence of anything obvious to the contrary (either on the face of the request or from the history of the relationship), the Competent Authority may rely on the accuracy of the content of the request and is not obliged to second guess the Competent Authority of another country.
>
> (Emphasis added).

[83] Then in that part of the affidavit specifically addressing his involvement in the present case Mr Nash made this statement:

> 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.
>
> (Emphasis added).

[84] The immediately following paragraph under the heading "Monitoring Compliance With Information Exchange Processes Between States" included the following:

> The 2013 Peer Review Report on New Zealand states at 5:
>
> > The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. …

> The standards provide for international exchange on request of *foreseeably relevant* information for the administration or enforcement of the domestic tax laws of a requesting party. …
>
> (Emphasis added).

[85] The passages which we have quoted were consistent in our view with the application of either the necessary or the relevant thresholds.

[86] With reference to this issue Ms Rose submitted:

> The OECD Commentaries are not binding and have no legislative effect. Whilst the traditional New Zealand approach has been to take into account the Commentary effective at the time of a double tax agreement's drafting, later Commentaries are of limited relevance where textual changes have been made to the Model Treaty and not implemented into domestic law (as in the case of the DTA). Thus, where an Art 25 decision has been made in reliance on the current (2014) OECD Commentary rather than analysis of what is required by the particulars of the DTA's text, it will likely be unlawful.

[87] As Wylie J observed,[67] in the absence of the relevant documents the only information available to the Court to assess the legality of the process followed was Mr Nash's affidavit. While we prefer not to associate ourselves with the Judge's observation on candour, the fact is that by reference to that affidavit Chatfield has satisfied us that Mr Nash asked the wrong question in his application of the "necessary or relevant" test.

[88] Consequently, we conclude that the assessment of the request was not lawful by reference to the requirements of art 25.

Issue 5: The evidential foundation for certain facts relied on by the Judge

[89] In the High Court Chatfield raised four concerns which we infer it claimed ought to have put the Commissioner on inquiry and prompted further investigation:[68]

(a) Was the information sought to advance an exchange control investigation into two of the target companies?

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67 At [89].
68 At [79].

(b) Had the NTS exhausted its domestic options?

(c) The effect of a suspension of the investigation by the NTS.

(d) The effect of the limitation period in Korea.

All four matters appear to have been raised for the first time in the second affidavit of Joon Youl Seo dated 21 July 2017.

[90] These are the matters which it would appear the Judge was referring to when he stated:[69]

> 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 Forest and Mr Nash.

In view of our conclusion on issue 4 we will address these further matters only briefly.

Exchange control investigation

[91] Chatfield's concern on this front was outlined in the judgment in this way:

> [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.

[92] Given the specific terms of art 2(1)(a),[70] on the face of it potential exchange control breaches would not be taxes covered by the DTA. However the pertinent consideration here is the state of the competent authority's knowledge. In his second affidavit Mr Nash deposed that at the time he dealt with the NTS request he was

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69 At [89].
70 At [7] above.

unaware of the exchange control breach allegation and that he only became aware of it when Chatfield filed its second amended statement of claim. Chatfield's submissions did not appear to challenge the Commissioner's asserted state of knowledge at the relevant time. Rather its submissions focused on dicta in *AXY v Comptroller of Income Tax.*[71]

[93] We agree that if, prior to a decision on a request, new facts emerge relevant to it, such facts should be taken into account by the competent authority. We also agree that if such new facts emerge after a decision on a request, there may be circumstances where the decision should be reconsidered. However, information that was not before a decision-maker plainly cannot be taken into account in the decision-maker's decision. In our view the decision to issue the 2014 notices could not be invalid on the basis of information which was not then known to the competent authority.

Exhaustion of domestic options

[94] This issue was described in the judgment as follows:[72]

> [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. 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.
>
> (Footnote omitted).

[95] Although Mr Seo deposed that Mrs Hwang sent him a copy of the NTS request in October/November 2016, the request was not exhibited. On 8 November 2016 Mrs Courtney sent an email to Ms Rose requesting the date of the NTS request and, if possible, a copy. However it appears that there was no response.

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71 *AXY v Comptroller of Income Tax*, above n 30 at [83].

72 The Judge noted that strictly speaking Mr Seo's assertions were hearsay but that the Commissioner did not take the point.

