Application to set aside a Notice issued by the Director of Income Tax

[2019]GRC005

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

A TAXPAYER **Applicant**

-and-

DIRECTOR OF INCOME TAX **Respondent**

Dates of hearing: 2nd and 3rd October 2018

Judgment handed down: 11th February 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: **Advocate C H Edwards**
Counsel for the Respondent: **Advocate J Hill**

Cases, Texts & Legislation referred to:

The Income Tax (Guernsey) Law, 1975
A Taxpayer v Director of Income Tax [2016] GLR 382
The Royal Court Civil Rules, 2007
Larsen v Comptroller of Taxes 2015 (1) JLR 430
R v Lancashire County Council, ex parte Huddlestone [1986] 2 All ER 941
Haskell v Comptroller of Taxes 2017 (1) JLR 230
Harrods Ltd v Times Newspapers Ltd [2006] EWCA Civ 294
R (Derrin Bros Properties Ltd) v First-tier Tribunal (Tax Chamber) [2016] 1 WLR 2423
Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited
R (Al-Sweady) v Secretary of State for the Defence [2009] EWHC 2387 (Admin)
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
The Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991
The Income Tax (Guernsey) (Approval of Agreements with India, Japan, Poland, Seychelles and St Kitts and Nevis) Ordinance, 2012
Secretary of State for Education and Science v Tameside MBC [1977] AC 1014
MH Investments v Cayman Islands Tax Information Authority (2013) 16 ITLR 274
The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015
The Indian Evidence Act, 1872
Selvi J Jayalalitha v Union of India (2007) 288 ITR 225 (Madras)
OECD, *Agreement on Exchange of Information on Tax Matters*
Woolmington v DPP [1935] AC 462
The Human Rights (Bailiwick of Guernsey) Law, 2000
The European Convention on Human Rights
The Universal Declaration of Human Rights

Sheldrake v DPP [2005] 1 AC 264
The Road Traffic Act 1988
R v Carr-Briant [1943] 1 KB 607
Sodeman v Regem [1936] WN 190
R v Keogh [2007] 1 WLR 1500
The Official Secrets Act 1989
R v Lambert [2002] 2 AC 545
R v Director of Public Prosecutions, ex p Kebilene [2002] 2 AC 326
Bamberski v Krombach [2001] QB 709
Comptroller of Income Tax v BKW (2013) ITLR 344
Comptroller of Income Tax v AZP [2012] SGHC 112
Salabiaku v France (1988) 13 EHRR 379
Janosevic v Sweden (2004) 38 EHRR 22
Sweet v Parsley [1970] AC 132
The Offences (Fixed Penalties) (Guernsey) Law, 2009
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
R (RP) v London Borough of Brent [2011] EWHC 3251 (Admin)
Iyadurai v Secretary of State for the Home Department [1998] Imm AR 470
ZT (Kosovo) v Secretary of State for the Home Department [2009] 1 WLR 348
R (Derrin Brother Properties Limited) v HMRC [2014] EWHC 1152 (Admin)
APEF Management Company 5 Limited v Comptroller of Taxes [2013] JRC 262
OECD, *Update to Article 26 of the OECD Model Tax Convention and Its Commentary* (2012)
Volaw Trust & Corporate Services Ltd v Office of the Comptroller of Taxes (2013) 17 ITLR 1
Acturus Properties Ltd v Attorney General 2001 JLR 43
The Investigation of Fraud (Jersey) Law 1991
Volaw Trust & Corporate Services Ltd v Office of the Comptroller of Taxes (2013) 16 ITLR 758
The Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013

Introduction

1. The primary relief sought in these proceedings is the setting aside of a Notice issued by the Director of Income Tax on 30 August 2016 to a trust company (to which I will refer as T Limited) pursuant to section 75B of the Income Tax (Guernsey) Law, 1975, as amended. That notice required T Limited to provide documents and furnish information within its possession about the Applicant, as well as a company incorporated in the British Virgin Islands (X Limited) and two trusts (the Y Trust and the Z Trust).

2. Leave to pursue this action was granted by the Court of Appeal (see para. 44 of the judgment at [2016] GLR 382, which contains some background information). Despite the hope of the Court of Appeal that these proceedings would be brought to a conclusion as soon as reasonably possible, as expressed at para. 45, certain procedural and other issues have delayed matters, as I will in due course explain. I have also borne in mind the guidance set out in paragraphs 46 to 48 of that judgment, recognising that this is the first occasion in which a notice issued following request made pursuant to a Tax Information Exchange Agreement ("TIEA") has been challenged.

3. At para. 11 of its judgment, the Court of Appeal dealt with whether the hearing before it should be in public or private. The proceedings before this Court have been in public, but I will adopt the approach of the Court of Appeal and anonymise this judgment, which will ensure that the private nature of the underlying information is protected. That is in accordance with an Order made by the Court of Appeal on 14 December 2016, as substituted

by a Consent Order made by the Bailiff on 12 January 2017, on the basis that neither party has sought any different order.

4. At the conclusion of the hearing in October, I reserved judgment. I now set out in this judgment my reasons for dismissing the Applicant's action and declining to grant any of the relief sought by the Amended Cause.

Specific disclosure

5. Before I turn to the substance of the Applicant's appeal, I will briefly set out the reasons for the decisions I took on the Applicant's applications for specific disclosure. The initial application was dated 21 December 2016. A further application dated 3 January 2017 was made. These applications were consolidated into a single amended and consolidated application dated 21 April 2017 and the hearing of that application took place on 24 August 2017. It was made pursuant to rules 71 and 73 of the Royal Court Civil Rules, 2007 and/or the inherent jurisdiction of the Court and sought specific disclosure of (a) various documents that had been referred to in the Respondent's evidence but not disclosed, (b) other correspondence and notes of meetings, and (c) internal documentation, correspondence and notes.

6. The application succeeded in part and I outlined my reasons for that decision at the time. Although I was not persuaded that rules 71 and 73 were directly engaged in respect of a claim made by way of judicial review, I was satisfied that some of the material sought by the Applicant ought to be provided by the Respondent but that some of what had been sought did not fall to be disclosed primarily because it was too far removed from the central issues in the proceedings about the legality of the Notice issued by the Respondent to T Limited. In reaching that decision, I was conscious that there were certain legitimate lines of enquiry open to the Applicant arising from the documents already referred to in the Affidavit evidence on which the Respondent wished to rely, but that the breadth of disclosure sought by the Applicant also strayed into what appeared to be a fishing expedition.

