

Shifting sands: the unravelling of international exchange of information and disclosure rules on tax matters

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Abstract

This article investigates the purview of Article 26 (Exchange of Information) of the OECD Model Tax Convention (MTC) which empowers revenue authorities in two different jurisdictions to obtain taxpayer-related information from each other. The operation of Article 26 is considered in light of the issues surrounding the non-disclosure of information in judicial reviews as well as New Zealand's recent international commitment to implement the new global standard on Automatic Exchange of Information (AEOI). The article examines the amendments made to Article 26 of the OECD MTC since its inception to ensure international currency on the exchange of information in tax matters, the secrecy obligations on the New Zealand tax authorities in disclosing the exchanged information under s 81 of the *Tax Administration Act 1994* (NZ); and the leading exchange of information cases in New Zealand. The article further examines New Zealand's recent international commitment to implement the G20 and OECD's Automatic Exchange of Information (AEOI) in accordance with the Common Reporting Standard (CRS) due diligence; a significant shift in how jurisdictions share tax information and a step away from the traditional 'exchange on request' model. The article demonstrates that, as evidenced by case law, an alternative approach to the strict rule of non-disclosure of information to the taxpayer in judicial reviews would protect the confidentiality obligations of tax authorities and maintain taxpayer confidence. It is argued that the principles enunciated by the House of Lords in *Tweed v Parades Commission for Northern Ireland* (2006) in relation to the scope for discovery under the *Human Rights Act 1998* (UK) and *European Convention on Human Rights* in UK judicial review proceedings would form an appropriate basis for such an approach. The analysis in this article serves as a guide for policy-makers to take the necessary steps to ensure that tax information secrecy is not sacrificed in the desire to achieve greater transparency.

Key words: article 26, OECD Model Tax Convention, double tax agreement, secrecy, Automatic Exchange of Information

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1. INTRODUCTION

Globalisation has been described as one of the largest forces currently affecting the world economy.¹ The destruction of traditional barriers such as distance and communication has fostered the rapid emergence and growth of transnational enterprises, which have permanently altered the existing legal and economic relations amongst nations.² While this trend has brought with it many benefits, it has also brought a wide range of economic, political, administrative and social ramifications.³ In particular, the digital economy, and increased investment and business opportunities in foreign countries have made international legal and fiscal arrangements more complicated,⁴ resulting in significant untaxed monies that are kept offshore.⁵ Additionally, there is an increased focus from revenue authorities on the information reporting obligations in relation to cross-border transactions and sharing between governments, more robust audits and associated controversy.⁶

The case of *Avowal Administration Attorneys Ltd v District Court at North Shore* established that the Australian Taxation Office (ATO) may exert its statutory powers in the jurisdiction of New Zealand's courts.⁷ While its powers are not directly applied to New Zealand taxpayers, the New Zealand revenue authorities acted upon the ATO's request to exercise search powers and obtained information on their behalf, which is equivalent to the ATO's search powers. This was made possible through Article 26 of the Australia-New Zealand Double Tax Agreement (DTA).⁸ A double tax agreement between two countries aims to avoid double taxation and to prevent tax evasion. In particular, Article 26 of the OECD Model Tax Convention (MTC) for double tax agreements is an instrument that provides a legal framework for the exchange of information to take place between two jurisdictions, to combat non-compliance with taxation laws.⁹

Article 26 imposes a secrecy obligation on the revenue authorities in relation to disclosure of exchanged information to the taxpayer. This obligation has been extended to restrict pre-trial discovery to the litigant in judicial review proceedings. Therefore, the DTA not only serves a dual purpose of avoiding double taxation and preventing tax

¹ Wayne Stevens, 'The Risks and Opportunities from Globalisation' (New Zealand Treasury Working Paper 07/05, July 2007) 1.

² David Held et al, *Global Transformations: Politics, Economics and Culture* (Polity Press, 1999).

³ Jonathan Perraton et al, 'The Globalisation of Economic Activity' (1997) 2(2) *New Political Economy* 257.

⁴ Ibid.

⁵ Organisation for Economic Co-operation and Development (OECD), *A Step Change in Tax Transparency: Delivering a Standardised, Secure and Cost Effective Model of Bilateral Automatic Exchange for the Multilateral Context*, OECD Report for the G8 Summit (June 2013), https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf.

⁶ OECD, 'Explanatory Statement: 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project' (OECD Publishing, 2015) 16: '[e]arly access to such [aggressive tax planning] information provides the opportunity to quickly respond to tax risks through informed risk assessment, audits, or changes to legislation'.

⁷ *Avowal Administration Attorneys Ltd v District Court at North Shore* [2010] NZCA 183; 24 NZTC 24,252 (CA).

⁸ *Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion* (opened for signature 26 June 2009, entered into force 19 March 2010) art 26.

⁹ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Publishing, Paris 2017) 488-505 (commentary on article 26, paras 1-4).

evasion, but it also serves as a double-edged sword, allowing the DTA jurisdiction tax authorities to exert significant power over New Zealand taxpayers while suppressing their ability to question the grounds for exercising that power.

Cases on the exchange of information have indicated difficulties in applying the provisions of the DTA with consideration to the New Zealand *Tax Administration Act 1994* (TAA) and the *Income Tax Act 2007* (ITA). In particular, taxpayers have argued that the revenue authorities' secrecy obligation under s 81 of the TAA has not been fully excluded for the purpose of carrying out the provisions of Article 26. However, it is questionable as the DTA take precedence over domestic law.¹⁰ Additionally, an appropriate balance must be maintained between the privacy rights of the taxpayer and protection of public revenue.¹¹ It is not a valid argument to say that when it comes to tax collection, all privacy rights are outweighed as a matter of public interest.¹² This suggests that further work is still required to achieve a genuinely workable Article 26 of the MTC.

Whilst bilateral treaties such as those based on Article 26 of the OECD MTC permit such exchanges, it may be more efficient to establish automatic exchange relationships through a multilateral information exchange instrument. The OECD developed an instrument for this purpose in 2011:¹³ the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (the Multilateral Convention).¹⁴ In order to tackle offshore secrecy and tax evasion, the Multilateral Convention¹⁵ provides a new global standard for the automatic exchange of financial account information (AEOI) pursuant to the *Common Reporting Standard* (CRS)¹⁶ and all possible forms of administrative co-operation between Contracting States.

The objective of this article is to address the scope of Article 26 of the MTC, which allows the revenue authorities in two different jurisdictions to obtain taxpayer-related information from each other, and the issues surrounding the non-disclosure of information in judicial reviews. This study will attempt to seek alternatives to the strict rule of non-disclosure of such information in judicial reviews. The basis on which the alternative approach is sought would include protecting the revenue authority confidentiality obligations and maintaining taxpayer confidence. In addition, this article

¹⁰ *Income Tax Act 2007* (NZ), s BH 1(4) gives effect to the DTA over the TAA and ITA.

¹¹ Reynah Tang, 'The Commissioner's Power to Access Taxpayer Information from Third Parties and a Taxpayer's Right to Privacy – A Case for Reform?', (2005) 34(1) *Australian Tax Review* 20.

¹² Duncan Bentley (ed), *Taxpayers' Rights: An International Perspective* (Bond University, 1998); *Chatfield & Co Ltd v Commissioner of Inland Revenue* (2015) NZHC 2099 [41 (c)]

¹³ *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (Protocol and amended Convention opened for signature on 27 May 2010, entered into force 1 June 2011), <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>.

¹⁴ As at 8 March 2018 there are 126 jurisdictions representing G20 countries, all OECD countries, major financial centres and an increasing number of developing countries participating in either the amended Multilateral Convention or the original Convention of 1988. It was signed by Australia on 3 November 2011 and entered into force from 1 December 2012. It was signed by New Zealand on 26 October 2012 and entered into force from 1 March 2014: see OECD, 'Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status – 29 November 2018', https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.

¹⁵ The DTAs give effect to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, opened for signature 7 June 2017 (entered into force 1 July 2018) (Multilateral Instrument, or MLI).

¹⁶ The *Common Reporting Standard* (CRS) is a part of AEOI and ensures that the information collected and supplied is in a standard format.

will consider the implementation of the new standard on AEOI and critically assess whether it would protect taxpayers' secrecy provisions under the TAA. At the same time, it will provide clarity to revenue authorities and taxpayers, and will enable revenue authorities to protect taxpayers' confidentiality.

The methodology¹⁷ used in this article analyses the relevant provisions of the applicable legislation, policies, guidelines, case law, and OECD reports relating directly to the objective of this research, together with Article 26 of the OECD MTC.

