Preston Hampton Haskell(Applicant) v The Comptroller of Taxes (First Respondent)

Jurisdiction:	Jersey
Judge:	W. J. Bailhache, William Bailhache, Bailiff
Judgment Date:	14 June 2017
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Text

Between
Preston Hampton Haskell
Applicant

–v–
The Comptroller of Taxes
First Respondent

and

The States of Jersey
Second Respondent

Before:

W. J. Bailhache, Esq., Bailiff, sitting alone

ROYAL COURT

(Samedi)

Hearing (civil) — application for judicial review in relation to the exchange of information relating to tax

Authorities

Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008.

Larsen v The Comptroller of Taxes [2015] (2) JLR 209.

Larsen and Ors v Volaw Trust and Ors [2016] JCA 137.

Volaw Trust and Corporate Services Limited and Larsen v Comptroller of Taxes [2013] (2) JLR 499.

Durant Intl Corp v AG [2006] JLR 112.

Minister of Finance v Bunge [2013] BDA LR 83.

Taxation (Implementation) (Jersey) Law 2004.

Advocate J. Harvey-Hills **for the Applicant**.

Advocate S. A. Meiklejohn **for the Respondents**.

THE BAILIFF:

Background

1 This is my judgment on the summons for directions issued by the applicant heard before me on 14 th February. The underlying case involves the application for judicial review of the first respondent's decision to issue notices dated 1 st September, 2016, ("the Notices") pursuant to the Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008 ("the Regulations") in respect of which leave was given by me as single judge on 26 th October, 2016. Following the grant of that leave, the first respondent provided an affidavit from Niamh Moylan ("the first respondent's affidavit") which is dated 3 rd February, 2017. Ms Moylan is the Director – International Tax for the States of Jersey, and attached to her affidavit were four exhibits:-

(i) The agreement between Jersey and the Kingdom of Sweden for the exchange of information relating to tax matters ("the TIEA").

(ii) The Ministerial Decision authorising the Comptroller of Taxes, the Deputy Comptroller of Taxes and the Director – International Tax and the Adviser –

International Affairs to represent the Minister as the competent authority for matters arising under all of Jersey's international tax agreements including the TIEA. In the circumstances, I accept the contention of Advocate Meiklejohn that the proper identification of the first respondent is the Competent Authority for Jersey, which is the nomenclature to be applied from hereon.

(iii) The model tax information exchange agreement developed by the OECD Global Forum Working Group on effective exchange of information.

(iv) Article 26 of the OECD Model Convention with respect to taxes on income and capital ("the Model Tax Convention").

2 The first respondent's affidavit detailed the following:-

"6. The original Request was sent by the STA [the Swedish tax Authority] on 4 March 2016.

7. The Comptroller of Taxes, the Deputy Comptroller of Taxes, the Adviser – International Affairs, the Tax Information Exchange Officer and I met on 10 June 2016 to review the request and to consider its validity within the terms of the TIEA.

8. My view, and the view of the others present at the meeting, was that the information sought by the STA was foreseeably relevant to Mr Haskell's tax position in Sweden and that the necessary notices would be issued to the Jersey entities identified in the Request subject to the correction of one error in the Request, namely that one of the taxes in respect of which the information was sought was not covered by the TIEA.

9. I discussed the Request verbally with the STA on 7 July 2016. In the course of this discussion it was agreed that the Request would be amended to reflect the issue identified within the original Request. The Request was reissued by the STA accordingly on 11 July 2016.

10. The Request stated that as a Swedish resident, Mr Haskell was liable to tax there on all of his income, wherever it arose in the world, as well as on any income or distributions from any trust in respect of which he was either a settlor or beneficiary. In addition he would be liable to tax on the profits of the Jersey companies identified in the Request and any others in respect of which he held a beneficial interest.

11. The Request provided reasonable grounds to say that Mr Haskell was a Swedish taxpayer who was, for all or part of the period under review, the beneficiary of or otherwise connected with the entities which were the subject of the Volaw notices and the JTC notices and that these entities were, at the time the Request was made, administered in Jersey.

12. The Request also provided reasonable grounds to say that Mr Haskell had

transacted with at least one account held by Barclays in Jersey.

13. Finally, the request provided reasonable grounds for suspicion that Mr Haskell had a relationship with Lloyds in Jersey.

14. On the basis of the information provided by the STA I issued the notices on 1 September 2016."

3 The affidavit goes on to deal with correspondence between Advocate Harvey-Hills and the first respondent following service of the Notices. Ms Moylan deposed that she took up with the Swedish Tax Authority the issues which Advocate Harvey-Hills had raised on behalf of Mr Haskell, and she satisfied herself that the Swedish Tax Authority had exhausted all reasonable avenues domestically to obtain the information requested. She had had explained to her the Swedish Tax Authority's reasoning regarding the tax residence in Sweden of the applicant and his liability to Swedish tax during the period covered by the request, noting that this had been upheld by the Swedish Administrative Court in 2015, and on appeal by the Fiscal Court of Appeal in April 2016. The Swedish Tax Authority had provided details about the applicant's lack of co-operation with their investigation into his worldwide income and potential tax liability in Sweden. Ms Moylan indicated that the Swedish Tax Authority had confirmed to her satisfaction that the information requested was foreseeably relevant to the assessment of the applicant's worldwide income for the period. As a result of those enquiries she responded to Advocate Harvey-Hills to state that, having reviewed the points which had been raised on behalf of the applicant and consulted further with the Swedish Tax Authority, she remained satisfied that the request was a valid one which fell within the terms of the TIEA.

4 The summons issued by Advocate Harvey-Hills seeks a number of orders against the first respondent. Insofar as it claimed relief against the second respondent, Advocate Harvey-Hills withdrew such claims at the hearing.

Stay

5 The first application is for a stay of the present judicial review proceedings until full and final determination of the action in *Larsen v The Comptroller of Taxes* [2015] (2) JLR 209 and *Larsen and Ors v Volaw Trust and Ors* [2016] JCA 137 (" *Larsen No.2*") or until further order.

6 Advocate Harvey-Hills submitted that the Privy Council's decision was unlikely to be of limited application, if that Court took the case. In that event the size of the instant case would be very much reduced, and it was desirable that a stay be effected until the position had been clarified. His underlying point was that the same issue of unfair procedure would arise in the present application as it did in *Larsen (No.2)*. He also submitted that the background to the issue of unfair procedure lay in an alleged inconsistency between *Larsen (No. 2)* and *Volaw Trust and Corporate Services Limited and Larsen v Comptroller*

of Taxes [2013] (2) JLR 499 (" *Larsen (No. 1)*"). In *Larsen (No.1)*, Beloff JA had said at page 520 at paragraph 31:-

> ***"Elementary fairness does seem to us, prima facie, to require the Comptroller to give the person the chance to make representations so as to avoid, it may be, entering into the terrain of notices and the possibility of penal sanctions for non-compliance therewith reg.*** 3 (as to which see reg. 15(2))."

7 However in *Larsen (No. 2)* it was said the Royal Court purported to modify that dictum, thus leading to inconsistency. Advocate Harvey-Hills anticipated that the appeal to the Privy Council in *Larsen (No. 2)* would resolve the inconsistency and thus limit the extent of the enquiry in the Royal Court in the present case.

8 The Respondents' contentions in this respect were that the present application should not be stayed pending the outcome of *Larsen (No. 2)*. The Respondents took the view that it was unlikely that leave to appeal either the Royal Court or Court of Appeal decisions would be granted by the Judicial Committee of the Privy Council and that in any event, notwithstanding some similarities, each was a specific case relating to the Notices issued to a specific taxpayer. Jersey's international obligations required the timely exchange of information. The application for a stay was an attempt to delay such exchange and should be refused.