7. At para. 46 of the judgment of the Court of Appeal given by Bailhache JA, the issue of what the Applicant might be entitled to see was touched on:

> "*… the Director must act rationally in the exercise of his powers, and for the purposes for which the power exists. This does not mean that he must examine critically the letter of request, nor does it mean that the applicant for judicial review is necessarily entitled to see that request. There are, of course, the competing requirements of respecting the European Convention rights, including the art. 8 rights of those affected, including the appellant, and the right of disclosure necessary to assess the proportionality of any interference with those rights, on the one hand, and of the proper response, on the other, to a request from a treaty partner where there is the obviously legitimate purpose, now clearly recognized internationally, of ensuring that taxes which are due in the country where they arise are accurately assessed and paid. This issue will arise in the Royal Court in the present case and we have not had put before us all the information which will necessarily be relevant to determining the application so we shall say little about it – but although we have not been addressed on it, it appears to us that there should be at least some plausible ground advanced on which it can be said that the appellant needs to see the request to make representations which are to be properly advanced on judicial review.*"

8. The Royal Court of Jersey had already tackled the principles applicable to applications for specific disclosure in similar proceedings. Both Advocate Edwards for the Applicant and Advocate Hill for the Respondent referred to the summary given by Commissioner Beloff QC

in *Larsen v Comptroller of Taxes* 2015 (1) JLR 430. Those principles arose from consideration *inter alia* of what Sir John Donaldson MR had observed about the duty of candour in *R v Lancashire County Council, ex parte Huddlestone* [1986] 2 All ER 941, on which Advocate Edwards relied. Once an applicant for relief by way of judicial review satisfies the Court that there is an entitlement to make the application, "*it becomes the duty of the respondent to make full and fair disclosure*". At para. 17 (also cited with approval at para. 10 of *Haskell v Comptroller of Taxes* 2017 (1) JLR 230), the Commissioner stated:

> "*In my view the following propositions can be extracted from Huddlestone 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 countervailing considerations, e.g. 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 any 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 penalized 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' …*".

I took the view that this summary offers helpful guidance as to the approach to be taken in this jurisdiction.

9. Underlying the approach to be taken, however, is a requirement that the material sought is relevant to the issues to be determined in the proceedings. As noted in *Harrods Ltd v Times Newspapers Ltd* [2006] EWCA Civ 294, on which Advocate Hill relied, regard must be had to the pleadings to see what is in dispute. Although the Cause was subsequently further

amended, at the time of this application it was apparent that one of the bases on which the Applicant was challenging the Notice issued by the Respondent was the change in the letter of request from it being a civil tax matter to it being a criminal tax matter, thereby enabling information to be sought in respect of periods before the entering into force of the TIEA. Accordingly, I was satisfied that a previous letter of request was relevant to ascertain whether it demonstrated that this change of position existed. However, any earlier letters of request on the same basis struck me as moving further away from the decision that was the subject of the proceedings and so looked more like hoping that something further would turn up than being directly relevant to the Notice itself.

10. Advocate Edwards also drew attention to the way in which the evidence by then filed on behalf of the Respondent placed reliance on the presumption of regularity and how that impacted on the need for the Applicant, and in time the Court, to be apprised of the process that led to the decision taken and subject to review. Whilst recognising the existence of a presumption of regularity (as explained, eg, in ***R (Derrin Bros Properties Ltd) v First-tier Tribunal (Tax Chamber)*** [2016] 1 WLR 2423), in the ***Haskell*** case, the Royal Court of Jersey stated (at para. 46) that it was not enough for someone on behalf of the Comptroller to say she was satisfied on a particular point:

> "*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 Authority requires her to be satisfied that the request of the Swedish Tax Authority 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.*"

11. I was satisfied that some of the material sought on behalf of the Applicant met these requirements. It would have been artificial, in my view, to treat the final letter of request in a series of transactions between the Respondent and the requesting tax authority as if it had been reviewed in isolation. I was satisfied that the history would have been in the mind of the decision-maker as was clear from the documentation in which that final letter of request had been analysed. As such, some further disclosure was ordered on the basis that, as stated in the English Court of Appeal in ***Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited*** [2002] EWCA Civ 1409 by Laws LJ (at para. 50), there is "*a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide*", which was emphasised in ***R (Al-Sweady) v Secretary of State for the Defence*** [2009] EWHC 2387 (Admin), a decision to which Advocate Edwards drew my attention. As will become clear later in this judgment, one of the issues for determination is whether the letter of request referring to a criminal tax investigation was properly founded as such or simply an expedient means to overcome what had been pointed out before as problematic given the date range of the information sought. Accordingly, some material showing what the previous position had been was, in my view, disclosable. However, I did not agree with the Applicant's contention that everything from the first contact by the requesting tax authority with the Respondent was relevant because that would depend on what was contained in the material ordered to be disclosed before being able to assess whether anything from an earlier

period was genuinely relevant. The application threw the net too widely. If reviewing the material showed that other material was relevant, a second application could be pursued. In my view, this type of "staged approach" was consistent with the principle that disclosure in judicial review proceedings is not the same, or as extensive, as in an ordinary civil action.

12. Such an application was then made dated 24 October 2017. It resulted in a further order for disclosure being made on 7 December 2017. Once again, the application was only partially successful. A second attempt was made to obtain disclosure of earlier letters of request. I was satisfied that they were unnecessary as not being relevant to the decision being challenged given what was shown through disclosure of the preceding round of exchanges prior to the request which the Respondent then accepted as the basis for the Notice to T Limited. There was also application for correspondence with T Limited to be disclosed, but I rejected that element of the application because the informal notice to which it related was not the subject of the current proceedings and so amounted, in my view, to a fishing expedition. The one element of the application that was successful, applying the principles to which I have just referred, was in relation to some materials that were referred to in one of the documents that my first order led to being disclosed. Given the connection to something that had already been disclosed, I was satisfied that the two documents sought were potentially significant because they would enable that material to be placed into its proper context and so granted that paragraph of the application.

Expert evidence

13. The other procedural matter that resulted in some delay to the final hearing taking place related to expert evidence. Because of the relevance of Indian law in relation to the position of the requesting authority, permission was granted to both parties pursuant to rule 10 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 to adduce reports and, if necessary, responses to each other's reports by an order dated 9 March 2018.