The article proceeds as follows. Section 2 provides a brief review of the literature relevant to taxpayers' secrecy and exchange of information under bilateral treaties and implementation of the AEOI. Section 3 sets out a succinct review of relevant legislative provisions regarding New Zealand tax authorities' information gathering powers and Article 26 of the OECD MTC. Section 4 reviews relevant legislative provisions regarding disclosure of information, judicial approaches in New Zealand and the need for change in disclosure rules. Section 5 discusses the implementation of AEOI in New Zealand. Finally, section 6 concludes by outlining the salient outcomes of the research.

2. CURRENT SCHOLARSHIP

This section presents the literature relevant to taxpayers' secrecy and exchange of information under bilateral treaties and implementation of AEOI. Prior research suggests that there has been expansion in the scope of exchange of information instruments over time,¹⁸ but this has been achieved at the compromise of the privacy rights of taxpayers.

Filip Debelva and Irma Mosquera's¹⁹ study examined the confidentiality and privacy rights of the taxpayer in exchange of information under AEOI standards. Their study concluded that the existing safeguards in respect of the taxpayer's right to privacy and confidentiality are not sufficient to tackle the challenges concerning the protections of the rights of the taxpayers.

According to Diepvens and Debelva,²⁰ there has been an increase in the rights of the tax authorities with an increase in instruments to exchange information but there has been no increase in taxpayer protection. The new AEOI standard further removes taxpayers' existing safeguards to privacy and confidentiality to improve the efficiency of the process of exchange of information.

Nayoung Kwon's study²¹ investigated hypothesised benefits of AEOI for New Zealand and the impact of AEOI on domestic laws and proposed legislative changes under the Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016.

¹⁷ The approach adopted for answering the research question was thematic analysis. Themes identified for the analysis included relevant sections in the TAA, relevant cases, treaties for exchange of information and AEOI.

¹⁸ Niels Diepvens and Filip Debelva, 'The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure' (2015) 24(4) *EC Tax Review* 210.

¹⁹ Filip Debelva and Irma Mosquera, 'Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions' (2017) 45(5) *Intertax* 362.

²⁰ Diepvens and Debelva, above n 18.

²¹ Nayoung Kwon, 'A Very Complicated Game of Hide and Seek - Will Automatic Exchange of Information Become a Game Changer in International Tax Evasion?' (Bachelor of Laws (Honours) Dissertation, University of Otago, 2016).

The study evaluated the cost and benefits of AEOI to New Zealand in terms of sovereignty, rights of taxpayers, administrative expense for Inland Revenue and financial institutions, and the impact of offshore tax evasion under AEOI. The study concluded that the implementation of AEOI would be less beneficial to New Zealand than suggested in eradicating tax evasion. The study reported that the cost of AEOI to New Zealand in terms of the factors listed above would outweigh the benefits of the AEOI. The study noted that the OECD's implementation of AEOI has a direct impact on New Zealand legislation and the OECD is effectively redefining the monopoly of the state over tax policy.

Ants Soone's study²² examined whether AEOI invades the privacy rights of the individual proportionately in Estonia. Contrastingly, Soone's study reported that AEOI serves as an efficient tool, and that information processes under automatic exchange do not interfere with the fundamental rights of the individual. It also argued that financial account information provided by the individual under AEOI is the standard information an individual is required to provide.

Sadiq and Sawyer's study indicated that many of the developing Asia-Pacific countries will be likely face challenges in grappling with understanding the implications of the common reporting standard for AEOI for their tax administrations and require modifications in their domestic laws to enable effective AEOI.²³ Dirakis and Bondfield's study²⁴ examined the growth of international collaborative initiatives to improve transparency and exchange of information. Their study also concluded that the Australian tax authorities' active involvement with the Joint International Tax Shelter Information Centre (JITSIC), *Foreign Account Tax Compliance Act* (FATCA) treaty with the US and participation in the OECD Multilateral Convention will be complex and resource intensive to manage.²⁵

The literature has not yet examined exchange of information in the context of rules relating to disclosure of information by tax authorities to taxpayers with consideration of the implementation of AEOI. This study addresses this gap and considers application of Article 26 of the OECD MTC and the issues surrounding the non-disclosure of information in judicial reviews. It suggests alternatives to the strict rule of non-disclosure of such information in judicial reviews. The next section first considers New Zealand tax authorities' information gathering powers both outside and within the DTA.

3. INFORMATION GATHERING AND ENFORCEMENT POWERS OF THE NEW ZEALAND REVENUE AUTHORITIES

3.1 Outside the DTA

In broad terms, a search is an examination of a person or property and can embrace a request for information.²⁶ Section 16 of the TAA and Part 4 of the *Search and*

²² Ants Soone, 'Exchange of Tax Information and Privacy in Estonia' (2016) 44(3) *Intertax* 279.

²³ Kerrie Sadiq and Adrian Sawyer, 'Developing Countries and the Automatic Exchange of Information Standard – A 'One-Size-Fits-All' Solution?' (2016) 31(1) *Australian Tax Forum* 99.

²⁴ Michael Dirakis and Brett Bondfield, 'The Developing International Framework and Practice for the Exchange of Tax Related Information: Evolution or Change?' (2013) 11(2) *eJournal of Tax Research* 115.

²⁵ *Ibid.*

²⁶ Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (Law Book Co, 1996).

Surveillance Act 2012 (SSA) provide for ‘warrantless searches’ and a right of access to be conferred on ‘...the Commissioner and any officer of the Department authorised by the Commissioner in that behalf...’. Such access constitutes a ‘search’ and the Commissioner of Inland Revenue (the Commissioner) carries out these ‘searches’ to secure the record for evidential purposes.

To exercise the power under s 16, the Commissioner or officer must provide consideration that the search is conducted out of necessity or relevance to the Inland Revenue Acts or for the purpose of carrying out other functions conferred on the Commissioner. Under this provision, the Commissioner is empowered to have full access to buildings, books, and documents, which may be under the control of a public authority, body corporate or any other persons. The definition of books and documents has also been recognised to include computer hard drives.²⁷ The Commissioner’s right to ‘full and free access’ under s 16 of the TAA seems to be the antithesis of the taxpayer’s reasonable expectation of privacy. Further, the Commissioner must be mindful that in performing a search, s 6A(2) of the TAA provides that the Commissioner is charged with care and management of taxes. A failure to do so will not of itself render the search unreasonable. The law confers on the Commissioner the right to access premises and to remove documents. The Commissioner is not required to exhaust other avenues of inquiry before access and removal will be considered reasonable. There are exceptions to warrantless searches. Under s 16(4) of the TAA, a search of a dwelling house requires a warrant to permit access²⁸ and under s 16C(2) TAA, a warrant is required for removal and retention of documents.

The High Court’s first instance decision in *Avowal Administrative Attorney v District Court at North Shore*²⁹ confirmed that the powers of the Commissioner to gather and obtain information under s 16 are very wide and are only subject to consideration of relevance. There has been a dramatic increase in the use of the revenue authorities’ search power since 2007.³⁰ Tubb suggests:³¹

[Inland Revenue’s] principal role is in ensuring voluntary compliance with the Revenue Acts. Its strategy inevitably involves the use of enforcement powers, along with education and consultation In order for the Commissioner to effectively treat the problem of aggressive tax planning, particularly widely distributed schemes, and tax crimes, the Commissioner clearly needs to have efficient and effective information gathering powers to obtain the information needed to verify various tax liabilities and deter and detect offending.

The Commissioner’s search powers are further extended under s 17 TAA, which imposes an unconditional obligation upon any person to furnish information or produce documents requested by the Commissioner for the enforcement or administration of the ITA or for any other purpose lawfully conferred on the Commissioner. Prior to the High Court’s 2010 decision in *Avowal*, the Court of Appeal had noted in a 1990 decision that

²⁷ *Avowal Administration Attorneys Ltd v District Court at North Shore* [2010] 24 NZTC 24, 256 (CA).

²⁸ The search of residential dwellings must be exercised within a context of individual rights set out in the *New Zealand Bill of Rights Act 1990*, the *Privacy Act 1993* and the *Evidence Act 2006*.

²⁹ *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] 2 NZLR 794 (HC).

³⁰ Graham Tubb, ‘Commissioner of Inland Revenue’s Power of Search and Seizure: ss 16, 16B and 16C Tax Administration Act’ (Paper presented at the New Zealand Law Society, Taxation Conference, Auckland, 1 September 2011).