9 In my judgment the application for a stay is premature. On the information currently available to me it is not clear whether the Judicial Committee will give leave. If it does not do so, then a stay at this stage simply causes delay. If it does give leave, then it may be that it would be sensible to examine more closely the extent to which the issues raised on appeal to the Privy Council will deal with the issues in the present case. It seems to me that it would be better to proceed with the current judicial review and, if it should be necessary, the application for a stay can be renewed when there is more clarity. It will be decided then against a background of knowing precisely what issues are likely to arise in the Judicial Committee and it may be that only a partial stay of the present proceedings would be appropriate as it may be possible to sever particular points which could conveniently be taken at this stage. Furthermore, if the present case is dealt with before *Larsen (No. 2)* reaches the Judicial Committee, if it does, it is possible that conjoined appeals might be helpful in both addressing the issues and saving time. For these reasons, the application for a stay is rejected at this time.

Duty of candour and disclosure

10 The applicant contends that the affidavit filed by the first respondent fails to meet the obligations of candour which are imposed on the first respondent and that further orders should be made in this respect.

11 I deal first of all with the duty of candour. It is referred to in *Larsen (No. 2)* where Beloff, Commissioner said this:-

> ***"17. In my view, the following propositions can be extracted from*** [*R v Lancashire CC ex p Huddlestone* [1986] 2 All ER 941] ***and are confirmed, not modified in any substantial way, in subsequent jurisprudence …***
>
> > ***(i) The duty of candour is triggered by the grant of leave or permission which itself demonstrates a judicial view that the application is arguable*** .
> >
> > ***(ii) The core content of the duty is to "lay before the Court all the relevant facts and reasoning underlying the decision under challenge" … in order to show that they have been considered*** .
> >
> > ***(iii) What the duty of candour requires is axiomatically fact specific.*** Its dimensions will depend upon the facts of any particular case (…)
> >
> > ***(iv) The respondent's explanation and disclosure must be "full and fair" … "so far as is necessary to meet the challenge" … but not every fact relied on by the respondent as relevant has to be specified*** .
> >
> > ***(v) It is pursuant to the duty of candour "ordinarily good practice" for a public authority to exhibit in its evidence any document of "significance to its decision" … The practice may be modified if there are counter-veiling considerations, eg confidentiality … or public interest immunity or legal professional privilege*** .
> >
> > ***(vi) The applicant is not, however, to be indulged as a Mr Micawber figure and granted disclosure (or an order that the respondent file further evidence on some point) in the hope that something may turn up, or to put it in a less literary but more conventional way, to be given the opportunity for a fishing expedition*** .
> >
> > ***(vii) The respondent will pay the price if it is insufficiently candid by having adverse inferences drawn against it, or by being penalised in costs, or even, in extreme circumstances, by being punished for contempt*** .
> >
> > ***(viii) Disclosure in judicial review is not the same (or as extensive) as disclosure in ordinary civil proceedings.*** It is required only where for some substantial reason, the application cannot be disposed of fairly without it … it is not necessary "to flood the Court with needless paper"
> >
> > …
>
> ***18. I start from the necessary premise that the grounds for the application have passed the threshold of arguability. Nonetheless, it is for the***

applicants to demonstrate in what way they can claim to be disadvantaged in advancing any point in support of any particular ground because of some perceived shortfall in the respondent's compliance with their duty of candour and such demonstration requires identification of the specific arguable point."

12 In relation to disclosure of the letter of request, Beloff, Commissioner, noted (at para 22) that the Comptroller is not in law obliged to disclose it as fairly required to dispose of the application as formulated, nor to disclose, on the same criteria, any of the other documents in his possession. On the application of *Durant Intl Corp v AG* [2006] JLR 112, he drew the following propositions:-

"24. I draw these propositions from** Durant **which is both authoritative and, in so far as applicable binding upon me:-

***(i) If an applicant wishes to see a letter of request s/he must suggest some plausible ground on which s/he can say that s/he needs it in fairness to protect his or her interests** .*

***(ii) Even if such need can be established, it must be balanced against competing considerations of confidentiality** .*

***(iii) The confidential character of letters of request in respect of current criminal investigations (including those in the sphere of tax evasion) is well established in international practice for obvious practical policy reasons** .*

***(iv) The default position is that such letters (and by parity of reasoning any communications with the requesting state) are not disclosable** .*

***(v) See further art. 26 of the OECD Model Tax Convention on Income and on Capital and the commentary thereon to the same general effect of presumptive confidentiality of letters of request** .*

25. I regard** Durant **as consistent with and supportive of my decision to reject the application to compel disclosure of the letter of request or derivative documents at this interlocutory stage."

13 *Durant* concerned a criminal investigation into corruption and not what is, as far as one can tell, a civil tax investigation. *Larsen (No. 2)* involved a criminal tax investigation. Although I was not addressed at very great length orally on the matter, the applicant in his skeleton argument contended that a distinction ought to be drawn between criminal and civil tax matters and that in the latter, the letter of request should routinely be disclosed. In that connection, reliance was placed on *Minister of Finance v Bunge* [2013] BDA LR 83, to which I will turn shortly. It was said that the difference between *Durant* and *Bunge* is the statutory and factual context in which the request is made. There may be a presumption in

criminal matters that letters of request are generally treated as confidential, but a different presumption applies in civil cases where there is an arguable case (leave having been granted) and the judicial review proceedings are not preceded by a fair procedure. It is said that in such cases fairness demands that the letter of request be disclosed.

14 By contrast the first respondent relies upon the commentary to Article 26 of the OECD Model Tax Convention, which states:-

> *"Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their cooperation.* The confidentiality rules of paragraph 2 apply to all types of information received under *paragraph 1, including both information provided in a request and information transmitted in response to a request.* Hence the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested state can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested state to be able to obtain or provide the requested information to the requesting state, without frustrating the efforts of the requesting state. If, however, court proceedings or the like under the domestic law of the requested state necessitate the disclosure of the competent authority letter itself, the competent authority of the requested state may disclose such a letter unless the requesting state otherwise specifies."

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

16 Nonetheless the Court is able to have regard to the commentary to the Model Tax Convention and of course also to the terms of the TIEA itself. Article 7 says this:-

> *"1. All information provided and received by the competent authorities of the Parties shall be kept confidential*.
>
> *2. Such information shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the purposes specified in Article 1, and used by such persons or authorities only for such purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in judicial decisions*.

3. Such information may not be used for any purpose other than for the purposes stated in Article 1 without the express written consent of the competent authority of the requested party.

4. The information provided to a requesting party under this agreement may not be disclosed to any other jurisdiction."

17 It is clear therefore that the terms of the TIEA anticipate confidentiality. That does not mean that the Court should not, in a proper case, order disclosure of the letter of request. Indeed there is nothing in *Durant*, *Larsen (No. 1)* or *Larsen (No. 2)* which suggests otherwise. What those cases do make clear however, is that there is a default position that the letter of request is not disclosable.

18 The purpose of the Regulations is to give effect to the TIEA, which distinguishes civil and criminal tax matters only for the purposes of when the TIEA came into force. Otherwise the TIEA contemplates the exchange of tax information whether for criminal or civil purposes, without distinction between the two. In my judgment, it follows that the Court should not create artificially a distinction which the TIEA does not itself make. In reaching that conclusion, I note that in the context of gathering information, an investigation may move from being a civil to a criminal investigation at any time depending upon whether the information gathered casts a fresh light on information previously available. In my judgment therefore there is no distinction between civil and criminal tax investigations other than in respect of the TIEA coming into force, and I therefore reject the submissions of the Applicant in this respect.