14. As a result of this order, I have been provided with an Opinion from Arvind Datar, a Senior Advocate, dated 3 July 2018, and a Legal Opinion of Tushah Mehta, the Additional Solicitor General of India, dated 1 July 2018, and an Expert Report in Reply from Mr Datar dated 31 July 2018. I will refer in more detail to the contents of these helpful Opinions, which are broadly consistent on the issues that most assist me, in due course.

Other evidence

15. Given the number of interlocutory hearings in this matter, there was a considerable amount of Affidavit evidence before the Court. For example, the Applicant has sworn ten Affidavits. The first of those Affidavits was sworn on 27 September 2016 and was directly in support of the Applicant's challenge to the Notice issued to T Limited. There followed a series of Affidavits filed in relation to the Applicant's appeal to the Court of Appeal, prior to the substantive response, once leave to proceed had been given, on behalf of the Respondent in the form of a Second Affidavit affirmed by the Compliance & International Manger at the Income Tax Office on 9 March 2017 and the Second Affidavit of the Deputy Director of Income Tax (Compliance & International) sworn on 10 March 2017. Both have acted under powers delegated to them by the Respondent under the Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991, meaning that each is able to act as the Competent Authority for the purposes of Guernsey's international tax agreements. There followed a series of Affidavits in relation to the Applications made by the Applicant for specific disclosure and inspection and for leave to amend the Cause. The Applicant's substantive response to the two Second Affidavits filed on behalf of the Respondent came in the Applicant's Tenth Affidavit sworn on 15 February 2018.

16. I have taken into consideration all the written evidence and materials placed before the Court, although I have concentrated on the four Affidavits to which I have just made reference because they relate to the evidence in support of the Applicant's claim and in opposition to it.

The facts

17. The Notice to T Limited dated 30 August 2016 states that it is made under section 75B of the Income Tax (Guernsey) Law, 1975, as amended. It explains that that section authorises requirements to provide documents and furnish information which are in the recipient's possession or power and which, in the opinion of the Competent Authority are, or may be, relevant to an inquiry into the liability to tax of any taxpayer, including giving assistance to another jurisdiction. It identifies that the Respondent had received a request for assistance under the TIEA between Guernsey and India and that the Compliance & Investigation Manager had carried out a review of the request "*and, taking into account the content of the request as a whole, ... concluded that the request has been made in accordance with the provisions of, and for the purposes of*" that TIEA. It identified the Applicant as the taxpayer with whose liability to tax the Respondent was concerned and mentioned X Limited and the Y Trust and the Z Trust as connected entities. The documents and information were required to be provided by way of certified copies and the period specified was from 1 April 1999 up to and including 31 March 2015 or, if later, from the date of creation or incorporation. Under the heading "Trust Information", details of all trusts connected to the Applicant where the Applicant is or was a settlor, protector or beneficiary were required, with more detailed explanation of what this would include also set out. Under the heading "Company Information", details of X Limited (including when it was known by a different name), including names and addresses of directors, shareholders and beneficial members and how its capital is allocated, were required.

18. The letter of request that led to this Notice was dated 16 December 2015 ("the December request"). It was sent by the Indian Tax Authorities ("the ITA") as the Competent Authority of the requesting State to the Respondent as the Competent Authority of the requested State. It was received on 30 December 2015. That letter indicated that previous requests for exchange of information could "*be considered closed*" and continued:

> "*The Indian Tax Authorities have requested information as per the 'Annexure' to this letter, which we believe is foreseeably relevant for the purposes of implementation of the Indian Income-tax Act, 1961. Your assistance is solicited to provide the specific information as per the 'Annexure' attached with this letter, as per the provisions of 'Exchange of Information' Article of Indo-Guernsey Tax Information Exchange Agreement.*
>
> *I assure you that this request is in conformity with the laws and administrative practices of India, and I confirm that if the requested information was within India, then the Competent Authority would be able to obtain the Information under the Tax Laws of India in the normal course of administrative practice. I further confirm that all the means available to Indian Tax Authorities have been pursued in India to obtain the Information, except those that would give rise to disproportionate difficulty in this regard.*"

19. The Annexure referred to appears to be a pro forma, although the ITA has not used the TIEA request template that the Income Tax Office publishes within its Procedural Manual on Exchange of Information, a copy of which the Deputy Director exhibited to his Second Affidavit. It does, however, follow a similar pattern and appears to have been developed by the ITA from the template made available by the Organisation for Economic Co-operation and Development ("OECD"). Box 11 on the form sets out the tax purpose for which the

information is requested, and the ITA has checked the box stating "*investigation or prosecution of tax matters*". Box 6 also indicates that an urgent reply is required due to "*Suspected fraud*" and that "*The information requested is essential for prosecution, appeal proceedings and penalty proceedings*". In Box 12 ("Relevant background"), the following information is given:

> "*A search and seizure action under section 132 of the Income Tax Act, 1961 was carried out on 25.08.2011 at the business and residential premises of [the Applicant].*
>
> *It was gathered that [the Applicant] is one of the beneficial owners in the account in the name of [X Limited] with HSBC Bank, Geneva, Switzerland. This bank account and income arising from this bank account ... [*NB there is apparently some text missing here in the copy provided*... [X Limited] was incorporated in the British Virgin Islands [in February 2004] by [the original administrator of X Limited]. Thereafter, from 1 November 2004, [T Limited] was appointed Directors of [X Limited]. Subsequently [in October 2009], name of [X Limited] was changed ...*
>
> *It is believed that the beneficial ownership of [X Limited] from 31.03.2004 until 29.10.2010 was held by four private family trusts of which [T Limited] Group companies were trustees. [T Limited] resigned as Director of [X Limited] on 29.10.2010. Thereafter, [three named individuals, but not including the Applicant] were appointed as directors. It is believed that now [S Limited] is new trustee and [V Limited] is new administrator for these trusts.*
>
> *It is apparent that [the Applicant] designed a complex multi-layered web of trust and companies to conceal [the Applicant's] unaccounted income. Therefore, information regarding [X Limited] and [the Applicant] is being requested from Guernsey.*
>
> *This investigation is "criminal" tax investigation and the information requested is very much essential for successful prosecution of [the Applicant].*
>
> *The Indian Income Tax Act, 1961 allows assessment of last 16 years in respect of foreign asset/income. In this case, the action in respect of the earliest of the 16 years would expire on 31.03.2016.*"

Appended to this pro forma Annexure is a further Annexure in which the ITA set out the information to be furnished pursuant to the letter of request.