[96] We do not consider that this point has significance, both because it arose after the date of the decision to issue the 2014 notices and because the allegation lacks specificity.

Korean limitation periods

[97] The judgment relevantly stated:

> [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.

[98] Mr Nash addressed the limitation period issue in his second affidavit, explaining that just because information relates to a year in respect of which an assessment could no longer be made or amended, does not mean that information of that nature cannot be exchanged. He made the point that information relating to earlier years may assist an understanding of the position in later years which are still open for assessment or amendment.

[99] We do not consider that the suggested limitation issue was of such significance as to put the Commissioner on inquiry that further investigation was required.

A suspension of the NTS investigation

[100] The judgment noted:

> [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 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.

[101] This point does not appear to have any significance. That may account for the fact that the formulation of issue 5 referred to three facts, not four.[73]

Conclusion

[102] We agree with the Judge's assessment that these matters raised "relatively little". At the material time when Mr Nash made his decision we do not consider that they amounted to alarm bells, quiet or otherwise.[74]

Issue 6: The correct approach to the interpretation of the DTA

[103] The genesis of this issue appears to be the Commissioner's concern about an observation by the Judge with reference to the interpretation of double tax agreements. After referring to sources of interpretation including the OECD Model Commentary the Judge stated:[75]

> 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". Otherwise relying upon more recent commentary risks retrospectively.
>
> (Footnote omitted).

[104] It was the Commissioner's submission that there was "nothing in the point" that the ambulatory approach which it was said New Zealand uses to interpret tax treaties risks retrospectivity. Mrs Courtney submitted that the Court interprets an enactment as it applies when the circumstances arise.[76] She also sought to invoke the dictum of Tipping J in *Lai v Chamberlains* concerning the retrospectivity of the traditional declaratory theory of law.[77] She argued that the ambulatory approach can be viewed in the same way as the principle that a statute is interpreted as always speaking as the law strives to keep itself relevant.[78]

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73 At [30] above.
74 See High Court judgment above n 2, at [89].
75 At [31].
76 Citing the Interpretation Act 1999, s 6.
77 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [130]–[131].
78 *Avowal Administrative Attorneys Ltd v North Shore District Court* (2007) 23 NZTC 21,610 (HC) at [24], citing *Hieber v Commissioner of Inland Revenue* (2002) 20 NZTC 17,774 (HC) at [20].

[105] Noting that this Court has recently considered the approach to the interpretation of double tax agreements, the Commissioner referred to the following statement in *Commissioner of Inland Revenue v Lin:*[79]

> The China DTA, like all double tax treaties, is to be interpreted according to the same principles applying to private contractual instruments. The parties' intention is to be discerned by interpreting the ordinary meaning of the treaty's terms in context and in the light of its object and purpose. The context also takes account of its contemporary background. Resort can also be made to subsequent agreement about the treaty's interpretation including, in this case, OECD commentaries.
>
> (Footnotes omitted).

[106] However more pertinent to the concern which we perceive underlies issue 6 are this Court's observations in the immediately following paragraph:

> [20] It is perhaps trite to observe that each treaty is the result of a discrete round of bilateral negotiations. The final instrument reflects the parties' agreement on what terms and conditions are appropriate to their particular relationship. We mention this point now, to answer briefly an argument advanced by Mr Clews for Ms Lin. He sought to pre-empt an interpretation difficulty for Ms Lin arising from the plain meaning of art 23 of the China DTA by referring to comparable provisions in double tax treaties negotiated by New Zealand with two other countries shortly after the China DTA. In Mr Clews's submission we should construe art 23 in the same way as differently worded companion provisions in the other treaties. We do not accept that submission. Each treaty must be construed discretely, in accordance with its own particular terms.
>
> (Footnotes omitted).

[107] In our view the final observation of Wylie J,[80] which prompted the Commissioner's submission, is conveying no more than the point made by this Court in *Lin* that each treaty must be construed discretely and in accordance with its own particular terms.

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79 *Commissioner of Inland Revenue v Lin* [2018] NZCA 38, (2018) 28 NZTC 23-052 at [19]. Leave to appeal was declined: *Lin v Commissioner of Inland Revenue* [2018] NZSC 54, (2018) 28 NZTC 23-061.

80 At [31] set out above at [103].

Result

[108] The appeal is dismissed.

[109] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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