19 In *Bunge* the Court of Appeal in Bermuda reached the ***"inescapable conclusion"*** that the terms of the letter of request would be made available to the Court for the purposes of any judicial review of a challenge to the Notice issued under the relevant TIEA. Advocate Harvey-Hills also relied on *Bunge* before me. Beloff, Commissioner, in *Larsen (No. 2)* respectfully disagreed with the decision of the Bermuda Court of Appeal. He pointed out that the logic of that approach was that once judicial review is afoot, disclosure of the letter of request is automatic even if there is no arguable basis established for questioning its propriety on the grounds of such non-conformity, but merely a desire to see if such a basis can be established. I respectfully agree with the Commissioner both for the reasons he gives and for those set out above and I do not consider *Bunge* to represent the law of Jersey.

20 Advocate Harvey-Hills contended that the requesting state had the obligation to show that the request made was within the scope of the TIEA. It was not, he said, for his client to prove anything. I do not consider that is correct for the following reasons.

21 Although one likes to think that most people pay the tax they are required to pay, it is not hard to reach the conclusion that similarly most people do not like paying tax. Some people

take a stage further their dislike of payment of taxes which are properly due, and take steps which are not proper to evade their liabilities. Fairness to those who do pay their taxes requires tax authorities worldwide to take appropriate efforts to collect in the tax which is due by those who are required to pay it.

22 On the other hand, citizens are entitled to structure their financial affairs in the most tax efficient way. This is because it is and always has been a fundamental principle that the state is not entitled to remove the assets of its citizens without legislation. That longstanding principle is indeed now confirmed by Article 1 of Protocol 1 to the European Convention on Human Rights, which now forms part of the domestic law of this Island. If taxation is not properly due in accordance with the law, a citizen is not obliged to pay it. The concept that tax ought to be paid where it is not due in law is not one which the law recognises, whatever its moral imperatives.

23 This tension between those who are obliged to pay their taxes but do not and those who on the back of good advice so structure their affairs as to avoid, legitimately, the payment of tax, can sometimes lead to aggressive behaviour by tax authorities. I regard all these statements as being applicable to all tax authorities and all people worldwide. The courts reconcile this tension by applying the law – the whole law — of the jurisdiction. Accordingly, the Royal Court applies the whole of the law of Jersey – involving the application of the statute, properly construed, and of the normal rules of administrative law, one of which is the duty on any public authority to give reasons for its decision. Another principle of administrative law is that there is a presumption of regularity on the part of the public authority – until there is a threshold passed which suggests that the public authority has not acted lawfully, the Court proceeds on the assumption that it has.

24 The legislative base in Jersey for the actions of the first respondent in this respect is the Taxation (Implementation) (Jersey) Law 2004 ("the Law") and the Regulations. The *vires* to make the Regulations arise under Article 2 of the Law, which set out that the States may make Regulations which are necessary or expedient for the purposes of implementing an agreement regarding or relating to taxation which the States have authorised to be signed on their behalf with the government of another country or territory – and in this case the TIEA is such an agreement. The Regulations contain much detail. Nonetheless it is relevant when reading and applying the Regulations to have regard to the fact that the vires for those Regulations depends on establishing that it is necessary or expedient for the purposes of implementing the international obligation or agreement. Furthermore the interpretation provisions in the Regulations make it plain that the powers which are conferred upon the first respondent in Jersey arise only in the same connection – for the purposes of implementing the international agreement. If therefore a request does not fall within the terms of the international agreement, the Regulations do not confer any power on the first respondent to provide information in relation to such a request, nor to require anyone to produce it. Although the Court does not normally find itself construing an international agreement, the structure of the Law and Regulations puts it in that position here, see *A Taxpayer v Director of Income Tax States of Guernsey Income Tax Office Guernsey Court of Appeal, Civil Division, Appeal no.507*, 21 st December 2016 at

paragraphs 24 – 33.

25 It follows that the first respondent, when exercising the powers conferred upon it by the Law and the Regulations, is required to establish that the actions which it is taking to facilitate the delivery of tax information to the requesting state are actions the first respondent is lawfully entitled to take. This requires an analysis of the incoming request to ensure that it falls within the ambit of the international agreement.

26 In this context, it is important to have regard to the terms of Regulation 1(A) of the Regulations which is in these terms:-

> ***"1A Tax information***
>
> ***(1) For the purposes of these Regulations "tax information" means information that is foreseeably relevant to the administration and enforcement, in the case of the person who is the subject of a request, of the domestic laws of the third country whose competent authority is making the request concerning any tax listed in the third column in the Schedule opposite the entry for that third country, including information that is foreseeably relevant to–***
>
> > ***(a) the determination, assessment and collection of such taxes;***
> >
> > ***(b) the recovery and enforcement of such taxes;***
> >
> > ***(c) the recovery and enforcement of tax claims; or***
> >
> > ***(d) the investigation or prosecution of tax matters*** .
>
> ***(2) Tax information may be –***
>
> ***(a) information within an individual's knowledge or belief; or***
>
> ***(b) information recorded in a document or any other record in any format, that a person has in his or her possession, custody or control"***

27 The definition of tax information extends to information which is *'foreseeably relevant'* to the administration and enforcement of the domestic law of the requesting country. *'Foreseeably relevant'* envisages that information may or may not be relevant – in other words, the requesting country may collect an amount of information which turns out not to be relevant to the administration and enforcement of its domestic laws, but at the time of making the request and obtaining the information, it is foreseeably relevant – it might be so relevant. This does not exclude the possibility of review on proportionality grounds, but it is important to recognise the structure of the definition, which envisages that some information may be collected which turns out not to be relevant to the administration or enforcement of the foreign fiscal law. The reference to information which is foreseeably relevant is taken directly from Article 1 of the OECD model agreement, and also reflects Article 1 of the

Swedish TIEA.

28 Regulations 2 and 3 of the Regulations provide as follows:-

"2 Provision of tax information by taxpayer

(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require the taxpayer to provide to the competent authority for Jersey all such tax information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph (1) shall be made by notice in writing.

3 Provision by other persons of tax information about taxpayer

(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require a third party, being a person other than the taxpayer, to provide to the competent authority for Jersey all such tax information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph (1) shall be made by notice in writing.

(3) Where a third party notice does not name the taxpayer to whom it relates, it must provide an account number or other identification for the tax information required.

(4) Subject to paragraph (5), the competent authority for Jersey shall send to the taxpayer to whom a third party notice relates a copy of the third party notice –

(a) in a case where, at the time the third party notice is given, the competent authority for Jersey does not know the taxpayer's name and address – within 7 days after the third party has provided to the competent authority for Jersey the tax information required by the third party notice; or

(b) in any other case – within 7 days after the third party notice is given.

(5) Paragraph (4) does not require the disclosure or provision of the third party notice to a taxpayer–

(a) if the competent authority for Jersey does not know the taxpayer's name and address;

(b) if its disclosure or provision would identify or might identify a person who has provided information that the competent authority for Jersey takes into account in deciding whether to give the notice;

(c) if the competent authority for Jersey is satisfied that there are reasonable grounds for suspecting that the taxpayer has committed a relevant criminal

offence;

(d) if the competent authority for Jersey is satisfied that disclosure of information of the description contained in the notice may prejudice the assessment, collection or recovery of tax or the investigation or prosecution of tax matters; or

(e) if the third country has requested that the taxpayer should not be informed of any matter relating to the request on the ground that –

(i) disclosure to the taxpayer would identify or might identify a person who has provided information relating to the third party request,

(ii) there are reasonable grounds for suspecting that the taxpayer has committed a relevant criminal offence, or

(iii) disclosure of information of the description contained in the notice may prejudice the assessment, collection or recovery of tax or the investigation or prosecution of tax matters.