³¹ *Ibid* 215.

s 17(1) is ‘expressed in the widest terms’³² and that ‘nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended’.³³

In a recent High Court case, *Chatfield & Co Ltd v Commissioner of Inland Revenue*,³⁴ Lang LJ considered a number of statements made in the IRD’s Operational Statement³⁵ and noted:³⁶

Nothing in section 17 precludes Inland Revenue from seeking information from multiple sources and from sources other than the affected taxpayer, whether before or after seeking the information directly from the relevant taxpayer.

The Court of Appeal upheld the decision of the High Court in *Chatfield*³⁷ and held that Commissioner’s s 17 notice to furnish information was valid.

The criteria to exercise the power under s 17 are identical to that of s 16 where the actions are conducted in necessity and have relevance. The Commissioner has the power to remove and retain books and documents for the period of time deemed necessary for a full and complete inspection.

The Commissioner’s statutory responsibilities include the tendering of advice to the Minister of Revenue. Additionally, by s 6 TAA, the Commissioner and the Minister are required to use their best endeavours to protect the integrity of the tax system.

3.2 Power to enforce revenue laws of another country

While it is generally agreed that the powers of the revenue authorities are far-reaching, with little restriction, the cases that are examined in this article highlight that rule of law prohibits a State from enforcing these powers for the tax office of a foreign state.

In *Peter Buchanan Ltd v McVey*,³⁸ Kingsmill Moore J reinforced this distinction by proposing that the courts would, in certain circumstances, have regard to the revenue laws of a foreign state, but in no circumstances enforce the revenue laws of another country.

³² *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259 per Richardson J at 7,262.

³³ *Ibid.*

³⁴ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289.

³⁵ IRD, ‘Section 17 Notices’, Operational statement (OS) 13/02, [43], <https://www.ird.govt.nz/technical-tax/op-statements/os-1302-sec-17-notices.html>. The OS outlines the procedures Inland Revenue will follow when issuing notices, including third party requests, under section 17.

³⁶ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289 [43].

³⁷ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614; the Supreme Court subsequently declined leave to appeal. *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] 28 NZTC 23,010.

³⁸ *Peter Buchanan Ltd v McVey* [1955] AC 516.

Martin's study aptly pointed out that the State's³⁹

...right to enact laws that impose a tax liability on persons who are outside New Zealand is distinct from its right to enforce those laws against those same persons outside New Zealand.

According to Martin, the New Zealand ITA does not extend to foreign jurisdictions but rather restricts its application to 'persons and transactions, which have a reasonably close legal and factual connection to New Zealand.'⁴⁰ However, the Commissioner is entitled to know the income earning activities performed in New Zealand and decide accordingly whether they are taxable or not. The revenue authorities' enforcement jurisdiction can only be exercised over persons that are residents of New Zealand, and incomes sourced from New Zealand. The criteria of falling within the definition of a resident are set out in ss YD 1 to YD 4 ITA.⁴¹

The Australian decision in *Currie*⁴² illustrates the principle that revenue authorities cannot use their powers of inspection or interview to obtain information for the tax office of a foreign state.⁴³ The Court concluded that the Australian revenue authorities acted *ultra vires* in exercising subdivision 353-10⁴⁴ to obtain evidence for the purpose of providing assistance to New Zealand to enforce its revenue law.⁴⁵ The Court specifically commented that revenue authorities cannot use their powers of inspection or interview to obtain information for the tax office of a foreign state.⁴⁶

New Zealand courts applied this restriction in *Connor v Connor*⁴⁷ and *Von Wyl v Engeler*.⁴⁸

In *The Case of the SS 'Lotus'*,⁴⁹ the Permanent Court of International Justice gave an important dictum on the parameters of a State's enforcement jurisdiction. The Court concluded that a State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do so. It further held:⁵⁰

Now the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary — it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from the convention.

³⁹ Denham Martin 'Enforcing Tax Laws Offshore' (1991, December) *New Zealand Tax Planning Report* [7].

⁴⁰ *Ibid* [8].

⁴¹ *Income Tax Act 2007*, ss YD 1, YD 2, YD 3 and YD 4.

⁴² *Currie v Deputy Commissioner of Taxation* [2000] FCA 1964, [2000] 724 VR 2000.

⁴³ *Ibid*.

⁴⁴ *Taxation Administration Act 1953* (Cth).

⁴⁵ *Ibid* Sch 1, subdiv 353-10.

⁴⁶ *Currie v Deputy Commissioner of Taxation* [2000] FCA 1964.

⁴⁷ *Connor v Connor* [1974] 1 NZLR 632.

⁴⁸ *Von Wyl v Engeler* [1998] 3 NZLR 416.

⁴⁹ *The Case of the SS 'Lotus'* (France vs Turkey) [1927] P.C.I.J (Series A) No. 10.

⁵⁰ *Ibid* 23, [45].

Further, in *Government of India v Taylor*⁵¹ a domestic Court (as opposed to an international Court) emphasised the State's limitation in enforcing its tax laws in a foreign jurisdiction. In *Government of India* Viscount Simonds J noted:⁵²

My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would, and should, entertain a suit by a foreign state to recover the tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J said in *King of the Hellenes v Brostrom* ... It is perfectly elementary that a foreign government cannot come here - nor will the courts of other countries allow our government to go there - and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to by the country to which he belongs.

However, Article 26 of the OECD MTC on the Exchange of Information authorises competent taxation authorities to exchange information which is foreseeably relevant to the tax affairs of the taxpayer or to the administration and enforcement of the domestic tax laws of the contracting states concerning taxes of every kind and description imposed. Accordingly, this article will investigate the rules regarding the international exchange of information, specifically Article 26 the OECD MTC.

3.3 The OECD Model Tax Convention on Income and Capital

Initiated in 1956 by the Organisation for European Economic Co-operation, the MTC was a 'collective project aimed at the development of uniform tax treaty provisions'.⁵³ The first full draft of the MTC⁵⁴ was completed by the OECD in 1963 and was subsequently published in 1977.⁵⁵ The MTC serves as a model used by countries in negotiation, application and interpretation of bilateral tax agreements. According to Appendix 1 of the OECD MTC, the OECD Working Party membership grew from 15 countries involved in drafting the first MTC in 1956, to 20 countries by 1963, and 36 countries by July 2018.⁵⁶ The OECD notes that the MTC now forms the basis for over 3,000 bilateral tax treaties.⁵⁷

The MTC works on the reciprocal assistance between tax administrations, made feasible by an exchange of assurance between the contracting States that the information received in the course of their co-operation will be treated with proper confidence.⁵⁸

The exchange of information between jurisdictions has a long history.⁵⁹ The 1963 initial draft MTC incorporated Article 26, a provision on the exchange of information in tax

⁵¹ *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 (LR HL) [*Government of India's case*].

⁵² *Ibid* 503.

⁵³ Jeffrey Owens and Mary Bennett, 'OECD Model Tax Convention, Why It Works' OECD Observer No 269, October 2008,

http://oecdobserver.org/news/archivestory.php/aid/2756/OECD_Model_Tax_Convention.html.

⁵⁴ Draft Double Taxation Convention on Income and Capital (OECD, 1963).

⁵⁵ Model Double Taxation Convention on Income and Capital (OECD, 1977).

⁵⁶ OECD, 'Members and Partners', <http://www.oecd.org/about/membersandpartners>.

⁵⁷ OECD, 'Tax Treaties: Update to the OECD Model Tax Convention Released' (18 December 2017), <http://www.oecd.org/ctp/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm> (accessed 28 January 2019).

⁵⁸ OECD, *Model Tax Convention on Income and on Capital* (OECD Publishing, 2014) C(26)-13, Commentary on art 26, paragraph 11, <http://dx.doi.org/10.1787/9789264239081-en>.

