

Privy Council upholds disclosure notices in leading tax case

Service area / [Dispute Resolution and Litigation, Trusts and Private Wealth](#)

Location / [Jersey](#)

Date / [24 June 2019](#)

The Privy Council has confirmed that the powers of the Comptroller of Taxes and the Attorney General to require the production of pre-existing documents do not violate the privilege against self-incrimination under Article 6 of the European Convention on Human Rights.

Please click here to [view the decision](#).

Pursuant to the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008, the Comptroller of Taxes can issue a Notice requiring a taxpayer or a third party to provide tax information relevant to the investigation and/or enforcement of foreign taxes. Under the Investigation of Fraud (Jersey) Law 1991, the Attorney General can issue a Notice requiring a person under investigation or a third party to provide documents in order to investigate, or assist another jurisdiction with the investigation of, serious or complex fraud. Both statutes underpin Jersey's commitment to assisting other countries in the prevention of fraud and financial crime, and highlight Jersey's commitment to ensuring compliance with the international standards set by the OECD.

In determining that the Notices under each statute did not violate the privilege against self-incrimination, the Privy Council considered recent case law from the European Court of Human Rights and held that:

1. No criminal prosecution had been brought against any of the appellants and the challenge on the grounds of Article 6 was brought at the stage of the gathering of documentary material as part of an investigation into the possible commission of offences.

2. The compulsion on the third party trust company to produce the documents consisted of the potential imposition of a fine for non-compliance, and did not involve physical or psychological pressure, which has been treated as important in relation to the production of real evidence.
3. The public interest in the investigation of international tax evasion and fraud was considerable, and it was not unreasonable to expect licensed providers of financial services to cooperate with investigations into offences of that character by producing information about their clients' affairs.
4. As the only potential incriminatory use of the documents would be in proceedings in countries which both adhere to the European Convention on Human Rights, the fairness of any trial was unlikely to be seriously prejudiced by the production of the documents at the pre-trial stage.

The Privy Council also clarified that Article 6(4) of the relevant tax information exchange agreement (TIEA), which precludes information from being requested where that same information could not be obtained under the laws of the requesting country if held there, does not provide a basis for challenging the validity of TIEA Notices in Jersey. This was consequential upon the Privy Council's finding that the TIEA does not form part of the domestic law of Jersey. It was also noted that the request for information specifically confirmed that the information sought would be obtainable under the laws of the requesting party, which statement the Comptroller would be entitled to treat as satisfactory evidence of compliance.

OFFSHORE LAW SPECIALISTS

This aspect of the decision suggests that it will not be possible to challenge TIEA Notices on the strict basis that the requesting country has not complied with the terms of the relevant TIEA, which agreement the Privy Council has found does not form part of Jersey law. However, we consider that notwithstanding this decision, the obligations, and limits on the obligations, in respect of information exchange as listed in TIEAs between Jersey and its treaty partners are relevant considerations to which the Comptroller should have regard in determining whether to issue a Notice. A failure by the Comptroller to have regard to such relevant matters, could result in a Notice being challenged on one of the wider judicial review grounds.

If you wish to discuss any aspect of this decision, or TIEA matters generally, please contact one of our lawyers.



FIND US

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com



FOLLOW US

Visit our trusts and private wealth team at [careyolsen.com](https://www.careyolsen.com)



PLEASE NOTE

Carey Olsen Jersey LLP is registered as a limited liability partnership in Jersey with registered number 80.

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen Jersey LLP 2019