(6) The third party notice shall –

(a) state whether the competent authority prohibits the third party from disclosing to the taxpayer the third party notice or any information relating to the notice (including any information about a warrant issued under Regulation 12 or other information relating to enforcement); and

(b) if the third party notice prohibits that disclosure to the taxpayer, state the ground on which it prohibits that disclosure, by reference to one or more grounds mentioned in paragraph (5).

(7) The third party shall not disclose the third party notice nor any information relating to it to the taxpayer that it is prohibited from so disclosing by virtue of any prohibition contained in the third party notice except –

(a) with the written consent of the competent authority for Jersey; or

(b) with the consent of the Royal Court.

(8) The competent authority for Jersey shall as soon as practicable send to the taxpayer the third party notice if the Royal Court gives consent to the third party to disclose it.

(9) For the purposes of paragraph (5) the competent authority for Jersey shall not be treated as knowing the name or address of the taxpayer by virtue of anything provided by the third party unless, upon providing the tax information, the third party expressly draws to the attention of the competent authority for Jersey the taxpayer's name or address.

(10) In this Regulation, a reference to the taxpayer's address is a reference to any address at which the taxpayer may be given information."

29 It will be seen immediately that the Regulations were (and are) in different form at the time of *Larsen (No. 2)* than they were at the time of consideration by the Court of Appeal in *Larsen (No. 1)*. The Court of Appeal was considering Regulations which required the first respondent to have reasonable grounds for believing that a taxpayer might have failed to comply or might fail to comply with a domestic law of a third country concerning tax and that any such failure had led or was likely to lead to serious prejudice to the proper assessment or collection of tax. If the Regulation applied, the first respondent might then require any person other than the taxpayer to provide documents in that person's possession which contained or in the reasonable opinion of the first respondent might contain tax information that was relevant to a liability to tax on the part of the tax payer. There were requirements under Regulation 3 of the previous regulations which directed the first respondent to allow a person a reasonable opportunity to provide the document or record in question before any notice was issued. That position has changed with the Regulations as set out above – the competent authority merely has to decide to respond to a request in order that the jurisdiction to issue notices arises, and there is no obligation to consult contained in the statute. However, although the amendments to the Regulations reduce some of the protections available to taxpayers or those holding information on their behalf, the Court on judicial review in my judgment is entitled to approach the exercise by the first respondent of its jurisdiction to issue a notice by presuming, in the absence of evidence which established otherwise, that it would not respond positively to a request concerning a taxpayer unless satisfied that the request fell within the ambit of the International agreement concerned – in the instant case, the TIEA with Sweden. If it were otherwise, the Judicial Review remedy which is provided for by the Regulations would make no sense in practice.

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

The Applicant's objections

31 Against that background I turn to the particular objections which the applicant puts forward in this case.

32 The applicant contends that the affidavit of Ms Moylan does not meet the required duty of

candour. It is said that it is extremely brief, asserts an alleged obligation of confidentiality and merely parrots the wording of the OECD model convention. The only documents exhibited are the TIEA between Jersey and Sweden, a Ministerial Decision concerning delegation of functions and the OECD model agreement and commentary. Complaint in particular is made at paragraph 24 of the first respondent's affidavit where Ms Moylan says:-

> *"I have been advised that there is a presumption of regularity in respect of any decision made by the Competent Authority and that no reason has been put forward by Mr Haskell that might properly challenge the merits of the decision that I made to issue the Notices.* That being so, I am not inclined to make any further disclosure of the background details contained in the Request."

33 The criticism which is made of this paragraph is that once leave has been given to bring judicial review proceedings, the presumption of regularity is discharged. In my judgment, such a criticism goes too far. The duty of candour is triggered by the grant of leave or permission which itself demonstrates that a judicial review of the application is arguable, and it follows that there is then a duty to put before the Court all the relevant facts and reasoning which underlie the decision under challenge. This may involve the public authority exhibiting in its evidence any document of significance relevant to the decision taken; but this will depend on the facts. The critical thing is that the public authority provides a comprehensive and rational account of its decision. Without that, the Court cannot assess the legitimacy of the decision and there is no counterbalance to the possibility, which would otherwise exist, of administrative malpractice. Nonetheless, the applicant has to demonstrate in what way he claims to be disadvantaged in advancing any particular ground he wishes to advance simply because of some perceived shortfall in the first respondent's compliance with the duty of candour which exists.

34 Advocate Harvey-Hills contends that it is not for his client to prove anything. It is for the first respondent to prove that he is acting within the terms of the TIEA. In my judgment that submission is to be rejected. The Law and the Regulations provide for the circumstances where the first respondent is able to give assistance to a requesting state, and a process for judicial review. It is true that there is an obligation on the first respondent to satisfy himself that he had jurisdiction to take the steps which he is taking in issuing a notice and/or in passing information to the requesting state, but it is equally true that there is a presumption of regularity. Until the taxpayer raises some reason why the first respondent is not acting lawfully, that presumption of regularity continues. This is not the same argument as the submission that there is no duty of candour. In my judgment, there is no reason why the duty of candour and the presumption of regularity should not run side by side. At the same time, I recognise that the duty of candour must not be so reduced that the taxpayer does not know the basis on which the decision to issue the Notice in question has been taken, and an assertion that no explanation of the reasoning will be provided because there is a presumption of regularity is of itself not a good enough discharge of that duty.

35 In order to assess the complaints which are made, it is necessary to look at the Notices actually issued. These are in very similar form, but I will take the letter addressed to Jemma

Trust Company:-

“Notice to produce tax information

The Taxation (Exchange of Information with Third Countries (Jersey) Regulations 2008.

In connection with:

Preston Hampton Haskell, date of birth: 28 May 1966 (Sweden)

DM Trust (Jersey)

1. I am in receipt of a request from the Swedish Competent Authority

2. I have examined the request and, being satisfied that it has been validly constituted in conformity with the terms of the Tax Information Exchange Agreement with Sweden, I have decided to respond to the request.

3. I require you to provide, within 30 days, the following information that I require in respect of the DM Trust (“the Trust”), for the period 1 January 2010 to 31 December 2014:

a. Confirmation that Mr Haskell is a settlor or beneficiary of the trust, whether directly or indirectly, and if so the information listed in points b – j below;

b. The trust deed and any subsequent amendments;

c. Details of the settlor and/or beneficiaries (if not stated in the trust deed);

d. Details of the protectors if applicable;

e. Copies of any letters of wishes;

f. Details of any other link between Mr Haskell and the trust, whether direct or indirect;

g. Copies of annual reports and/or financial statements for the period;

h. Copies of bank account statements for all the bank accounts held by the trust during the period;

i. Statement of the trust's assets and their valuations as at 31 December for each of the requested years;

j. Details of any communication between Mr Haskell, the trustees and/or any bank in connection with any loans and/other distributions to and/or from the trust.

4. In accordance with Regulation 3(4) a copy of this notice is being sent to the tax payer who is the subject of the request.