⁵⁹ Dirkis and Bondfield, above n 24.

matters relevant for carrying out the provisions of the Convention. The OECD Committee on Fiscal Affairs in 1975 revised and approved the text of Article 26 and the Commentary to the OECD MTC. Revised Article 26 was incorporated into the 1977 MTC. The revised Article 26 had been stated as an ‘extensive exchange of information clause’ and some questions of interpretation of the earlier version were removed by additions to the commentaries.⁶⁰

To prevent tax evasion the revision process intended to ensure that Article 26 should accurately reflect the obligation of Contracting States to supply information available concerning relevant facts from third countries. In the revised version, the application of Article 1’s effect on Article 26 was removed, which previously restricted the application of the MTC to residents of one or both of the Contracting States.⁶¹ Furthermore, the application of Article 26 was extended beyond the standard request format of information to automatic and spontaneous exchanges of information.⁶² Automatic exchange of information is defined as the ‘systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income’.⁶³ Spontaneous exchange of information occurs in circumstances where information is made available to the other Contracting State due to its foreseeable relevance for tax purposes to that State ‘without the latter having asked for it’.⁶⁴

In 2005, changes to the wording of Article 26 were made with the purpose of clarifying doubts as to its proper interpretation rather than to alter its substance.⁶⁵ The Commentary to the 2005 MTC acknowledges that the intention for revision is that Article 26 is to be interpreted as widely as possible while simultaneously restricting possible opportunistic behaviours of Contracting States.⁶⁶ The standard for making requests under Article 26(1) requires the exchange of information to be ‘foreseeably relevant’ to the corresponding Convention or to the domestic laws⁶⁷ in place of what was previously a requirement of exchanging information that it was deemed ‘necessary’; thus expanding the range of tax information that may be exchanged. It provides the opportunity for the treaty countries to exchange information that is foreseeably relevant for carrying out the provisions of a DTA or to the administration or enforcement of the domestic laws concerning income tax as specified by national law for both parties. Secondly, the addition of paragraph 4 clarifies the tax authorities’ indisputable obligation to obtain information for the Contracting States regardless of whether the providing State has a

⁶⁰ Carlo Garbarino and Sebastiano Garufi, ‘Transparency and Exchange of Information in International Taxation’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013) 172, 179, citing Max Widmer, ‘Exchange of Information’ (1981) 21 *European Taxation* 162, 164.

⁶¹ Currently, article 26(1) of the OECD Model Tax Convention states that the assistance is not restricted by arts 1 (‘Persons Covered’) and 2 (‘Taxes Covered’) of the tax treaty itself.

⁶² Council of Europe, above n 59.

⁶³ OECD, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Module 3 on Automatic (or Routine) Exchange of Information* (2006) [1], <http://www.oecd.org/tax/exchange-of-tax-information/Manual-implementation-EOI-provisions-tax-purposes.pdf>.

⁶⁴ *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Module on General and Legal Aspects of Exchange of Information* (2006) [18], <http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf>.

⁶⁵ OECD, ‘The 2005 Update to the Model Tax Convention’ (15 March 2004) 44, para 4.1, <https://www.oecd.org/ctp/treaties/34576874.pdf>.

⁶⁶ OECD, *Model Tax Convention on Income and on Capital [Condensed Version]* (OECD, 2005) 313.

⁶⁷ *Ibid* 353.

domestic tax interest in the information sought. Thirdly, the addition of Article 26(5) excludes interference from bank secrecy, which presents an obstacle to effective information exchange.

Article 26(2) corresponds to the third and subsequent sentences of the paragraph before the 2005 amendment and requires that the information obtained under the MTC is to be treated as secret in the same way as information obtained under the domestic law of the state.⁶⁸ Further, Article 26(2) allows information shared between the treaty countries to be used for other purposes which comply with domestic laws under the provision in which the supplying State authorises such use.⁶⁹ Additionally, paragraph 2 of Article 26 was renumbered as paragraph 3. The rules surrounding the decision to decline an exchange of information have remained comparatively unchanged in paragraph 3. The limitation in Article 26(3) does not allow a State to decline supply of information on the grounds of bank secrecy laws. The rules establish three different circumstances that justify non-cooperation with the Article. These are:

- processing requests that are inconsistent with domestic laws or practice;⁷⁰ or
- where the requests are inconsistent with the administration of the Contracting State;⁷¹ or
- where the supply of information would expose a commercial secret or would be contrary to public policy.⁷²

Therefore, the MTC provides that the requested information should be in accordance with the domestic tax rules. There should not be an obligation to supply information which discloses trade secrets or contradicts public policy, and States may limit their application of the Convention under international law.⁷³ The substance of the paragraph has not changed despite its different placement within the Article and additions were made for clarification. However, the limits on the Convention constrain the powers of revenue authorities to access timely information from other jurisdictions, but results from the unwillingness of government to furnish information.⁷⁴

In July 2014, paragraph 2 of Article 26 was amended to allow the competent authorities to use information received for other purposes, provided such use is allowed under the laws of both States, and the competent authority of the supplying State authorises such use.⁷⁵ Earlier it was an optional provision in paragraph 12.3 of the Commentary.

Since the exchange of international information to prevent tax fraud, avoidance and evasion is high on the political agenda, banking secrecy and tax havens in foreign

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ *Ora Fiduciary Ltd (Cook Islands Ltd) v FSC (The Treasurer of the Revenue Management Division of the Ministry of Finance and Economic Management)* (2015) CIHC, Misc No 43/2014, Grice J. The High Court of the Cook Islands investigated the FSC's use of its powers to investigate the business affairs and directors of trust and company service providers (TCSP) in the context of a request for information from Sweden authorities. The Court was prepared to limit the scope of the request.

⁷⁴ Dirkis and Bondfield, above n 24.

⁷⁵ OECD, above n 9, 498, para 12.3.

countries are increasingly under pressure. Therefore, over the last few years, an enormous number of Tax Information Exchange Agreements (TIEAs) have been signed with countries where there are no double tax agreements, and which have banking secrecy laws or are considered 'tax havens'.⁷⁶

The secrecy requirement within Article 26 has consistently remained identical, directing the treaty countries to treat information received under the Article as secret under domestic tax laws.⁷⁷ This confidentiality treatment extends beyond the information exchanged to include the details of the procedural requests and responses made between the tax authorities.⁷⁸ Exclusion of the disclosure restrictions applies to the courts and administrative bodies where they become involved with the assessment, collection, enforcement or prosecution of the tax concerned.

Article 26(2) distinctly refers to any DTAs entered into by New Zealand and excludes the tax authorities' secrecy obligations in these agreements, thus allowing authorities to share information with the requesting country. It does not however in itself exclude the effect of s 81 TAA in preventing the same information, which is shared with the requesting country, from being disclosed within New Zealand. Therefore, the next section considers the limitations on New Zealand tax authorities to supply the information in judicial review.

4. DISCLOSURE OF INFORMATION BY TAX AUTHORITIES

The function of disclosure is to provide both parties to a dispute with the relevant documentary evidence before trial to assist them in appraising the strength or weakness of their respective cases.⁷⁹ The doctrine of discovery is in direct opposition to the powerful secrecy provisions outlined by New Zealand domestic laws in s 81 TAA.

4.1 New Zealand legislative provisions: section 81 TAA

Section 81 imposes the obligation of secrecy on every Inland Revenue (IR) officer in regards to all matters relating to 'Inland Revenue Acts, or another Act that is or was administered by or in Inland Revenue'.⁸⁰ This obligation extends to any requirements to produce information in any Court or Tribunal, barring the exception of the necessity in disclosure for the purpose of carrying out the duties of the Inland Revenue Acts.⁸¹ The rationale behind secrecy of taxpayer information is to provide assurance that tax affairs of taxpayers are solely the concern of the IR and the taxpayers and that the tax information will not be used to embarrass or prejudice them.⁸² However, the amendments to tax secrecy provisions have expanded the circumstances where

⁷⁶ OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, 'Brief on the State of Play on the International Tax Transparency Standards' (September 2017) 9: 'the number of bilateral exchange relationships under this instrument [Convention on Mutual Administrative Assistance in Tax Matters] amounts to more than 7,000', available at: <https://www.oecd.org/tax/exchange-of-tax-information/brief-and-FAQ-on-progress-on-tax-transparency.pdf>.

⁷⁷ TAA s 81, and *Taxation Administration Act 1953* (Cth) s 3C.

⁷⁸ OECD, above n 9.

⁷⁹ Chris Finlayson and F Shepherd, 'Discovery' in Justice Mark O'Regan (ed), *The Laws of New Zealand* (Online updated to May 2017) [2].

⁸⁰ TAA s 81(1C).

⁸¹ *Ibid* ss 81(1) and (3).

⁸² *Knight & Anor v Barnett & Ors* [1991] 13 NZTC 8,014; 2 NZLR 30 (CA) 398, 406.

taxpayer's secret information can be disclosed.⁸³ The IR's Standard Practice Statement 11/07 provides detailed guidelines about process and factors that the Commissioner will take into consideration while disclosing the secret information.⁸⁴

Section 81(4) covers the exceptions that specifically allow the Commissioner to share information as it is necessary for:⁸⁵

1. Prosecution under any Act of the Parliament of New Zealand or any country;
2. Purpose of investigation into any suspected indictable or summary offence; and
3. An investigation into misappropriation of money payable by the Department.

Subsection 81(4)(k) covers the specific circumstances where information can be shared with another country.⁸⁶ The subsection provides that information may be disclosed to any authorised officer of the Government of any country, conditional on the existence of a reciprocal law of the requesting country; or a reciprocal arrangement has been made with the Government of the requesting country, with the provision that communication is limited to information that gives effect to the reciprocal law or to the reciprocal arrangement.