20. On 7 January 2016, the ITA acknowledged that the Respondent had sent a letter of acknowledgement of receipt of the request and provided a complete copy of the request (which arose because a page had previously been omitted). A TIEA Request Review Document was completed on 12 January 2016 by a Compliance and Investigation Analyst and it was counter-signed by the Compliance & International Manager on 22 January 2016. He was in agreement that the request could be processed, subject to receiving clarification from the ITA that previous requests had been withdrawn prior to proceeding with the December request. There was also an issue about the poor photocopying of the information requested, the bottom of the first page being incomplete. (Nothing, however, was said about what appears to be poor copying in relation to the content of Box 12, which appears to have at least one line of text missing, as noted when I quoted it above. In the Second Affidavit of the Compliance & International Manager, he explains he was of the opinion that "*the missing text from the background was minor in nature*".) Because there was no response to the request to the ITA for clarification, the Compliance and Investigation Analyst sent a further e-mail on 5 August 2016. This elicited a letter from the ITA on 12 August 2016 confirming that the prior

requests were withdrawn. Once the Respondent received this, he was able to proceed to issue the Notice to T Limited.

21. The TIEA Request Review Document, therefore, contains the analysis undertaken of the ITA's December request. Although the Affidavit evidence subsequently filed in these proceedings explains the process more fully, this is the contemporaneous record of what was considered prior to issuing the Notice to T Limited. It first sets out background information concerning previous requests. The earliest requests referred to were dated 18 December 2014 and explained that on 11 February 2015 "*a letter was sent to India concerning each of the above TIEAs outlining substantial deficiencies with the requests*". It records that on 30 March 2015, three new revised requests were received and that on 10 July 2015 a letter of deficiencies was sent in relation to them. Because only a partial response was received, a further letter was sent on 17 September 2015, which "*also contained new information as a result of our s75D enquiries with [X Limited]*". Six new requests were received on 25 September 2015, and they crossed in the post with the letter dated 17 September 2015. As a result, key information in that letter had not been taken into account. Then the December request arrived. In the next section of the Review Document, information required to satisfy overall conformity with the TIEA is set out. It notes that the request relates to the investigation or prosecution of tax matters and is criminal in nature. It identifies that the request extends beyond the 16 years permitted by Indian law, which appears not to have been adjusted from wording used in earlier requests. It continues:

> "*From open source information it would appear that India received intelligence that [the Applicant's] extended family had circa US$53 million in hidden bank accounts in Switzerland. (This information being leaked via Wikileaks).*
>
> *It would appear logical that this information formed part of the grounds in [sic] which the Indian tax authorities executed a search warrant under section 132 of the Indian Tax At 1962 [sic] on the premises of [the Applicant] on 25 August 2011.*
>
> *As a result of this search the Indians obtained evidence in support of the alleged, undisclosed accounts held with HSBC Bank, Geneva. …*
>
> *In our letter of 17 September 2015, we suggested in any revised request that it may be helpful to use a suitable edited version of our standardised question set for trust and companies. India appear to have welcomed this suggestion as can be seen from their revised question set, where they have utilised our trust and company questions as follows with no changes to our recommended text …*".

In the section describing the nature of the activity being examined or investigated, the Review Document states (at 10.1): "*India need to determine the tax liability of [the Applicant] with regards to [the Applicant's] worldwide income in accordance with Indian's tax legislation. On the back of the identified undisclosed accounts held with HSBC in Geneva, they suspect that [the Applicant] may have undisclosed funds held in Guernsey which would be liable to taxation.*" In relation to whether the information requested is foreseeably relevant, the Review Document states (at 11): "*India are concerned that the named Indian taxpayer has undisclosed income in Guernsey via the company [X Limited]. This could potentially incur a tax liability in India and/or tax evasion offences.*"

22. By a letter dated 21 September 2016, the Applicant's Advocates invited the Deputy Director to withdraw the Notice to T Limited. That letter set out the arguments that have been repeated in these proceedings. The Deputy Director's reply dated 23 September 2016 indicated that he was satisfied the Notice was valid and so declined to withdraw it.

23. In order to place the December request into context, it is necessary to refer to certain other events and documents prior to its receipt.

24. The letter of 17 September 2015, sent by the Compliance & International Manager to the ITA, to which reference is made in the TIEA Request Review Document, dealt with the position as it then stood, which related to the requests from the ITA received on 30 March 2015. It set out some factual information about X Limited, referring to the beneficial ownership of the company being held from 31 March 2004 until 29 October 2010 by four family trusts of which T Limited Group companies were trustees. The letter further explained that the Applicant was a discretionary beneficiary of two discretionary trusts of which T Limited was trustee and that the Applicant had been a discretionary beneficiary of another discretionary trust that had been closed in 2006 when the assets were settled into one of those other two trusts, which in turn were two of the trusts beneficially owning X Limited. That information had been obtained from T Limited following a notice served under section 75D(5) of the 1975 Law. This letter enclosed two organisational structure charts showing the position when T Limited was involved and when it was not. The letter contained the sample trust and company questions that the ITA might find it useful to edit for use in any future request. The letter also stated:

> "*Under section 11 of your previous requests, you have explained that the information required is for the "determination, assessment and collection of taxes". To avoid any potential confusion and to ensure clarity, it would be helpful if the tax purpose for which the information is requested is detailed in the body of the main request emulates that detailed in any supporting annexures i.e. clearly identifying whether the request relates to a criminal or civil investigation in both sections.*"

25. The notice served on 30 July 2015 on T Limited was issued by the Deputy Director. It indicated that he was "*currently considering issuing a notice to you under section 75B of the Law relating to*" X Limited and the Applicant but, before doing so, he required T Limited to furnish information to him. The Deputy Director wished to know if X Limited is known to T Limited and, if so, in what capacity and he also required "*an outline summary of the information/documents in your possession or power relating to the formation of the company, the beneficial ownership of the company and the company's activities during the period 1 April 1998 to 20 March 2015*". He asked if the Applicant was known to T Limited and, if so, in what capacity.