5. …"

36 A similar letter was sent to Jemma Trust Company in relation to the company Sharmayne Finance and to Volaw Trust and Corporate Services Limited in relation to the company Belleron Finance Limited, Hellifield Overseas Limited and to Volaw Trust seeking a full list of companies and trusts managed on behalf of Mr Haskell by that company. In addition a notice was sent to Volaw Nominees 1 Limited in connection with the company Golden Impala Limited.

37 The Notices served on Lloyds Bank International Limited and Barclays Bank PLC did not describe Mr Haskell as having been born in Sweden. In connection with Barclays, a particular account number was given, but no more detail appears in the Notice issued to Lloyds Bank where there is merely a request to the Bank to provide information in relation to " *all accounts held by Mr Haskell at Lloyds Bank International Limited and/or Lloyds TSB Offshore Limited, Jersey, whether in his name or jointly with others, or to which Mr Haskell is a signatory or of which Mr Haskell is the ultimate beneficial owner, for the period 1 January 2010 – 31 December 2014*."

38 The objections taken by Mr Haskell to the issue of these notices were firstly set out in a letter dated 15 th September, 2016, from Advocate Harvey-Hills to Ms Moylan. In this letter it was asserted that the Notices were defective within the terms of the Regulations because they failed to identify whether Mr Haskell was a taxpayer or third party for the purposes of the Regulations. Other complaints were made in so far as it was said that there was uncertainty as to whether the various corporate entities were treated as the taxpayer for the purposes of the request for information. Advocate Harvey-Hills requested also that confirmation be given as to which tax was relevant in the context of the notices and which tax liabilities were in issue. It was asserted that Mr Haskell was a resident of England, and until 2011 had been a US citizen and paid tax to the US. It was further asserted that he had never been resident in Sweden, although he visited that country from time to time between 2010 and 2014. Furthermore it was asserted that Mr Haskell has disputed his tax residence but has not refused to cooperate with the Swedish Tax Authority. However, the Swedish Tax Authority had allegedly not taken other steps to request the information from Mr Haskell which they now sought by way of the Notices, in contravention of Article 4.1 of the TIEA which provides that " *the competent authority of the requesting party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty*." Thus is was said that if a request had been made of Mr Haskell, he would have been in the position to assist the Swedish Tax Authority in the provision of relevant documentation rather than requiring third parties to provide a huge array of documents, many of which were irrelevant, all at short notice.

39 It was also contended that any reissued notice should give Mr Haskell a proper explanation of the request and of the reasons why the Comptroller was minded to issue a Notice, so that he had a reasonable opportunity to make representations.

40 The response from Ms Moylan sent on 20 th September, 2016, indicated that she had considered the points raised, consulted with the Swedish Authorities and was satisfied that the request issued by the Swedish Competent Authority was a valid request within the terms of the TIEA. She was satisfied the Notices were validly raised, and she would not therefore be re-issuing them. She continued:-

> *"Without addressing all of your points, I would note that there is no obligation in the Regulations to name the taxpayer who is the subject of a request for information and that the Notices do not do so.* For the avoidance of doubt, however I can confirm that Mr Haskell is the taxpayer in this case.
>
> *I therefore do not consider that there is any basis for suspending or re-issuing the Notices."*

41 It appears to me that there are three fundamental issues at the heart of the applicant's opposition to the issue of these Notices.

> (i) The request is based upon the proposition that the applicant was a resident of Sweden for the relevant years, and he contends he was not;
>
> (ii) There is a lack of clarity around the connections between the applicant and the particular entities in respect of which information is being sought. That lack of clarity could be ameliorated had there been any proper attempt by the Swedish Tax Authority to obtain the information requested by use of its domestic powers; and
>
> (iii) There is a lack of clarity around the taxes in respect of which the tax information is being sought.

42 There are a myriad of other points that arise but they are in my view peripheral to these three points which are essential to the present argument as to directions. Against that background, therefore, what information has been provided by the First Respondent pursuant to the duty of candour which exists?

43 Paragraphs 10 to 13 of the First Respondent's affidavit state this:-

> *"10. The Request stated that as a Swedish resident, Mr Haskell was liable to tax there on all of his income, wherever it arose in the world, as well as on any income or distributions from any trust in respect of which he was either a settlor or a beneficiary. In addition, he would be liable to tax on the profits of the Jersey companies identified in the Request and any others in respect of which he held a beneficial interest.*

11. The Request provided reasonable grounds to say that Mr Haskell was a Swedish taxpayer who was, for all or part of the period under review, the beneficiary of or otherwise connected with the entities which were the subject of the Volaw Notices and the JTC Notices, and that these entities were, at the time the request was made, administered in Jersey.

12. The Request also provided reasonable grounds to say that Mr Haskell had transacted with at least one account held by Barclays in Jersey.

13. Finally, the Request provided reasonable grounds for suspicion that Mr Haskell had a relationship with Lloyds in Jersey."

44 Pausing there, the information provided sets out a basis upon which, if the underlying information were correct, the first respondent could properly respond to the Request from the Swedish Tax Authority for the provision of tax information pursuant to the TIEA. However, although there is no obligation on the part of the first respondent to provide the letter of request itself, the summary information provided in these paragraphs does not set out in any detail the information which would lead a recipient of the Notice or the taxpayer, to accept that the Notices were properly issued. The affidavit is unhelpful in that respect.

45 Ms Moylan then goes on to set out the objections raised by Advocate Harvey-Hills to the issue of these Notices. She indicated that a summary of these issues was sent to the Swedish Tax Authority and that she spoke to that Authority to satisfy herself that it had exhausted all reasonable avenues domestically to obtain the information requested. She gives no other information as to what she asked, nor what she was told. On 20 th September, 2016, she received additional details regarding the applicant's liability to tax in Sweden and the steps which had been taken by the Swedish Tax Authority to obtain the information domestically. Ms Moylan indicated that the Swedish Tax Authority relied for its reasoning regarding tax residence on a decision by the Swedish Administrative Court in 2015, allegedly upheld on appeal by the Fiscal Court of Appeal in April 2016. She went on to say:-

"The STA also provided further details regarding the partial assessment to income tax issued by them to Mr Haskell in May 2016 which was referred to in the letter from Mourant of 15 th September 2016. They confirmed to my satisfaction that the information requested was foreseeably relevant to the assessment of Mr Haskell's worldwide income for the period, which was not fully addressed in the partial assessment. Finally, they provided more details about Mr Haskell's lack of cooperation with their investigation into his worldwide income and potential Swedish tax liability. On the basis of this information, the STA had concluded that they had exhausted all reasonable steps available to them to obtain the information domestically, as required under Article 4(5)(i) of the TIEA."

46 The letter from Messrs Mourant Ozannes on 15 th September, 2016, fairly and squarely put

the issue of tax residence before the first respondent. The answer to that issue has been merely an assertion by Ms Moylan that she was " *satisfied that the Request was a valid one within the terms of the TIEA*" which necessarily implies satisfaction that for the tax years in question the applicant was resident in Sweden for tax purposes. In my judgment that is not enough. Whilst she is not required to produce the letter of request, she is required to provide more than a statement that she is satisfied. Administrative law requires that she must have reasonable grounds to be satisfied, because her decision to give assistance to the Swedish Tax Authorities requires her to be satisfied that the request of the Swedish Tax Authorities is properly grounded, and that depends upon tax residence which she is told is an issue. The presumption of regularity applies for as long as the issue is not raised with her – in other words, on first receipt, she is entitled to accept a statement in the request, assuming it is there, that the applicant was tax resident in Sweden, and hence the potential liability to Swedish taxation arose. From the moment she was told of the dispute however, particularly in circumstances where leave to commence judicial review proceedings has been given, the obligation arises upon her to say with candour why the applicant is said to be a Swedish resident for tax purposes. She has not done so and in my judgment, she should do so exhibiting any relevant documentation which goes to establish the point. It appears for example that there are decisions of the Administrative Court and the Fiscal Court of Appeal which confirm that residence. By contrast, Messrs Mourant Ozannes assert that these decisions were interlocutory in nature and referred to the provision of security for the Applicant's potential tax liability, and they do not themselves concern his separate appeal against the tax assessment. Thus it is said that the courts have not reached a substantive determination on his residence and liability to pay tax in Sweden, which is a condition precedent to the power conferred on the first respondent to issue a notice to obtain tax information on behalf of the Swedish Tax Authorities.