Subsection 81(4)(k) effectively authorises the sharing of information between New Zealand and other countries provided that both contracting countries receive mutual assistance.

Additionally, s 88 TAA expressly excludes the effect of s 81 on the disclosure of information in arrangements for relief from double taxation and exchange of information.⁸⁷

The next section considers the judicial interpretation and application of Article 26(2) of the OECD MTC in the light of taxpayers' claims to secrecy under s 81 TAA.

4.2 New Zealand's judicial approach

This section considers and analyses relevant cases that specifically address the exchange of information and disclosure of information.

The disclosure aspect of Article 26(2) was tested in the case of *E R Squibb & Sons (NZ) Ltd v Commissioner of Inland Revenue*⁸⁸ in 1991. At the time of judgment, the 1972 DTA was in force, which in essence was similar to the 1963 Draft Convention and the subsequent 1995 DTA signed with Australia.

The particulars of the case involved E R Squibb & Sons Ltd seeking production of documents from the Australian Taxation Office (ATO) revealing the identity of an informant (on the grounds that until the identity of the informant was known it was

⁸³ TAA s 81(BA). Specific exceptions to the secrecy requirements: TAA ss 81(1B), (4), (8), 81A, 81B.

⁸⁴ IRD, 'Application of Discretion in Section 81(1B) of the Tax Administration Act 1994 – the Secrecy Provisions', Standard Practice Statement 11/07, <http://www.ird.govt.nz/technical-tax/standard-practice/general/sps-1107-application-of-discretion.html>.

⁸⁵ TAA s 81(4)(a).

⁸⁶ TAA s 81(4)(k), <http://www.legislation.govt.nz/act/public/1994/0166/latest/DLM352409.html>.

⁸⁷ TAA ss 88 and 81.

⁸⁸ *E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue (No 3)* [1991] 13 NZTC 8,174 (HC).

unable to challenge the accuracy and reliability of the information disclosed) and those containing information about other taxpayers used to make the assessment (on the grounds that this information would help the taxpayer to challenge the method of calculating the extra tax). The New Zealand Commissioner argued that the documents were secret under Article 20 of the 1972 DTA,⁸⁹ and therefore the Court was precluded from disclosing them in the judicial review proceeding. The Court at first instance held that all of the classes of documents should be made available by the Department but only to a named tax advisor. The Judge said that ‘the modern approach to discovery, and indeed to civil litigation generally, is to require parties to put their cards on the table to the greatest extent possible’.⁹⁰ However, in allowing even limited disclosure of the name of the informant, information about other taxpayers and information supplied by the ATO, the Commissioner argued that the Court had pushed out the boundaries of discovery beyond tolerance level.

Richardson J at the Court of Appeal in 1991, reversed this judgment and enforced that ‘information exchanged under the DTA is secret and shall not be disclosed to persons such as the taxpayer concerned’.⁹¹ Emphasis was placed on the exclusion clause in the 1972 DTA where disclosure of information exchanged cannot be disclosed to anyone ‘other than those...concerned with the assessment or the collection of the taxes to which this Agreement applies’.⁹² The exclusion clause did not apply to an individual taxpayer since there is a clear distinction between those in authority that are concerned with the assessment and collection of taxes, and an individual taxpayer that is concerned with its own tax liability.

Richardson J held that a system was in place for the taxpayers to inquire into the validity of an assessment without personally challenging the details of the requests made in accordance with the DTA.⁹³ The issue was approachable through the Taxation Review Authority (TRA) or the High Court, both of which are in the same position as the Commissioner, to determine the validity of the assessments. In the circumstance of a judicial review, the High Court is able to determine the validity of the IR’s conduct.

The standing of the subsequent judgment made in the Australian case of *Currie v Deputy Commissioner of Taxation*⁹⁴ in 2000 was challenged in *Avowal Administrative Attorneys Limited & Ors v Commissioner of Inland Revenue* in 2010.⁹⁵ Avowal submitted that the DTA empowered the Commissioner to ‘...provide the ATO only with information already in his possession for New Zealand tax purposes but [the Commissioner] was not empowered to use his statutory powers to secure further information where recovery of Australian tax was the dominant purpose’.⁹⁶ However, the amendment to Article 26 by

⁸⁹ Article 26 was previously titled Article 20 in the Double Taxation Relief agreement between Australia and New Zealand, which was signed in 1972.

⁹⁰ *E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue (No 3)* [1991] 13 NZTC 8,174, 8,179 per Eichelbaum CJ.

⁹¹ *Commissioner of Inland Revenue v E R Squibb & Sons (New Zealand) Ltd* [1992] 14 NZTC 9,146 (CA).

⁹² *Ibid* 9,152.

⁹³ *Ibid* 9,159.

⁹⁴ In *Currie v Deputy Commissioner of Taxation* [2000] FCA 1964, Finkelstein J decided that providing information to the New Zealand Inland Revenue was not permissible as Subdivision 353-10 of Sch 1 of the *Taxation Administration Act 1953* (Cth) must be exercised for the ‘purpose of inquiring whether there is any tax due under the Tax Act’.

⁹⁵ *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] 24 NZTC 24,252.

⁹⁶ *Avowal Administration Attorneys Ltd v District Court at North Shore (No 2)* (2007) 23 NZTC 21,616 (HC) [15] (Baragwanath J, the first instance decision).

the inclusion of ‘obtain’ in the sub-clause 4 in the 2005 Protocol⁹⁷ demonstrates that ‘the Commissioner’s authority in sharing information has been extended from what they were previously’.⁹⁸ The Court held that, while the pre-amendment DTA did not impose on the Commissioner the ‘obligation’ of using its information-gathering powers to obtain information for the ATO as per the 2005 amended agreement, the Commissioner certainly had the ‘power’ to do so. Additionally, it is consistent with the 2003 Commentary to Article 26, which identified that ‘Contracting States often use the special examining or investigative powers provided by their laws for purposes of the application of their domestic taxes even though they do not themselves need the information for applying these taxes’.⁹⁹

The High Court in making its decision of *Avowal Administrative Attorneys Ltd v District Court at North Shore*¹⁰⁰ was bound by *Squibb*, with Article 26(2) of the DTA preventing the discovery of documents to be exchanged under that provision. In *Avowal* the taxpayer argued in the Court of Appeal that s 81 TAA imposed secrecy of information derived from the search. *Avowal* identified s 88 TAA as the exception to s 81, which permitted the supply of information obtained from the searches to the ATO, provided that the Commissioner has an obligation to supply the information. The Court held that exchange of information that arises outside of the Commissioner’s obligations is unlawful by s 88. The Court of Appeal found that the Commissioner was obliged to supply information to the ATO under Article 26(1) through the application of Article 26(2)(b), indicating that the Commissioner is not obliged to supply information if it was not obtainable under Australian law.¹⁰¹ In *Avowal*, the information was obtainable by the ATO under subdivision 353-15 of Australia’s *Taxation Administration Act 1953*, therefore it constituted an obligation on the Commissioner to perform the equivalent.¹⁰²

The issues raised in the *Avowal* case were clarified in the 2005 Protocol.¹⁰³ Article 26(4) requires the Australian and New Zealand Commissioners to use their information-gathering measures to obtain information for the requesting State. This obligation extends the functions of the ATO and IR and enables them to extend their jurisdiction powers across the trans-Tasman borders because the State is required to exercise their search powers even if they may not need the information for their own tax purposes. However, the format of a request requires compliance with former paragraph (Article 26(3) before it is accepted for processing¹⁰⁴ but the limitation in Article 26(3) does not allow a state to decline supply of information on the grounds of bank secrecy.¹⁰⁵

The New Zealand Supreme Court moved from the *Squibb* decision and took a different approach in the 2008 case of *Westpac Bank*.¹⁰⁶ In *Westpac Bank* the Court stated that

⁹⁷ 2005 Protocol to the 1995 Australia-New Zealand Double Taxation Relief Agreement.

⁹⁸ *Avowal Administration Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,616 (HC) [15].

⁹⁹ OECD, *Model Tax Convention on Income and on Capital [Condensed Version]* (OECD, 2003) 292.

¹⁰⁰ *Avowal Administration Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,616 (HC).

¹⁰¹ *Avowal Administrative Attorneys Ltd v District Court at North Shore* (2010) 24 NZTC 24,252 [58].

¹⁰² The fact that, in *Avowal*, the Court did not need to decide whether s 88 would permit the Commissioner to ‘voluntarily’ disclose information under a DTA shows less certainty about the ambit of s 88.