26. By way of example, one of the requests received on 30 March 2015 and which is dated 20 March 2015 ("the March request") shows in Box 11 that the box relating to "*determination, assessment and collection of taxes*" has been checked, as has "*other*", with the addition of "*The assessee may be liable for prosecution*". The Annexure to that request includes the following facts in para. 1:

> "*a. In pursuance of information received by the Government of India, that the said payer has undisclosed and untaxed overseas assets, with HSBC Bank, Geneva, including such investments in [X Limited] …, investigation proceedings were commenced against [the Applicant] for the purpose of taxation of such undisclosed assets, in violation of the provisions of the Indian Income Tax Act, 1961.*
>
> *b. The investigation proceedings and the subsequent conduct of the said tax payer revealed an intentional/wilful attempt to evade income tax and also making statements that are known to be false (or does not believe to be true). Thus, investigation proceedings have been initiated against the said tax payer.*

c. In the meanwhile, due to utter non cooperation on the part of the said tax payer, since the said undisclosed assets are not situated in India, but are based and managed abroad, the only means available to the Indian tax authorities, to obtain the requested information, is through recourse to the provisions of the TIEA with Guernsey, which mandate the exchange of such information as mentioned in the said TIEA."

At para. 3.a of the Annexure, it is confirmed that "*the request for information relates to investigation or prosecution of a criminal tax matter involving an intentional conduct on the part of the said tax payer.*" The covering letter also explains that the ITA hoped that its further request had taken care of all the clarifications and suggestions made on behalf of the Respondent, which were said to be "*broadly on points like nature (civil/criminal) of investigation, determination of period for which documents were sought, correct spelling of the Indian Entity, foreseeable relevance of the request being made etc.*".

27. The Deputy Director (Compliance & International) responded to the March request in a letter dated 10 July 2015. That letter identified one overriding aspect on which further input was sought. It related to the indication in Box 6 that an urgent reply was sought because "*The scrutiny assessment in the case of the person under reference shall be barred by limitation on 31.03.2015, however, the information may be useful even after this date.*" Given that the request was only received on the day before the date mentioned, the Deputy Director pointed out that complying with it would have been practically impossible. However, in light of the addition of an indication that the information sought might be useful even after the statute of limitation date specified, the Deputy Director enquired about how the requested documents and information will remain foreseeably relevant to the purpose of the ITA's request. The letter also stated:

> "*I would also like to thank you for confirming that your request for information relates to the investigation of a criminal tax matter in section 3a of your Annexure. I have, however, noted that in section 11 of the request, you have continued to detail that the information required is for the "determination, assessment and collection of taxes", which I appreciate you then state under "other" that "the assesse [sic] may be liable for prosecution". To avoid any confusion in relevant future requests (i.e. where the provisions of Article 14(2)(a) of our TIEA are relevant), and with the greatest of respect, it would be helpful if, when making a request which satisfies the provisions of Article 14(2)(a) of our TIEA, you specify in section 11 of your request template that this request does relate to a "criminal tax matter" (as opposed to the possibility that the Indian authorities may be able to pursue the prosecution of the civil tax matter).*"

28. There is a considerable amount of further detail provided in the Applicant's ten Affidavits. Whilst I have considered carefully the content of each, I do not think it is necessary to extract more than a high level overview of certain matters, principally dealt with in the Applicant's First Affidavit. The ITA's investigation of the Applicant arose from a leak of documents and the subsequent receipt by the ITA of information from the French Government under the terms of a double taxation agreement India has with that country. The particular document in issue, referred to as a Base Note, is written partially in French and appears to link the Applicant with X Limited and an account that company has with HSBC Bank in Geneva. The balance in that account hit its peak in 2006. It was this Base Note that led to the search and seizure action by the ITA. Reference is also made to a number of interviews the Applicant attended with the ITA. The Applicant indicated that one of the Applicant's uncles might be able to assist about X Limited. The Applicant refers to, and relies upon, the information provided to the ITA by that uncle and exhibits a letter dated 22 December 2011 sent by HSBC Private Bank (Suisse) SA to the Applicant's uncle, which refers to X Limited and explains

that persons, including the Applicant, had not "*visited nor opened nor operated the Account of the above named company with the Bank*", and had not "*initiated any transactions with the bank in relation to the Account*" and that the Bank's "*files do not reflect any receipts or payments made from or to the above individuals in relation to the Account*". Notices containing detailed revised assessment orders were given to the Applicant dated 31 March 2015. Reference is made therein to the Base Note proving beyond doubt that the Applicant, as assessee, "*has beneficial interest in the bank account under consideration*" and those assessments comment adversely upon the Applicant's refusal to sign a consent waiver form enabling the ITA to seek information from the Bank. The Applicant has appealed these revised assessment orders. The Applicant has also been made subject to a civil penalty. The Applicant has not been informed that any criminal investigation is underway.

29. I do not need to refer in detail to the evidence given on behalf of the Respondent. However, in the Compliance & International Manager's Second Affidavit, he does comment comprehensively on the approach he took to considering the December request in the light of how the TIEA Request Review Document had been completed by reference to the content of the TIEA. In particular, and because it is relevant to one of the elements on which the Applicant challenges the lawfulness of the Notice to T Limited, in respect of the tax purpose for which the information was sought, he refers to the content of Box 12, to which reference has already been made, and explains:

> "*It was therefore apparent to me from the information provided by India that the purpose of their request was being made in the context of an ongoing criminal investigation, in order to determine the full facts. As such at this early stage in their investigation, I was aware that specific criminal proceedings had not commenced at this time. …*
>
> *In order for a matter to be considered a "criminal tax matters" [sic], it needs to be considered by the Competent Authority of the Republic of India as intentional conduct, which is liable to prosecution. As already stated above, I was aware that the purpose of India's request, was with a view to obtain evidence for criminal legal proceedings. To clarify, it does not require the criminal proceedings to have commenced at the time of the request.*
>
> *In relation to "intentional conduct", I would not expect, nor would I require that this be evidenced by the Republic of India when making a request. When considering this aspect, I am cognisant of the guidance given by the OECD on the 2002 Model Agreement, which states that when considering this definition it "… does not create an obligation on the part of the applicant Party to prove to the requested party an element of intent".*
>
> *From the perspective of Guernsey making a similar request of the Republic of India on the basis of "criminal tax matters", it would be the case that sufficient belief would need to be in the mind of the Director, at the time of the request, that the taxpayer (who was to be the subject of a request under the TIEA) had acted with intent resulting in a failure to comply with the requirements of the Income Tax (Guernsey) Law, 1975, as amended and if the documents and information to be requested from India supported/evidenced the Director's belief then the Director would refer the matter to Her Majesty's Procurer [sic] for consideration of prosecution, in accordance with section 201 of the Law. In such a case, the Director is satisfied a request could be sent to the Republic of India on the basis that Guernsey considered this as a "criminal tax matter". On receipt of the requested information and documentation, this would then either help to further establish the suspected intentional conduct of the taxpayer or alternatively dispel this. This explanation is*

given to demonstrate how such a request is seen in the reverse from the Republic of India, when considering such matters.