47 I should like to be clear that the Royal Court of Jersey will not be considering whether the Applicant is or is not resident in Sweden for tax purposes. That is beyond its remit. The investigation in the Royal Court is as to whether or not the First Respondent has acted reasonably in concluding that the Applicant has been resident in Sweden in the relevant years with a corresponding liability to pay tax. That is a narrower question altogether, and for the avoidance of doubt it is very unlikely to involve any affidavit evidence of Swedish domestic law, including its domestic law regarding tax although it may involve both a review of the Swedish judicial decisions referred to in paragraph 46 above in order to identify the reasonableness of the First Respondent's decision and a review of the grounds on which the Swedish tax authority regarded him as so resident. The actual assessment of tax residence is properly a matter for the Swedish courts rather than the Royal Court of Jersey albeit the fact of a challenge to tax residence in the country of the requesting state may have some impact on the proportionality and reasonableness of the actions of the requested tax authority issuing the relevant notice. That issue is for argument at the final hearing of this application, but in the meantime the basis upon which the assertion of Swedish tax residence is made does need to be verified and Ms Moylan's affidavit does not go far enough in that respect.

Connections with the Applicant

48 The second set of issues surrounds the alleged connection between the applicant and the various trust and corporate entities. Ms Moylan gives no evidence of why she is satisfied that this link exists. Instead she relies upon the presumption of regularity.

49 On the other hand, the applicant does not himself set out much detail in this respect. In relation to Sharmayne Finance Limited, he indicates in his affidavit that the company was disposed of in 2011 and he has no further connection with it. In those circumstances, he raises a sufficient issue that requires the First Respondent to go beyond reliance on the principle of regularity, and in fulfilling the duty of candour, it would be appropriate therefore that the first respondent gives such information as it can to justify the Swedish Tax Authorities' request in relation to Sharmayne.

50 The applicant provides no such threshold objection in relation to Belleron Finance Limited, Hellifield Overseas Limited or Golden Impala Limited. However, the Notice itself requires information as to " *the identity of the immediate and ultimate beneficial owners of [each] company and details of any changes in ownership during the period, to the extent known*". That request of itself seems to me to prompt questions. If it had been a request as to whether the applicant was the immediate or ultimate beneficial owner of the company that might be a different matter, but it is not. The request on its face leaves a gaping hole between the applicant and the information which is sought. It is because the Notice is drafted so widely that one would expect the first respondent to provide some factual basis connecting the applicant with the companies in question.

51 The remaining requests in the Notices refer to the DM Trust and the Harper Trust. The request in relation to the DM Trust seeks a confirmation from Jemma Trust Company that Mr Haskell is a settlor or beneficiary of that trust, whether directly or indirectly. If that confirmation is given then further information is sought. A similar approach is taken in relation to the Harbour Trust, and in each case the relevant time period is between January 2010 and December 2014. The legitimacy of this Notice turns upon the connection with the applicant, and if that is established, then subject to any of the other objections, particularly around the question of tax residence, there would seem to be no lack of clarity in relation to the request. It is true that it is currently unclear as to the extent to which there has been a proper attempt by the Swedish Tax Authority to obtain the information requested by use of its domestic powers, and I now turn to that objection.

52 In my judgment, it is necessary to distinguish between different obligations which arise within the TIEA. Some of them clearly are obligations which the contracting parties owe each other, which have a direct impact on, and engage the rights of, the tax payer or the person served with a notice to provide information – a good example of these is the obligation to provide tax information, because that obligation is directly linked to the legislation which has been adopted by the States. Thus for the purposes of considering the rights of judicial review of the first respondent's actions pursuant to Regulation 14, it is open to the Court to examine whether the information which is the subject of a notice is " *tax information*" for the purposes of the Regulations. Other obligations which are to be found in

the TIEA are not reflected in the Regulations. An example of this is the obligation under Article 4 of the TIEA which is in these terms:-

> *"The competent authority of the requesting Party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, expect where recourse to such means would give rise to disproportionate difficulty."*

53 This obligation imposed upon the parties to the TIEA could have been included within our domestic law. Article 2 of the Law enables the States by Regulations to make such provision as appears to be necessary or expedient for the purposes of implementing an approved agreement. However, the Regulations do not contain any such requirement. It follows that there is nothing in the domestic law of this Island which requires the Court to investigate the extent to which, if at all, the requesting party has performed this obligation towards the requested party. As between the parties to the agreement, the obligation is not justiciable on international law grounds, and as between the taxpayer and/or recipient of the notice and the requested party, the matter is not justiciable because it does not fall within the Law and Regulations. It is true that the definition of a " *request*" pursuant to Regulation 1 of the Regulations defines a request as one that is made under a tax information exchange agreement that complies with the requirements of that agreement. It might be argued therefore that the taxpayer has an interest in the performance of the obligation under Article 4 of the TIEA which is described above. I reject that argument as requiring an unnecessarily wide view of the Regulations. It appears to me that that provision of the TIEA is one of administrative convenience between the parties to that agreement and is not intended to provide any right to the taxpayer or to a recipient of a notice to argue that insufficient efforts have been made by the requesting party to obtain the information by other means. To hold otherwise would open the door to lengthy examinations in the Royal Court of Jersey as to the processes which might have been followed in other jurisdictions, a course of action only liable to cause delay and not particularly relevant to the taxpayer or recipient of the notice. It is for the requested party to object if it considers that the requesting party could have obtained the information more directly in its own jurisdiction.

54 Linked to this point is the Applicant's objection that the Notices were issued by the First Respondent without warning, and without giving any reason to the recipient, nor any opportunity to make representations. It is said that that was unfair. In my judgment this objection cannot be sustained. In *Larsen (No. 1)*, the Court of Appeal made it plain that there was an obligation in some circumstances to give the opportunity for making representations, but the regulations which were then being considered were not the same as those which apply in the present case. The amendments which were made in 2012 were clearly intended to enable a more speedy transmission of tax information when a request was received. Accordingly, regulation 3(4) of the former regulations required the Comptroller, before giving a notice under that regulation, to allow the person of whom the requirement was to be made a reasonable opportunity to provide to the Comptroller the document or record concerned. That provision was removed in 2012. In *Larsen (No. 1)* Beloff JA said this at paragraphs 30 and 31:-

> ***"It is well established that fair procedures can (unusually) supplement any legislative scheme (primary or delegated) in so far as they do not frustrate the purpose of the scheme … While the 2008 Regulations contain no express provision for representations to be made by the person of whom the requirement is made as to why the request made does not justify a notice, Reg 3(4), as noted, provides for a 'reasonable opportunity' to that person to provide to the Comptroller the document or record concerned without the need for a notice.*** Reasonableness must, in our view, require not only making available sufficient time for such provision but also sufficient explanation as to why the information is required. There is nothing to prevent the person, given that opportunity, then to exploit it by making a case against such provision, which the Commissioner (sic) would be obliged to take into account before issuing a notice. Subject only to the circumstances set out in Reg 3(6) which prevent the Comptroller from disclosing certain matters from the person from whom the information is sought …, we were told by Advocate Kelleher for the Comptroller that there is no practical reason why the Comptroller should not inform the person of the substance of the request .
>
> ***31. Elementary fairness does seem to us, prima facie, to require the Comptroller to give the person the chance to make representations so as to avoid, it may be, entering into the terrain of notices and the possibility of penal sanctions for non-compliance therewith Reg 3 (as to which see Reg 15(2)).***"