¹⁰³ 2005 Protocol to the 1995 Australia-New Zealand Double Taxation Relief Agreement.

¹⁰⁴ OECD, above n 99, 10.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Westpac Bank Corporation Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, 2 NZLR 709 (SC). The case involved investigation by the Commissioner of a number of structured financing arrangements entered into by major banks trading in New Zealand. The issue before the Court was the extent to which tax-secrecy laws (TAA s 81) restricted the Commissioner, in defending proceedings brought by one bank,

‘[d]isclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner’s statutory functions’.¹⁰⁷ The Court held that in a dispute over the exercise of Commissioner’s functions, a prohibition on use by the Commissioner in a court of third party material which discloses the identity of parties, is completely inconsistent with that purpose.¹⁰⁸

In the 2016 case of *Chatfield*¹⁰⁹ the High Court affirmed that the legal landscape in relation to taxpayer secrecy has changed since the *Squibb* and *Avowal* decisions.¹¹⁰ The Court held that in disclosure of information from revenue authorities to taxpayers, there is a need to balance the public interest in disclosure against the public interest in withholding and confidentiality. It held that the decision in *Squibb* was prior to the introduction of the current ‘foreseeably relevant’ term found in the current Article 26(1) of the OECD MTC.¹¹¹

Additionally as was noted in section 3.3 above, following the amended OECD Commentary of 2012, Article 26(2) was amended in July 2014¹¹² to allow competent authorities to use information received for other purposes, provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use.¹¹³ Prior to 2014 this was an optional provision in paragraph 12.3 of the Commentary.

Supporting confidentiality in *Chatfield*, the High Court concluded that the Republic of Korea’s request for information need not be disclosed to Chatfield. On appeal, the Court of Appeal also noted that discovery in judicial review cases is not as of right but is a matter of discretion and, as such, Chatfield was unsuccessful in obtaining copies of documents exchanged between the Commissioner and the National Taxation Service of Korea (NTS).¹¹⁴ However, Chatfield applied for judicial review¹¹⁵ of the validity of the Commissioner’s decision to issue s 17 information request notices in an exchange of information request. The High Court rejected in its entirety the Commissioner’s proposal to show the Judge the relevant documents on a confidential basis and to address

from using information held by the Inland Revenue relating to the business affairs of other banks and disclosing their identity.

¹⁰⁷ Ibid [69].

¹⁰⁸ Ibid [63].

¹⁰⁹ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 1234, (2016) 27 NZTC 22-053, to be read in conjunction with Ellis J’s earlier judgment: *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099, (2015) 27 NZTC 22,024. Chatfield the accounting firm had sought judicial review against the Commissioner’s decision to issue notice pursuant to TAA s 17 to furnish information about the 15 corporate clients that the company held on behalf of the clients. The information requested included financial statements, sale agreements and explanations for changes in ownership of certain properties. The Commissioner issued the notice as the NTS requested information pursuant to the DTA between New Zealand and Korea.

¹¹⁰ *Chatfield & Co Ltd v Commissioner of Inland Revenue* (2015) NZHC 2099 [50 (c)]

¹¹¹ OECD, above n 9.

¹¹² OECD, above n 57.

¹¹³ Ibid 425.

¹¹⁴ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614 [20]. As noted at n 37 above, the Supreme Court subsequently declined leave to appeal. *Chatfield & Co Limited v Commissioner of Inland Revenue* (2017) 28 NZTC 23,010.

¹¹⁵ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZHC 3289 (22 December 2017). The High Court reviewed the Commissioner’s decision to issue s 17 information request notices referencing Article 25 of the NZ-Korea DTA.

the Judge directly in relation to them because Chatfield would not have the opportunity to respond.

The Court found that the word ‘necessary’ under Article 25 of the NZ-Korea DTA (equivalent to Article 26 of the MTC) required that the Commissioner must be satisfied 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 the information was in relation to income tax, corporation tax, inhabitant tax or fiscal evasion. Justice Wylie held that in the absence of any evidence suggesting that the Commissioner, as required by law, had obtained confirmation from the NTS that it had exhausted all local remedies before making the DTA request, the Commissioner’s decision to issue the notices against Chatfield under s 17 TAA was invalid.¹¹⁶

The next section outlines the new international standard by the OECD for the exchange of information, which represents a fundamental shift because it moves from a passive compliance to an active gathering and reporting, and its impact on New Zealand’s judicial interpretation and application.

4.3 Need for change in disclosure rules

The rigid rule for non-disclosure of information exchanged under Article 26 was set by the Court of Appeal in the *Squibb* case. The decision was made through the interpretation of the DTA and is the binding judgment for the application of disclosures under the Article.

However, Article 26(2) has undergone significant modifications. Considering the significant amendments to the Article 26(2) Commentary, the courts have moved from the *Squibb* and *Avowal* decisions to a different approach in *Westpac Bank* and *Chatfield*. The July 2014 amendments to MTC allow competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. The first part of Article 26(2) requires information exchanged under the Article to be treated under the domestic law of the receiving State. The second part impinges on the former by imposing restrictions on disclosure to taxpayers. Hence, there is a need for balancing the public interest in disclosure against the public interest in withholding and confidentiality.

Historically, there was no general duty of disclosure in judicial reviews for several practical reasons. The process of the disclosure can be ‘costly, time-consuming, oppressive and unnecessary’.¹¹⁷ However, ‘everyone has right to be secure against

¹¹⁶ The future impact of this judgment on New Zealand’s existing DTA (specifically the operation of Article 25) with Korea is beyond the scope of this article.

¹¹⁷ See the UK decision of *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 AC 650 [2]. The issue in the case was whether discovery of five documents held by the Parades Commission should be ordered for purposes of Mr Tweed’s application for judicial review, to the extent that such application turned on a proportionality argument under the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*. The Court ordered for the disclosure application.

unreasonable search’¹¹⁸ and without adequate disclosure, it is difficult for the taxpayer to be appropriately represented.

The amended paragraph allows information to be disclosed in New Zealand courts and judicial review proceedings but not to the taxpayers themselves. While the paragraph itself does not clearly define whether reference is made to the information quantifying the details of the request (request) or to the information made available as a response to the request (information), the Commentary applies secrecy obligations on ‘both information provided in a request and information transmitted in response to a request’.¹¹⁹ Baragwanath J also accepted that there is no ‘material difference between requests and information where the latter must include the former’.¹²⁰

There are justifications to distinguish between the request and information. First, the type of information contained in the request and information supplied are comparatively dissimilar. The type of information contained in the request is essential for three purposes. It serves to communicate the criteria in identifying the relevant taxpayer(s), clarifying the information sought regarding these taxpayer(s) and the reason behind the necessity of the information.¹²¹

In general, the request contains information for administrative purposes. Secondly, in circumstances similar to the *Squibb* case, the request may contain sensitive information such as the identity of an informant. In other circumstances, other foreign taxpayers or entities may form a segment of the information, but cases involving such a situation are likely to be of the kind that can be dealt with ‘by the court making specific orders in the context of the particular case’.¹²²

Through the perspective of the first part of Article 26(2), s 81(3) TAA allows the tax authorities to produce any information in court, where the matter is for the purpose of carrying into effect all Inland Revenue Acts administered by the authorities.¹²³ Matters carried out for the purposes of the DTA fall under s BH1 of the ITA, which itself falls under s 81(3) TAA. The domestic rule does not subject the tax authorities to disclose the ‘request’. However, disclosure orders should not be ‘automatic’ in judicial review cases. As an alternative, the more flexible and less prescriptive principle adopted by Lord Carswell in *Tweed v Parades Commission* provides a suitable domestic approach to disclosure.¹²⁴ Lord Carswell’s approach requires judging the ‘need for disclosure [by] taking into account the facts and circumstances’.¹²⁵ Specifically, the judge would receive and inspect the documents to assess whether it would provide ‘sufficient extra

¹¹⁸ *Tauber v CIR* (2012) NZCA 411, [2012] 3 NZLR 549, (2012) 25 NZTC 20-143. Section 16(1) of the TAA overrides any other Act, and therefore there are no restrictions to conducting unreasonable searches.

¹¹⁹ OECD, above n 9, 497.

¹²⁰ *Avowal Administration Attorneys Ltd v District Court at North Shore (No 2)* (2007) 23 NZTC 21,616, 21,625.

¹²¹ OECD, above n 9, 489.

¹²² Lord Chief Justice of England and Wales, ‘Defendant’s Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper’ (28 April 2016) 12 [24], <https://www.judiciary.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf>.