As such, I was satisfied by the statements provided by the Republic of India that they considered this to be a criminal matter which, at the time of making the request, is intended to be prosecuted within the Republic of India and as such, would be considered to be "criminal tax matters" as defined in the TIEA."

There is one other paragraph to which I will refer (para. 45):

"*Each request for information under a TIEA is considered by the Director to stand apart and is reviewed based on the content of that request. This is also reflected in the request under the TIEA, where in part 5 of the request, the Republic of India have considered this to be an "Initial request". As such, although the request review document includes reference to earlier requests, this is included solely for internal (within the Income Tax Office) information purposes and did not factor into the consideration given as to whether the request received on 16 December 2015 was in conformity with the TIEA.*"

30. It is against that factual background, taken from the entirety of the evidence before the Court, that the lawfulness of the Notice to T Limited on 30 August 2016 falls to be assessed.

Statutory framework

31. Section 75B of the 1975 Law, as amended, provides:

"*(1) The powers conferred by this section may be used for the purpose of inquiring into the liability or the amount of the liability to tax of any person (**"the taxpayer"**), or for the purpose of the enforcement of any such liability and the collection and recovery of any amount due, or for the purpose of the implementation (within the meaning of section 75CC) of any approved international agreement or any provision thereof, in any case in which the Director believes it necessary or desirable to do so for the purpose of performing his functions.*

(2) Subject to the provisions of this section, the Director may by notice in writing require any person other than the taxpayer to deliver to the Director or, if required to do so by the Director, to make available for inspection by the Director, such documents, and to furnish the Director with such information, as are in that person's possession or power and which (in the Director's opinion) are, or may be, relevant to –

(a) any liability to tax to which the taxpayer is or may be, or may have been, subject, and

(b) the amount of any such liability and/or

(c) the enforcement of any such liability and the collection and recovery of any amount due.

(3) Before a notice is given to a person by the Director under subsection (2), that person must be given a reasonable opportunity to deliver or make available the documents in question or to furnish the information in question voluntarily, unless the

Director believes that that would prejudice the inquiry to which the document or information relates or the performance by the Director of his functions. …

(5) To comply with a notice under subsection (2), copies of documents may be delivered instead of originals, but –

(a) the copies must be in such form as the Director may specify, and

(b) if so required by the Director, the originals of the documents must be made available for inspection by the Director in accordance with the requirement,

and a failure to comply with a requirement under this subsection constitutes a failure to comply with the notice under subsection (2).

(6) A person who without reasonable excuse fails to comply with any provision of a notice under subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding twice level 5 on the uniform scale and to a further fine not exceeding level 3 on the uniform scale for each day on which the failure to comply continues after the date of conviction."

Section 75C further provides:

"*(1) Subject to subsection (2), the Director of Income Tax may exercise his powers under section 75A and 75B if, pursuant to the provisions of an approved international agreement, a request for information is made to him by the competent authority of a requesting state.*

(2) The Director of Income Tax must be satisfied that the request for information is made in accordance with the provisions of, and for the purposes of, the approved international agreement pursuant to which it is made.

(3) The Director of Income Tax may ask the competent authority for further information, documents and particulars in support of a request for information.

(4) In this Part of this Law –

***"approved international agreement"** means an agreement or arrangement providing for the obtaining, delivery, making available, furnishing and/or exchanging of documents and information in relation to tax, which is made between the States of Guernsey and the government of another territory, or which is otherwise binding upon Guernsey and governed by international law (including, without limitation, an agreement which has been acceded to or ratified by the United Kingdom on behalf of Guernsey), and which is specified for the purposes of this Law by Ordinance of the States,*

***"competent authority"** means the person or authority designated by the requesting state as the competent authority for the purposes of the approved international agreement pursuant to which the request for information is made or specified as the competent authority for the purposes of this Law by regulations of the Committee, and*

"requesting state" *means the party to the approved international agreement on behalf of which the request for information is made.*

(5) This section is without prejudice to the generality of sections 75A and 75B."

32. The Income Tax (Guernsey) (Approval of Agreements with India, Japan, Poland, Seychelles and St Kitts and Nevis) Ordinance, 2012 specifies *inter alia* that the TIEA the States of Guernsey signed with the Republic of India on 20 December 2011 is specified for the purposes of the 1975 Law pursuant to section 75C. The definition of "implementation" of an approved international agreement or any provision thereof to which reference is made in section 75B(1) of the Law found in section 75CC "*includes the enforcement or enactment of the agreement or provision, and the securing of the administration, execution, recognition, exercise of enjoyment of the agreement or provision, in or under domestic law.*" Although section 75CC(1) empowers the making of regulations for the purpose of implementation, no such regulations have been made in relation to the TIEA with India.

33. Section 75D of the Law contains supplementary provisions. In particular, subsection (5), which was used by the Deputy Director, provides:

> "*Where the Director intends to give a notice to a person under section 75A or 75B, the Director may by notice require him –*
>
> *(a) to tell him what documents and information he has in his possession or power which are or may be relevant to the liability to tax to which the notice under section 75A or 75B would relate or the amount thereof, or to the enforcement of any such liability and the collection and recovery of any amount due,*
>
> *(b) not to remove, tamper with, falsify or destroy any documents to which the notice under section 75A or 75B would relate or cause or permit them to be removed, tampered with, falsified or destroyed, and*
>
> *(c) to take any steps which appear to be necessary for preserving them or preventing interference with them,*
>
> *and a failure to comply with a requirement of a notice under this subsection is punishable in the same manner as a failure to comply with a notice under section 75A or 75B.*"

34. The object and scope of the TIEA between Guernsey and India are described in Article 1:

> "*The Contracting Parties, through their competent authorities, shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.*"

By paragraph 1 of Article 3, in respect of India, "*taxes of every kind and description imposed by the Central Government or the Governments of political subdivisions or local authorities, irrespective of the manner in which they are levied*" are made subject to the TIEA.