55 In my view it is clear that the " ***reasonable opportunity***" provisions of regulation 3(4), which then existed provided the necessary introduction for the conclusion that reasonableness required not only making available sufficient time for that provision, but also a sufficient explanation as to why the information is required. The fair procedures which could supplement the legislative scheme were not then inconsistent with it. However, the amendments introduced to the Regulations in 2012 in my judgment carry with them the necessary conclusion that the type of fair procedures which the Court of Appeal had in mind in the extract cited above could not reasonably supplement the legislative scheme, because they would be inconsistent with it. Assuming the Regulations to be *intra vires*, which is the conclusion reached in *Larsen (No. 2)* and from which I will not depart as a court of equal jurisdiction dealing with directions without very good reason to do so, it appears to me that I should proceed for the moment on the basis that there is no longer any requirement to provide a reasonable opportunity for the taxpayer or recipient of the notice to provide the information without a notice or, prior to leave being granted, to set out reasons why the notice was issued and assistance given. That also seems to me to be consistent with the views expressed by Beloff Commissioner in *Larsen (No. 2)* at paragraph 30 of his judgment.

Lack of clarity over taxes

56 A number of points were raised under this general heading.

57 The first was that in the first respondent's affidavit, at paragraphs 8 and 9, Ms Moylan revealed that her view was that in the original request from the Swedish tax authority, one of the taxes in respect of which the information was sought was not covered by the TIEA. As a result she discussed the matter with the requesting authority and it was agreed that the request would be amended to reflect the issue identified with the original request. In his skeleton argument, Mr Harvey-Hills indicates that this is concerning and should be properly explained. I do not see any force in that argument. The issue is not whether information was disclosed pursuant to a request that was made and then withdrawn, but whether it is properly disclosable in relation to the request actually received. Another way of putting that is that it appears the applicant wishes to criticise the Comptroller for doing exactly what the Comptroller should do – namely to scrutinise the incoming application.

58 At paragraph 10 of her affidavit, Ms Moylan says that the request stated that as a Swedish resident the applicant was liable to tax there on all his income wherever it arose in the world, as well as on any income or distributions from any trust in respect of which he was either a settlor or a beneficiary. In addition he would be liable to tax on the profits of Jersey companies in respect of which he held a beneficial interest. This approach is criticised on a number of grounds, but the essence of the criticism is that more information should be given as to why the tax information is relevant to particular taxes which are due in Sweden. One potential criticism was that the Swedish Tax Authority and indeed the first respondent, might have misunderstood the nature of a trust. In my judgement such an approach is misconceived. The Royal Court is not to concern itself with any detailed examination of Swedish tax law. If the information in question is foreseeably relevant to the determination, assessment, recovery, enforcement or collection of a tax covered by the agreement and the first respondent has resolved to assist the requesting state, then it would seem to follow that it should be assimilated and disseminated. Whether there is an argument in Sweden that the tax assessment is incorrect is not for this Court to consider. The purpose of the agreement, and thus the purpose of the domestic legislation which gives effect to it, is to ensure the transfer of information to enable the tax dispute to occur in the jurisdiction where the tax is alleged to be due. Accordingly, despite Mr Harvey-Hill's submission, it is in my judgement not necessary to understand what is being said as to whether the Swedish Tax Authority recognises trusts, as to whether the Settlor is liable for tax on any income, or as to whether a beneficiary is liable for tax on income whether he receives a distribution or not. The information is *prima facie* foreseeably relevant to the assessment or collection of a tax, and provided that is so, it passes the threshold for a proper decision by the first respondent to collect the information and remit it to the requesting state.

59 Advocate Harvey-Hills submitted that unless foreign tax law is fully understood, there was no basis upon which one could be sure that the request fell within the TIEA, and in practice the Court would not be able to police it. In my judgement, that is another way of submitting that the Royal Court ought to make an enquiry into the legitimacy of any prospective assessment for tax which would include, if it made such an investigation, enquiry into the foreign tax law and also the underlying facts of the case. That is not in my judgement a course which this Court should follow. All we are concerned with is a review of the actions

of the first respondent against the classic judicial review tests of illegality, irrationality and procedural impropriety. One can see that there may well be circumstances where on the information provided the applicant would have sufficient grounds to challenge the notice – let me assume that he is the settlor but not a beneficiary of one of the trusts in question and that that trust has received income. If it be so that a Swedish resident is only liable for tax of a foreign trust where he is a beneficiary as opposed to a settlor, then it would be open to the applicant to put forward a case that there were no apparent vires for gaining the tax information about the trust in question because he was not a beneficiary, and he could put before the Court the relevant Swedish tax law which established that point. This is the counterpart to the presumption of regularity. Until there is some basis for believing that the information is not foreseeably relevant to the assessment or collection of one of the taxes mentioned in the TIEA, the presumption applies and the Court will not be drawn into ordering the disclosure of a stack of information to establish what is in fact presumed.

60 A similar point can be made in relation to the criticism that Ms Moylan indicates the request stated that the applicant would be liable to tax on the profits of any companies not named in the request in respect of which he held a beneficial interest. First of all Advocate Harvey-Hills says that it is unclear whether this means something different to being a shareholder. I do not follow that criticism. A beneficial interest may arise where a person is the registered shareholder, or it may arise where the shares are held by others upon some trust or nominee arrangement for him. The expression " *beneficial interest"* is therefore wider. Again that is perfectly clear, and the presumption of regularity means that the applicant would have to show that under Swedish tax law in relation to the relevant taxes, beneficial interests are not covered. The answer to the complaint that Ms Moylan may be referring to controlled foreign corporation taxation requirements is misplaced. If it is to be asserted that Swedish tax law requires a particular threshold level of ownership and that the applicant falls short of it, then that could have been asserted. Until that arises, one would have anticipated that the information is foreseeably relevant to the assessment, collection etc. of tax.

61 At paragraph 11 of her affidavit, Ms Moylan says that the request received provided reasonable grounds for saying that "Mr Haskell was a Swedish tax payer who was, for all or part of the period under review, the beneficiary of, or otherwise connected with the entities which were the subject of the Volaw notices and the JTC notices, and that these entities were, at the time the request was made, administered in Jersey".

62 Advocate Harvey-Hills raises a number of criticisms of this paragraph. He says first of all that when Ms Moylan uses the expression *"for all or part of the period under review"* it is apparent that she is not clear that the Swedish Tax Authority has reasonable grounds for requesting documents for the entire period, and if that should be the position, then it would be unreasonable to provide the information covering the entire period. I think that is a fair point which requires to be clarified. The applicant is entitled to know in respect of what period it is said that he is liable for Swedish tax and it is up to the Swedish Tax Authority to make it plain that it is not seeking information outside that period.

