

STEP ISRAEL 2018

Case law update – Jersey

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Introduction

Ariel v Halabi and Her Majesty's Revenue & Customs (2018) JRC 006A

- John David Ariel – trustee in bankruptcy of Simon Halabi
- Simon Halabi - bankrupt in UK and executor of the Estate of X deceased
- HMRC – Issued an information notice in connection with Mr H's UK tax affairs

Background

March 2010

Mr H declared bankrupt in UK

October 2012

Trustee in bankruptcy produces letter of request from English High Court to Royal Court of Jersey

Requested Jersey court to exercise its powers under the Bankruptcy (Désastre) (Jersey) Law 1990 Article 49 to:

- Recognise trustee in bankruptcy's appointment and
- Give the trustee powers to be exercised in Jersey

Recognition Order

- Recognised the trustee in bankruptcy's appointment by the court in England
- Authorised the exercise in Jersey of all powers the trustee was entitled to exercise in England and Wales to the extent not contrary to Jersey law
- Authorised obtaining of material from named parties in relation to trusts and other entities

But

- *"Save with the leave of this Court, the Representor shall only use the information or documents so produced for the purposes of the administration of the estate in bankruptcy of Mr H, in whichever jurisdiction, under the direction of the High Court."*

November 2013

- Proceedings in Jersey to join the trustees of the A Trust of which Mr H's estate in bankruptcy was a substantial creditor
- Royal Court of Jersey ordered (the "**Consent Order**") the trustees of the A trust to provide information and documentation to the trustee in bankruptcy:
- *"Provided always that such disclosure shall not be used for any purpose other than the Representation and shall not be disclosed to any third parties, other than to the parties' legal advisors....."*

May 2017

First Tier Tribunal (Tax Chamber) in London approved the issue of an "**information notice**" by HMRC requiring the trustee in bankruptcy to produce to HMRC all documents and information received pursuant to the Recognition and the Consent Order

The trustee in bankruptcy applied to the Jersey court seeking:

- Court's leave under the Recognition Order and
- A variation of the Consent Order

in both cases to enable him to comply with the information notice

HMRC

Asserted that information predating the bankruptcy was required by it to establish Mr H's present and past tax position

First Tier Tribunal approved the issue of the information notice on ex parte application of HMRC but trustee in bankruptcy was allowed to make written representations. His difficulty in respect of the Jersey material was recognised but issue of notice was approved on the basis that the recipient should use best endeavours to obtain the material which would include the obtaining of appropriate orders from the Jersey court

Failure to obtain variation having used best endeavours would amount to a reasonable excuse for failure to comply with the information notice so penalties should not be imposed for non-compliance

Three issues for the Jersey court

1. Would compliance with the information notice constitute a breach by the Trustee of the Recognition Order or the Consent Order?
2. Did the court have jurisdiction to issue the orders requested?
3. If so, should the court do so in the exercise of its discretion?

Findings of the Jersey court on the first two issues

- Compliance with the information notice would be breaches of the Recognition and Consent Orders without suitable further orders from the Jersey court
- Court had jurisdiction to give leave for material obtained for the purposes of the administration of the estate of the bankrupt, to be used for other purposes. That was the purpose of the provision

"In our judgment, it is ultimately a matter for the Court as to the level of restriction which it places upon the use of material obtained pursuant to an Article 49 order and the Court must have jurisdiction to vary that in the light of changed circumstances..."

Consent Order was by its nature not a final order. Court sought to control onward disclosure of material supplied to a party in the relevant proceedings

"In our judgment Court always has an ongoing ability to vary an order which it has made about the confidentiality of material produced before it..."

Enforcement of foreign taxes

Rule 3 of Dicey Morris and Collins The Conflict of Laws (15th edition)

"English courts have no jurisdiction to entertain an action... for the enforcement, either directly or indirectly, of a penal revenue or other public law of a foreign state"

Based on the House of Lords decision in *Government of India v Taylor* [1955] AC 491

Rule is also followed in Jersey law

Enforcement of foreign taxes continued

After reviewing English case law Jersey court held:

The schedule 23 (information notice) provisions are "*investigatory powers which enable HMRC to gather information for the purpose of checking a taxpayer's tax position*"

Fact of some "teeth" to ensure compliance "*does not turn the provision into an enforcement provision for our purposes*"

Fact that trustee in bankruptcy was on the "horns of a dilemma"(contempt of the Jersey court or failure to comply with an obligatory notice under English law) "*did not amount to indirect enforcement of a foreign tax law*"

Exercise of court's discretion

Recognised that bankruptcy and tax are two very separate matters

Separate legislation to enable confidential information:

- To assist in overseas insolvencies (Article 49 of the Bankruptcy Law)
- To prevent tax evasion (Taxation - exchange of information legislation)

Wrong as a matter of general principle for court to mix up the two "routes" established by the legislation

Court's discretion continued

"If it were to become common for material supplied for insolvency purposes to then be disclosed to taxation authorities for tax purposes, this would be to circumvent the separate routes established by the legislature"

"...in the ordinary case, this court should refuse a variation permitting a trustee in bankruptcy to comply with an information notice where HMRC are able to obtain that information using the agreed procedure of a TIEA (tax information exchange agreement)"

TIEA procedure

Requires a requesting party to pursue all available means in its own territory to obtain the information before requesting information under the TIEA save *"where recourse to such means would give rise to disproportionate difficulty"*

In this case, if the Jersey court refused to vary the orders and the trustee in bankruptcy refused to comply with the information notice, HMRC would have complied with the unable to obtain the information by other means test and the Comptroller of Taxes in Jersey would have to assist under the terms of the Jersey / UK TIEA

Court's conclusions

- In general, consent to disclose of information for tax purposes should not be given under the bankruptcy legislation where there is an alternative route of obtaining that information
- In this case, HMRC applied under the TIEA but still required material relating to the period prior to 2010, outside the ambit of the TIEA

"In these circumstances, we have to determine whether to consent to the Trustee complying with the information notice in circumstances where, were we to refuse, and the Trustee were subsequently to refuse to comply, either he would be penalised, (possibly on a daily basis) or HMRC would be denied access to material situated in the United Kingdom to which they are entitled under English law, where an independent judicial monitor has found their request to be reasonable and there is no alternative route available under the TIEA"

- The orders were granted to enable the trustee in bankruptcy to comply with the information notice

Speaker



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Questions

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