35. Article 14 deals with the entry into force of the TIEA:

> "*1. The Contracting Parties shall notify each other in writing of the completion of their procedures for entry into force of this Agreement.*
>
> *2. This Agreement shall enter into force on the date of receipt of the later of the notifications referred to in paragraph 1 of this Article and shall thereupon have effect forthwith:*
>
> *a) for criminal tax matters on that date; and*
>
> *b) for all other matters covered in Article 1 on that date, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.*"

The definition of "*criminal tax matters*" given in paragraph 1(f) of Article 4 is "*tax matters involving intentional conduct whether before or after the entry into force of this Agreement which is liable to prosecution under the criminal laws or the laws relating to taxes covered by this Agreement of the requesting Party*".

36. The obligation to exchange information upon request is set out in Article 5 of the TIEA:

> "*1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party. 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.*
>
> *2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, the requested Party shall use all relevant information gathering measures necessary to provide the requesting Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes. …*
>
> *6. The competent authority of the requesting Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:*
>
> *a) the identity of the person under examination or investigation;*
>
> *b) the period for which the information is requested;*

c) the nature of the information requested and the form in which the requesting Party would prefer to receive it;

d) the tax purpose for which the information is sought;

e) grounds for believing that the information requested is present in the requested Party or is in the possession of, or is in the control of or obtainable by, a person within the jurisdiction of the requested Party;

f) to the extent known, the name and address of any person believed to be in possession or in control of or able to obtain the requested information;

g) a statement that the request is in conformity with the laws and administrative practices of the requesting Party, that if the requested information was within the jurisdiction of the requesting Party then the competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

h) a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties."

The definition of "*information gathering measures*" in paragraph 1(h) of Article 4 is "*laws and administrative or judicial procedures that enable a requested Party to obtain and provide the requested information*".

37. Article 7 of the TIEA deals with the possibility of the requested Party declining a request for information:

"*1. The competent authority of the requested Party may decline to assist:*

a) where the request is not made in conformity with this Agreement; or

b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or

c) where disclosure of the information would be contrary to public policy (ordre public) of the requested Party. …

3. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed."

38. Article 9 of the TIEA covers how confidentiality attaches to the information that is the subject of a request:

"*1. All information provided and received by the competent authorities of the Contracting 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. Information provided to a requesting Party under this Agreement may not be disclosed to any other jurisdiction."

39. Article 13 provides that the Protocol attached to the TIEA forms an integral part of it. The first paragraph of that Protocol states:

> "*The competent authorities may take into consideration the commentaries pertaining to the 2002 Agreement on Exchange of Information on Tax Matters of the Organization for Economic Cooperation and Development (OECD Model Agreement) when interpreting provisions of the Agreement that are identical to the provisions in that OECD Model Agreement.*"

Grounds of Applicant's challenge

40. At para. 39 *et seq.* of the Amended Cause, the grounds on which the Applicant seeks the quashing or setting aside of the Notice to T Limited are set out. Paragraph 39 relates to whether:

    (i) the Notice was *ultra vires* or vitiated by an error of law on the basis that it was not made pursuant to the provisions of the TIEA and so outside the power conferred on the Respondent by section 75C(2) of the 1975 Law;

    (ii) the Respondent should have found the request contrary to public policy and, in any event, the period for which information was required to be provided should not have extended to earlier than the entry into force of the TIEA because section 278E of the 1961 Act meant the Respondent could not properly conclude that it involved a criminal tax matter as defined in the TIEA;

    (iii) the material required to be provided could not be foreseeably relevant to any investigation of the Applicant; and

    (iv) the use to which the material could be put was misunderstood by the Respondent.

    However, if the Notice itself were not *ultra vires* or vitiated by such an error of law, the Respondent's decision to issue it was irrational because he did not ask himself the right question as required by, eg, *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (para. 40). Further, it was also irrational for the Respondent to conclude that the request of the ITA related to investigating or prosecuting a criminal tax matter where earlier requests had not clarified that and they referred to a limitation period that applied only to re-opening a tax assessment (para. 40A). The information that the Respondent had relied on to conclude that the Notice to T Limited was a proper one to issue was the product of the Respondent's unlawful act in issuing a notice to T Limited under section 75D of the 1975 Law when the Respondent could not have intended to issue a notice under section 75A or 75B

at that time, which meant that any subsequent step was tainted by that unlawfulness (para. 40D, combined with paragraphs 40B and 40C).

41. On behalf of the Applicant, Advocate Edwards has now advanced five bases on which the Respondent's decision to issue the Notice to T Limited is said to be flawed. First, the information required by the Notice does not meet the test from the TIEA that it is foreseeably relevant. This is closely related to the second basis, namely that the information was not for a criminal tax purpose, which involved the Respondent asking himself the correct question in the context of the ITA's request and to scrutinise that request adequately. The third basis relates to whether or not the reverse burden of proof contained in section 278E of the 1961 Act, as it operates in the context of investigating an offence contrary to section 276C of that Act, means that the offence falls outside the definition of "criminal tax matters" in the TIEA. The fourth ground also relates to section 278E and whether the Respondent should have declined to accede to the ITA's request on the basis that to do so is contrary to Guernsey's public policy. The fifth basis advanced is that the request is fatally flawed because of the information used in it being provided to the ITA by the Deputy Director after service of the notice under section 75D of the 1975 Law, which was not a notice that the Law permitted at that time.

42. These five grounds of challenge were reduced during oral submissions to three main points. Advocate Edwards concentrated on the need for the Respondent to be satisfied that the request demonstrated foreseeable relevance to an extant investigation into a criminal offence, being a key requirement under the terms of the TIEA, the impact of section 278E of the 1961 Act and whether this provision means that there is no intentional conduct or whether it ought to be viewed as contrary to public policy, and finally the consequences of the prior notice issued by the Deputy Director relying on section 75D(5) of the 1975 Law, which was impermissible at that time.