¹²³ TAA s 81(3)(i)

¹²⁴ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [2]

¹²⁵ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [32].

assistance to the appellant's case on proportionality, over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case'.¹²⁶

It is suggested that the principle in *Tweed* could be adopted into the New Zealand judicial review system and that the courts are currently not bound by *Squibb* which enforced the second part of Article 26(2), interpreting it to hold that the Article prevents disclosure of relevant documents.

On the second part, Baragwanath J suggested an alternative to the strict non-disclosure rule. In the *Avowal* case, Baragwanath J promoted the possibility of providing the applicant leave to appoint a special counsel to act as *amicus curiae* where the information sought is secret under the DTA.¹²⁷ The necessary boundaries of the counsel's obligation would include non-disclosure of confidential information to the applicants and submissions to the court to be made on an *ex parte* basis. An option for a special counsel would restore confidence to the taxpayer by providing representation, and preserve the secrecy obligations of the tax authorities imposed by domestic law and the DTA. However, difficulties would emerge in the appointment of the special counsel, which would require mutual agreement between the taxpayer and the Crown (tax authorities).

As discussed in the introduction, in order to tackle offshore secrecy and tax evasion, the Multilateral Convention¹²⁸ provides a new global standard for the automatic exchange of financial account information (AEOI) pursuant to the Common Reporting Standard (CRS)¹²⁹ and all possible forms of administrative co-operation between Contracting States. The next section covers studies from different jurisdictions that examine the issues related to implementation of AEOI and taxpayers' secrecy. Since New Zealand has signed the Multilateral Convention,¹³⁰ it is relevant to consider the impact of implementation of AEOI on the secrecy provision under s 81 of the TAA.

5. AUTOMATIC EXCHANGE OF INFORMATION (AEOI)

In response to the G20's April 2009 call for action 'to make it easier for developing countries to secure the benefits of the new co-operative tax system environment, including a multilateral approach for the exchange of information',¹³¹ the OECD and Council of Europe amended the Multilateral Convention and developed a Protocol¹³²

¹²⁶ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [41].

¹²⁷ *Avowal Administration Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,616 (HC).

¹²⁸ The DTAs give effect to the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (MLI).

¹²⁹ As noted at n 16 above, the *Common Reporting Standard* (CRS) is a part of AEOI and ensures that the information collected and supplied is in a standard format.

¹³⁰ The MLI was signed by 68 jurisdictions (including New Zealand) on 7 June 2017 and has since been signed by a further 19 jurisdictions. The MLI entered into force for New Zealand on 1 October 2018: see OECD, 'Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of 23 January 2019', <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>.

¹³¹ See comments reported by the OECD in 'A boost to multilateral tax cooperation: 15 countries sign updated Convention on Mutual Administrative Assistance in Tax Matters' (27 May 2010), <http://www.oecd.org/ctp/exchange-of-tax-information/aaboosttomultilateraltaxcooperation15countriessignupdatedconventiononmutualadministrativeassistanceintaxmatters.htm>.

¹³² OECD and Council of Europe, Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, Provisional Edition [2010],

effective from June 2011. The Protocol ensures that the Multilateral Convention is consistent with agreed international standards on exchange of information for tax purposes developed by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes¹³³ and opened the membership of the Multilateral Convention to non-members of the OECD.¹³⁴ The Multilateral Convention is now a global instrument. It allows countries to quickly modify specific provisions of Covered Tax Agreements (CTAs) that are designated by Contracting Jurisdictions to the Convention. The countries can use either bilateral tax treaties or the Multilateral Convention to achieve AEOL.

The Multilateral Convention contains strict rules on confidentiality and proper use of exchange of information. Instead of requesting to exchange information between tax authorities it permits automatic exchange of financial account information pursuant to the CRS¹³⁵ (subject to the detailed terms agreed).¹³⁶ The CRS Multilateral Competent Authority Agreement (CRS MCAA), is based on Article 6 of the Multilateral Convention. The agreement specifies the type of information to be exchanged as well as the time and manner of such exchanges.¹³⁷

The exchange of information in the Convention on Mutual Administrative Assistance in Tax Matters is structured under a reciprocal system, which falls into three main types of exchange:¹³⁸

1. Exchange of information on request; or
2. Spontaneous exchange of information; or
3. Automatic exchange of information.

This article focuses on exchange made on request, as this involves the application of the IR s16 TAA powers.

As of November 2018, 108 jurisdictions have committed to exchange information, of which 49 jurisdictions undertook their first exchange in 2017.¹³⁹ New Zealand is a

http://www.oecd.org/ctp/exchangeofinformation/2010_Protocol_Amending_the_Convention.pdf.

¹³³ *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (Protocol and amended Convention opened for signature on 27 May 2010, entered into force 1 June 2011), <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>.

¹³⁴ As of 23 January 2019, 87 jurisdictions have signed the MLI, including all OECD Members with the exception of the United States: see OECD, 'Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures', above n 130.

¹³⁵ The CRS sets out the international rules for collection and reporting of financial account information (identity and financial information) for exchange for financial institutions for participating jurisdiction.

¹³⁶ Countries need to be party to an international legal agreement for exchanging information automatically. In addition to this, an extra agreement, called a 'Competent Authority Agreement' (CAA) has to be signed. Where all parties sign the same agreement, it eventually allows for a widespread exchange of information. Countries can choose bilateral CAAs to limit exchanges with a wider audience. The Bahamas and Singapore are choosing bilateral CAAs. See OECD, 'International Framework for the CRS', <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>.

¹³⁷ Alicja Brodzka, 'The Future of Automatic Tax Information Exchange in EU Countries' (2015) 12(4) *US-China Law Review* 352.

¹³⁸ *Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (Protocol and amended Convention opened for signature on 27 May 2010, entered into force 1 June 2011), <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>.

¹³⁹ See OECD, 'AEOL: Status of Commitments' (November 2018),

signatory to the Multilateral Convention, which entered into force for New Zealand on 1 March 2014 with effect from 1 July 2017. New Zealand has implemented AEOI and intends to complete its first information exchange under the regime by 30 September 2018.¹⁴⁰

The new AEOI international standard will result in significant amounts of tax information being shared regularly and automatically around the world and has been described as a significant step towards achieving global tax transparency by obliging those who are best able, to identify the real persons hiding behind entities (mechanisms) widely used for tax evasion.¹⁴¹ The AEOI standards are based on the United States' FATCA standard¹⁴² and are designed to benefit all participating jurisdictions.¹⁴³

It is a fundamental shift because it moves from a passive compliance to an active gathering and reporting. AEOI standards requires all financial institutions pursuant to due diligence standards, to identify from their financial accounts those accounts that are held or controlled by non-residents. From these non-residents accounts financial institutions are required to collect CRS-compliant¹⁴⁴ identity, tax residency and financial information of the tax residents in reportable jurisdictions¹⁴⁵ and provide the information to the relevant revenue authorities.¹⁴⁶

New Zealand has adopted a wider approach than a narrower due diligence procedure and the legislation requires financial institutions to report *all* of the information (all financial accounts held or controlled by non-residents) to the Commissioner.¹⁴⁷ Under the wider approach, the Commissioner will receive information for all financial accounts held or controlled by residents of reportable jurisdiction as well non-residents.¹⁴⁸ Hence, the responsibility of sorting and filtering information is the

<https://www.oecd.org/tax/transparency/AEOI-commitments.pdf>.

¹⁴⁰ IRD, 'Automatic Exchange of Information', Policy and Strategy Special Report (February 2017), <https://taxpolicy.ird.govt.nz/sites/default/files/2017-sr-aeoi-v1.pdf>.

¹⁴¹ Andres Knobel and Markus Meinzer, "'The end of bank secrecy'? Bridging the Gap to Effective Automatic Information Exchange: An Evaluation of OECD's Common Reporting Standard (CRS) and Its Alternatives' (Tax Justice Network (TJN) Final Report, London, 24 November 2014), <http://www.taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf>.

¹⁴² Foreign Account Tax Compliance Act (FATCA) (US) was enacted in 2010 by the US to implement automatic exchange of information between the US and 113 jurisdictions with which US has signed Intergovernmental Agreements. FATCA aims to reduce tax evasion by US citizens, tax residents and entities. FATCA imposes reporting and due diligence obligations on financial institutions and certain other non-financial foreign entities to supply US resident account holder information to the US Inland Revenue Service. See US Treasury, 'Foreign Account Tax Compliance Act (FATCA)', <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

¹⁴³ FATCA was designed specifically for and to benefit the US: IRD, 'Automatic Exchange of Information', above n 140, 7. The definition of 'foreign account information –sharing agreement' in s YA1 of the *Income Tax Act 2007* (NZ) has been modified to include both FATCA and CRS.

