



Lawyers, Corporate Service Providers and TIEAs

A. Introduction

Bermuda has entered into bilateral agreements over the last few years with a number of countries¹, the purpose of which is to enable mutual assistance in the administration and enforcement of the parties' respective tax laws by enabling each to obtain tax information relevant to their taxpayers in the territory of the other.

Constitutionally, Bermuda does not have the power to make such agreements as they fall within the special responsibilities of the Governor, under the Bermuda Constitution. The UK Government has, however, issued a letter of entrustment to the Government of Bermuda giving it the power to negotiate and conclude such agreements with the governments of other countries for the purpose of enabling the mutual exchange of tax information.

These tax information exchange agreements (TIEAs) are made enforceable in Bermuda by the International Cooperation (Tax Information Exchange Agreements) Act 2005 which became operative law in Bermuda on 30 December 2005.

The scheme of the 2005 Act is as follows:

(a) to make statutory provision enabling the

Minister of Finance to provide assistance to any requesting party according to the terms of the TIEA between the Government of Bermuda and the foreign requesting government:

- (b) to describe the circumstances in which the Minister may decline to provide such assistance;
- (c) to provide the machinery for the Minister to compel a person in Bermuda to provide the requested information (“*a notice in writing served on any person in Bermuda*”);
- (d) to create a statutory obligation on the person served to provide the information;
- (e) to excuse compliance with a notice in certain defined circumstances;
- (f) to provide an “*absolute defence*” to any claim by a person to whom a duty of confidentiality is owed in respect of the requested information when provided to the Minister pursuant to a notice;
- (g) to create a period of 20 days delay from the time the requested information is received by the Minister before it is forwarded to the requesting party; and
- (h) to create certain criminal offences for failing to comply with a notice or tampering with, altering, destroying or damaging the information.

This article describes the obligations of lawyers and corporate service providers when they are served with notices to provide information issued by the Minister under the 2005 Act.

¹ TIEAs with the following countries are operative as at the date hereof: Argentina, Aruba, Australia, Bahrain, Canada, China, Denmark, Finland, France, Iceland, India, Ireland, Japan, Mexico, Netherlands, New Zealand, Norway, Portugal, South Africa, Sweden, United Kingdom and United States.

B. "...a person on whom a notice has been served...": a source of confusion

It is fundamental to a proper understanding of the 2005 Act to appreciate that the person who is required to provide the requested information (and who may be criminally liable for a failure to do so) is the person who is "served" with the notice. Where the requested information relates to the financial affairs of a Bermuda incorporated company that does not have a physical presence in Bermuda it is not unknown for the notice to be addressed to the company in the care of the law firm or the corporate service provider carrying on business at the same address as the registered office of the company.

This has caused much confusion. Is the law firm or the corporate service provider "served" with the notice? Common sense would indicate that the inclusion of the name of the law firm or the corporate service provider in this scenario is simply part of the address of the company; that the company is the only person actually "served".

It would be otherwise, of course, if the only person named in the notice was the law firm or the corporate service provider. But if their names are simply included as hosts of the target company the obvious way to avoid any confusion would be to name only the target company; and omit the names of any other entity that may share the registered office address.

Of course it is possible that a corporate service provider or a law firm may have been the intended target of the notice. There is nothing in the 2005 Act which excludes them from its ambit. If they are served with a notice to provide information they would be bound to consider their duty of confidentiality to their clients and the right to refuse disclosure of information on the grounds of legal professional privilege. It is to these concepts that this article now turns.

C. Confidentiality and Legal Professional Privilege Distinguished

It is important to appreciate the difference between a right of confidentiality and legal

professional privilege. A right of confidentiality is a legal right which the law will enforce either (a) to prevent a person to whom confidential information has been imparted from disclosing it in circumstances where such disclosure would be detrimental to the person to whom the duty was owed; or (b) by awarding compensation to the person to whom the duty was owed for breach of it. The duty may arise under a contract or may be found to exist at common law (i.e., where the nature of the information imparted and the circumstances in which it was imparted are such that the law imposes a duty to keep the information confidential). Lawyers and corporate service providers owe duties of confidentiality to their clients in respect of information and documents relating to their clients' private affairs.