63 Advocate Harvey-Hills complains that the expression *"the beneficiary of"* is unclear – does this mean a shareholder, or something more? He also submits that it is unclear whether it is being stated that the applicant is the only beneficiary of the various trusts and companies. I do not think there is anything in this criticism. The expression *"the beneficiary of"* is obviously wider than the word *"shareholder"*. If there were no provision of the Swedish tax legislation in question which enables the Swedish tax authority to go outside the expression *"shareholder"*, then there would be a basis for criticising the decision to give effect to the request – but, once again, there is a presumption of regularity and until the applicant shows that the request goes wider than the tax law of the requesting state, there is no basis for further enquiry. A similar point can be made in relation to the expression *"or otherwise connected with"*, which again is either legitimate under the relevant Swedish tax legislation, or it is not.

64 Ms Moylan states that the request provided reasonable grounds for suggesting that the applicant has transacted with one account held by Barclays in Jersey. In my view that does not go far enough. The duty of candour requires the first respondent to say what the nature of that transaction was. For all one knows from such a statement, he may have made a transfer to a third party account at Barclays Bank in St Helier in settlement of a debt which is due. The applicant complains that the relevant notice requires the production of all accounts at Barclays to which the applicant is a signatory. I do not see any objection to that request provided that the request is limited to the period in respect of which the tax claim is made, and provided that the transaction, details of which presumably will be provided, foreseeably raises the possibility of other relationships between the applicant and Barclays. One can take judicial notice of the proposition that a person is not usually a signatory on a bank account without having some significant relationship to the account holder.

65 The applicant complains about the notice issued against Lloyds, on the basis of a relationship between the applicant and that bank. In my judgement, it is appropriate that the first respondent provides at least some detail of the basis upon which it is asserted that the relationship exists.

66 Advocate Harvey-Hills asserts that the first respondent has gone wrong where Ms Moylan says that "the STA advised that their reasoning regarding Mr Haskell's tax residence and liability to Swedish tax during the period covered by the Request had been upheld by the Swedish administrative court in 2015, and on appeal by the Fiscal Court of Appeal". It seems to me that there is a straightforward answer to this objection. If the applicant is in litigation with the Swedish tax authorities as appears to be the case, he will have a copy of all the relevant documentation which he can put before the Court in Jersey to establish the lack of reasonableness in the first respondent in accepting the assertions of the requesting authority; or, put another way, to demonstrate that the request of the Swedish tax authority in fact falls outside the scope of the TIEA and is therefore not legitimate. In my judgment the first respondent has gone far enough by indicating the basis upon which it is said that the notices are properly issued. Whether they are or not is a question which will be decided at the hearing of the application for judicial review. Similarly, the question as to whether the Applicant's place of birth in the USA rather than in Sweden is material to the issue of his tax

residence is something where the Court can make enquiry at the final hearing, and no explanation of the approach of the Swedish tax authority is in my judgement relevant or necessary.

67 Complaint is made of the notice issued to Volaw in relation to the applicant, which seeks "a full list of companies and trusts managed on behalf of Mr Haskell by Volaw Trust and Corporate Services Limited or any of its affiliates".

68 As Advocate Harvey-Hills correctly states in the skeleton argument, a company services provider provides services to a company. In so far as companies are concerned, if the applicant were to be beneficially entitled to 100% of the issued share capital of a company, it seems to me to be at least arguable to say that the company services provider may in some circumstances be described as managing the company on his behalf. This does not prevent technical arguments being run later: what is in question at this stage is whether there is any reasonable basis for the decision to seek information in relation to a company which is being administered by a company services provider in Jersey and where the majority shareholder is the tax payer in question.

69 As to a trust of which Volaw might be a trustee and the applicant a beneficiary, the question is a common sense question as to whether such a trust is caught by the language of the notice. Is it a trust *"managed on behalf of Mr Haskell"*? If Volaw is comfortable in saying that it did not manage the trust on behalf of a particular beneficiary who happened to be Mr Haskell, but on behalf of the beneficiaries as a whole, then the language which the notice has provided does not extend to providing information about such a trust. It is then open to Volaw to decline to answer that particular question upon the basis that although the applicant might be one of the beneficiaries, Volaw is confident that it does not manage the trust on his behalf. That is a question of fact and Volaw will know whether it is true or not in the case of any such trust.

70 I turn now therefore to the prayers for relief.

71 The applicant seeks an order that the first respondent files and serves within 28 days an affidavit which sets out the basis of and gives full reasons for the Comptroller's decision to issue the Notices, and exhibits all relevant documentary evidence referred to the in the affidavit of Ms Moylan. Advocate Meiklejohn on behalf of the first respondent submitted that if the Court considered that he had not succeeded on his argument, then the first respondent would prefer the Court not to make an order that a further affidavit be sworn, but to indicate that the arguments had been lost, and the first respondent would then consider how best to meet the objection, realising that if it did nothing, there might be some adverse inferences drawn at the time of the hearing for judicial review. I accept that is the appropriate approach to adopt. It enables the Court to draw inferences as to the lawfulness of the first respondent's actions having regard to the presumption of regularity and the objections which the applicant has raised to the Notices issued. It is apparent from what I have set out above that it appears to me that the affidavit of the first respondent currently

falls short of meeting the duty of candour in these respects:-

(i) There is no adequate explanation of why it is satisfied that the applicant was resident in Sweden for tax purposes for the relevant years.

(ii) For the reasons set out at paragraphs 49 and 50, there is further information that might be relevant, in connection with the duty of candour, insofar as concerns Sharmayne Finance Limited, Belleron Finance Limited, Hellifield Overseas Limited and Golden Impala Limited.

(iii) The period requested and reasons for it are unclear – see paragraph 62 above.

(iv) There is currently no sufficient information to justify the request in relation to Barclays in Jersey as set out at paragraph 64 above.

(v) There is similarly no sufficient information in relation to the Notice issues against Lloyds as set out at paragraph 65 above.

72 In these respects therefore, it is for the first respondent to consider whether some further affidavit evidence should be filed, and it has leave to do so provided that such affidavit evidence is filed within the next 28 days.

73 The applicant is permitted to file and serve affidavit evidence in response within 28 days of receipt of the first respondent's affidavit.

74 The application for leave to adduce expert evidence in relation to matters of Swedish tax law appertaining to the applicant's liability to pay Swedish tax is granted, and such expert evidence should be filed and served on the first respondent within 28 days of this judgment. The first respondent has 28 days in which to file expert affidavit evidence in response. I expect such affidavit to set out the Swedish rules on tax residence and on the extent to which tax assessments can be raised on settlors and beneficiaries of trusts. In making these orders I should like to emphasise that the Royal Court will not engage in an exercise to identify Swedish tax law. If there is any contention, the Court will proceed upon the basis that the first respondent cannot be considered as having acted unreasonably or unlawfully in circumstances where, on the evidence available to it, there is *prima facie* a basis for asserting that the information is foreseeably relevant to the administration and enforcement of the domestic laws of Sweden concerning taxes covered by the agreement. As has been said both in *Larsen No. 2* and before, the Royal Court is not the place to argue out issues of foreign tax law, on a judicial review of this kind. They can be argued out where it matters, namely in the requesting state.

75 The parties shall apply to the Bailiff's Judicial Secretary within seven days of this judgment being handed down in order to fix a date for the hearing of the application for judicial review with a trial estimate of two days. The applicant should file written contentions 56 days before the hearing and the First Respondent file written contentions 28 days before the

hearing. The applicant has leave to file any further written contentions in reply 14 days before the hearing, and must provide to the first respondent and to the Court agreed bundles 7 days before the hearing. There is liberty to apply.

76 There will be a pre-hearing review fixed by the Court at its convenience within 7 days of the filing of written contentions by the first respondent.

77 The costs of the current application will be costs in the cause. That was the application contained in the applicant's summons and it appears to me to be an appropriate order to make.