¹⁴⁴ The CRS contains the reporting and due diligence standards that underpin AEOI. A jurisdiction that is party to the Convention must require financial institutions resident in that jurisdiction to comply with the CRS.

¹⁴⁵ A reportable jurisdiction is one that also wants to receive CRS information. Not all participating jurisdictions will be reportable jurisdictions. For example, some smaller participating jurisdictions that are international finance centres may not have a tax system and therefore have no need to receive information.

¹⁴⁶ IRD, 'Automatic Exchange of Information', above n 140, 16. Section 22 of the TAA, provides specific rules for this requirement.

¹⁴⁷ IRD, 'Automatic Exchange of Information', above n 140, 16; TAA s 185N(7).

¹⁴⁸ IRD, 'Automatic Exchange of Information', above n 140, 16; TAA s 185N(7).

Commissioner's. A regulation-making power to determine New Zealand's reportable jurisdictions is provided in section 226D TAA.¹⁴⁹

The information collected by the revenue authorities from financial institutions under CRS may also be used for purposes other than AEOI.¹⁵⁰ However, the Commissioner can only use this information for matters consistent with the Commissioner's statutory role and obligations.¹⁵¹ To implement the AEOI, New Zealand has incorporated the CRS directly into domestic law.¹⁵²

Additionally, with the implementation of AEOI, the Commissioner will have the responsibility of determining the information to be exchanged with other jurisdictions and the new section 91AAU TAA empowers the Commissioner to determine whether the particular jurisdiction is a participating jurisdiction.¹⁵³ It also authorises the Commissioner to limit, amend, suspend or withdraw a determination.

With the implementation of AEOI, tax authorities now have extensive powers to obtain information from other jurisdictions and share the information with different agencies domestically and with overseas tax authorities. Therefore, it appears that the secrecy provisions in the existing legislation are being relaxed.¹⁵⁴ Further, there are concerns about confidentiality and data security as there will be exchange of sensitive information that is personal and financial, and the jurisdiction with which information is exchanged may not have adequate administration and technology systems in place to ensure that the information exchanged is kept secure and is not used for other purposes.¹⁵⁵ The only safeguard provided by New Zealand legislators is that when there is a breach in exchange of information, the Commissioner is authorised to determine under new s 91AAV TAA to suspend that jurisdiction as a reportable jurisdiction on a temporary basis. The determinations made by the Commissioner under s 91AAV TAA¹⁵⁶ need to be confirmed by Order in Council or they will lapse.¹⁵⁷ However, in both developed and developing countries, legislators may struggle to integrate the CRS changes with the existing legislative framework and to provide guidance notes on the implementation of the CRS.

6. CONCLUSION

In an era of globalisation and rapid growth of e-commerce, there has been an increase in cross-border commercial and financial transactions, as well as international rules and practices to ensure their effectiveness. This article shows that the current MTC allows for disclosure of information detailed in the information request. The Court of Appeal

¹⁴⁹ Reportable jurisdictions are the jurisdictions with which New Zealand tax authorities will exchange CRS information.

¹⁵⁰ IRD, 'Guidance on the Common Reporting Standard for Automatic Exchange of Information' (June 2017) 9.

¹⁵¹ Ibid.

¹⁵² IRD, 'Automatic Exchange of Information', above n 140, 57.

¹⁵³ A participating jurisdiction is one that has implemented AEOI and provides CRS information to other jurisdiction.

¹⁵⁴ Ernst and Young, 'Proposed Changes to Inland Revenue's Powers: Towards a New Tax Administration Act', *Tax Watch Edition 10* (November 2015), <http://www.ey.com/nz/en/services/tax/ey-tax-watch-edition-10-november-2015-proposed-changes-to-inland-revenues-powers> (accessed 28 January 2019).

¹⁵⁵ IRD, 'Automatic Exchange of Information', above n 140, 18.

¹⁵⁶ TAA s 91AAV.

¹⁵⁷ IRD, 'Automatic Exchange of Information', above n 140, 18.

decision of *E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue* set the precedent for non-disclosure,¹⁵⁸ but the courts have moved away from the *Squibb* judgment, and an appropriate system for disclosure has not been introduced. The recent decision of the High Court in *Chatfield*¹⁵⁹ quashing section 17 notices is recognition that the pendulum has swung too far in favour of the tax authorities.

The counter-argument against disclosure is that confidentiality is an essential feature of all tax authorities. Although the equivalent domestic laws are not as stringent as the DTA, they also do not allow for the dilution of confidentiality obligations.¹⁶⁰

In substitution of the rigid rule set by the *Squibb* case, Lord Carswell's principle in *Tweed v Parades Commission* is an appealing option.¹⁶¹ The principle requires an assessment of documents by a judge to decide whether the disclosure would provide sufficient assistance to the appellant's case over the summary of information already provided. In addition, the 2017 OECD Commentary to the OECD MTC allows for the disclosure of information to the taxpayer when the judicial authorities allow it.¹⁶²

It is arguable that when information is highly confidential or if there are no mechanisms to protect sensitive details, Baragwanath J's approach in the *Avowal* case¹⁶³ could be employed. This requires a special counsel appointed by the Crown acting on behalf of the taxpayer, with obligations of non-disclosure to the applicants while representing their best interests. Although Article 26 appears to be exclusive, nevertheless the implementation of Lord Carswell's principle and Baragwanath J's approach to the Article would balance taxpayer confidence and tax authority confidentiality.

Article 26(3) of the MTC allows a State to decline to exchange information that discloses trade secrets or the disclosure of which contradicts public policy. It appears that this limits the Commissioner's powers to access information from other jurisdictions, and potentially constrains timely exchange of information, and facilitates unwilling government participation.¹⁶⁴ It seems that Article 26(3) represents government protection of industry and wider public interests but at the same time it acts as a conduit for unwilling governments to limit the Commissioner's powers to access information from other jurisdictions in a timely manner.

Overall, it appears that by joining the Multilateral Convention and adopting the AEOI standards with enactments in domestic legislation and procedures, New Zealand has taken a step forward to combat tax evasion and avoidance.¹⁶⁵ The AEOI agreement will have a significant impact on the volume of data that moves between jurisdictions and there is a potential for tax authorities to cross-check domestic tax compliance based on AEOI from other jurisdictions. However, the effective use of this broad information-collection power by the Commissioner under AEOI without compromising the taxpayer's privacy rights is debatable. Under AEOI, the information reported to the tax authorities will include both residents' as well as non-residents' information and the

¹⁵⁸ *E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue (No 3)* [1991] 13 NZTC 8,174 (HC).

¹⁵⁹ *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZHC 3289.

¹⁶⁰ TAA s 81(4)(a).

¹⁶¹ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 AC 650 [2].

¹⁶² OECD, above n 9, 498.

¹⁶³ *Avowal Administration Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,616 (HC).

¹⁶⁴ Dirks and Bondfield, above n 24.

¹⁶⁵ IRD, 'Automatic Exchange of Information', above n 140.

responsibility of filtering the information for determining which information is to be exchanged with other jurisdiction will be left to the tax authorities.¹⁶⁶

The New Zealand TAA and ITA have been amended to integrate the CRS changes with the existing legislative framework for FATCA (where possible) to provide regulatory powers to the Commissioner to make determinations about which jurisdiction will be a participating jurisdiction and which information is relevant for exchange with another jurisdiction. These amendments have broadened the powers of the Commissioner.¹⁶⁷ Tax authorities will also receive information about tax residents' offshore investments and assets.

Based on the above, it is relevant that tax authorities as custodians of significant amounts of information should provide appropriate safeguards when determining the release of information or determining whether particular information is relevant. To make the tax system equitable, the challenge for tax authorities is to keep up with the pace of change and to establish a legal and administrative environment that ensures confidentiality of the relationship between taxpayers and tax authorities and the appropriate use of information exchanged.

Tax authorities have information available to them (such as in relation to different taxpayers' affairs and as provided under the DTA and AEOI) to which the taxpayer has no access and which the taxpayer is therefore unable to analyse and refute. This creates an imbalance in favour of the tax authorities as the onus of proof in tax cases is on the taxpayer. It may be that this imbalance will not be addressed as it relates to public interest immunity and the secrecy provisions must continue to deny discovery of certain information in order to protect the tax base.

That said, there should be further investigation into the necessity of balancing taxpayers' rights to confidentiality against better use of information obtained to protect public revenue. Future research in this area is clearly warranted.

¹⁶⁶ Ibid.

¹⁶⁷ TAA ss 91AAU, 91AAV.