Legal professional privilege on the other hand protects from disclosure communications (whether oral or in writing) that are confidential in character and which are brought into existence for the dominant purpose of either enabling the client to obtain, or the legal advisor to give, legal advice or for use in litigation (either existing or contemplated). The right belongs to the client who may either waive it or insist on its observance.

D. Information Protected by Privilege

Upon receiving a request from another jurisdiction the Minister may decline to honour it if (*inter alia*) the requested information is protected from disclosure under the laws of Bermuda on the grounds of legal professional privilege. Does the Minister's failure to decline a request for assistance on this ground preclude a challenge to the Minister's notice to produce on the same ground?

The 2005 Act does not contain any provision exempting or excusing a person from complying with a notice to produce (except in limited circumstances where the information is not in Bermuda or is outside the possession or control of the person served: see below). Nor does the 2005 Act expressly enable a legal challenge to be made to the validity or the scope of a notice. On the contrary, the Act

is cast in terms mandating compliance. Section 6 of the 2005 Act states:

“A person on whom a notice has been served under section 5 shall provide the information specified in the notice to the Minister within the period specified in it”.

On top of this section 9 creates a criminal offence punishable by imprisonment and/or a fine of \$5,000 for failure to provide information pursuant to a notice.

Notwithstanding the absence of any provision permitting a legal challenge to a notice, it is unlikely that a Bermuda Court would refuse to hear such an application simply because the Act does not expressly permit it. A Bermuda Court would not infer that the Bermuda legislature intended to exclude such a challenge without clear language evidencing such an intention given that legal professional privilege is a fundamental human right protected *inter alia* by the Constitution of Bermuda : *Fubler v Attorney General of Bermuda* (1994) Bda LR 64, per Ground J. at page 11.

E. Challenge to a Notice to Provide Protected Information

Any objection on the grounds of privilege must be raised by the client since it is for his protection that the rule exists. A challenge by way of legal action would most likely take the form of a claim in the Supreme Court by the client for a declaration that he (or his lawyer served with a notice) is not obliged to disclose the requested information on the grounds that it is protected by legal professional privilege.

F. Confidential Information

The Minister cannot decline to issue a notice on the ground that the information is merely confidential. Nor can a service provider (whether legal or corporate) who is served with a notice decline to provide the information on this ground. The person providing information pursuant to a notice is,

however, protected by the Act from any claim by his client for a breach of his duty of confidentiality. The Act provides in s. 7 that compliance with any direction given in a notice served under the Act is an absolute defence to any claim brought against that person in respect of any act done or any omission made by him in good faith in obedience to that direction.

G. Information Not Present in Bermuda

Under section 6 of the 2005 Act a person served with a notice is not required to comply if the information *“(a) is not in Bermuda; or (b) is not in the person’s possession or control”*.

Possession and control are legal concepts. These words are therefore likely to have been intended by the legislature to bear their legal meaning. Information that is in Bermuda and compellable by the person served with a notice presents no problem in understanding the legal obligations involved. However, a question may arise where the information is not in Bermuda but is compellable from its source abroad by the person served in Bermuda. Is such a person served with a notice obliged to produce the information in those circumstances? What if the information is in Bermuda but is not in the possession of or compellable by the person served? These are questions that are not so simple to answer.

The grammar of section 6 suggests that the two requirements are disjunctive (i.e. the existence of either of the two facts excuses compliance). Thus, the person served is not required to comply if either (a) the information is not in Bermuda (whether or not it is compellable by the person served) or (b) is not compellable by the person served (no matter where it resides).

David Kessaram
Managing Director/Head of Litigation Department
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