43. On behalf of the Respondent, Advocate Hill summarises his position as being that the Respondent is not required to undertake his own investigation but is instead entitled to take the factual and legal propositions stated by the ITA in the letter of request at face value and assume it is acting lawfully. Accordingly, provided the Respondent is rationally satisfied that the request conforms to the TIEA and that the information is foreseeably relevant to the investigation, the section 75C Notice is lawful. More particularly, on the grounds set out in the Amended Cause, the reverse burden in section 278E of the 1961 Act does not mean that there is no requirement for intentional conduct, but relates instead to the method of proving that element of the offence in section 267C and section 278E has been found to be compatible with the terms of India's Constitution, all of which must be viewed in the light of an ongoing investigation into such offending, where the scope of enquiry is necessarily broader than the steps already taken in respect of assessing the Applicant to tax. This makes the Notice both lawful and rational because the terms of the TIEA are designed to render assistance to the ITA in its criminal investigations. Advocate Hill points out that some of the issues raised by the Applicant appear to challenge the lawfulness of the section 75D notice, which is not the subject of these proceedings and where the Applicant is out of time to mount any such challenge.

44. Although Advocate Edwards developed his arguments on foreseeable relevance before tackling the issues relating to section 278E of the 1961 Act, I will deal with those matters first on the basis that if the Applicant is correct that there is nothing that can be brought within the definition of "*criminal tax matters*" involved in this case, it follows that any notice given requiring information for a period before the entry into force of the TIEA must necessarily be set aside. This is the effect of Article 14 of the TIEA. Further, by taking the issues in this order, I think it puts into clearer context consideration of the question of foreseeable relevance. However, before turning to the helpful evidence of the experts on Indian law

relating to section 278E and other relevant provisions of the 1961 Act, I will make some general observations.

General observations

45. The TIEA between Guernsey and India is one of a number of such agreements that have been entered into pursuant to letters of entrustment from the United Kingdom Government to the States of Guernsey. One aspect of the significance of such agreements is that they recognise that Guernsey has a developing international legal personality. In the context of rendering assistance in relation to a criminal investigation, there are certain similarities with the type of assistance that might be given under the terms of a mutual legal assistance agreement or even pursuant to letters rogatory. In accordance with principles of comity, it should be borne in mind that it becomes both a duty and a pleasure for our domestic authorities to render the assistance requested, provided, of course, that to do so falls within the terms of the agreement and any overarching applicable statutory framework. This reflects what Quin J said at para. 181 of *MH Investments v Cayman Islands Tax Information Authority* (2013) 16 ITLR 274.

46. Where a request is made in the context of an ongoing investigation being undertaken by a foreign state which is a counterparty to such an agreement, it should also be borne in mind that the subject of that investigation will not face any adverse consequences until a prosecution is instituted and guilt is either admitted or proved. In much the same way that a purely domestic investigation would entail seeking information in the hands of those who control it by whatever powers are available, possibly with a view to piecing together a case capable of being prosecuted or of closing down other avenues of enquiry, the step of seeking information from a source in another jurisdiction is confined to part of that investigatory process. The TIEA involved in this case is designed as a simple mechanism to afford such a level of assistance in cases where its terms are met.

47. I have reminded myself that the Applicant bears the burden of proving to this Court's satisfaction that one or more of the grounds of challenge pleaded and developed in argument can be established and, if so, that it is appropriate to grant the relief sought by the Applicant.

The experts' evidence

48. On the issues that are relevant to my decision, the parties' experts appear broadly to agree because, in his Expert Report in Reply, Mr Datar states: "*I generally agree with the descriptions of the relevant legal framework as set out by Mr Mehta*". Accordingly, this is not a case in which I have to choose between competing expert evidence. However, both experts seem to me to have strayed beyond what was needed by way of expert evidence in this case and have descended a little into arguing on behalf of the Applicant and the Respondent. That task falls to the Advocates appearing and not to the expert witnesses, so I have disregarded anything that appears to align itself to the parties as clients (and indeed, Mr Datar even refers expressly to "*my client*" in his Expert Report in Reply). Equally, though, I remain satisfied that both are suitably qualified to give expert evidence of Indian law and do not disregard anything relevant that they have to say as a result. I have further noted that the instructions to the experts have not asked for their opinions on identical questions, with the result that I have sought to extract from their opinions what I consider to be the aspects that coincide. As necessary, I will also refer to the opinion each gives on issues not addressed in detail by the other.

49. Mr Datar was asked to consider whether an Indian resident, being a beneficiary of an offshore discretionary trust who neither contributed assets to it nor received any distributions from it has any liability to tax under the Income-tax Act, 1961. The difficulty with posing the question in that way is that it makes factual assumptions that may or may not be correct but

are, in any event, beyond the scope of the decision the Court is reviewing. Mr Datar was also asked several questions about the effect of section 278E of the 1961 Act, which is the most relevant aspect of his initial Opinion, and then about the 16-year limitation period and whether it applies to civil or criminal proceedings or both. Mr Mehta was asked to opine on whether the facts and matters before the ITA gave rise to any criminal tax liability on the part of the Applicant taxpayer, whether the information requested would be relevant to an investigation into criminal tax liability and the admissibility in evidence of the Base Note and, if not, whether material obtained under a TIEA would be admissible in India. The fifth issue raised with him relates to sections 276C and 278E of the 1961 Act. The final issue relates to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 and whether it operates retrospectively. However, it was common ground that this 2015 Act is not applicable in relation to the Applicant and so is an area I need not consider further. The Expert Report in Reply of Mr Datar then comments on the content of Mr Mehta's Legal Opinion. As is apparent, the central questions relate to the criminal nature of what the Applicant could face in India and how these issues affect the assessment by the Respondent of the December request.

50. Although both experts refer to section 276C of the 1961 Act, Mr Mehta also referred to the possibility that the Applicant could be prosecuted under section 277 of the 1961 Act, of which mention was also made by Advocate Hill in his submissions. Section 277 (as substituted in 1975 and amended in 2012) provides:

> "*If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he knows or believes to be false, or does not believe to be true, he shall be punishable,–*
>
> *(i) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;*
>
> *(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.*"

Mr Mehta adds that "*if an Indian resident verifies his Indian income tax return, whereunder he has failed to disclose his true and complete taxable income and/or foreign assets and foreign bank accounts, in accordance with law, he could be prosecuted for such criminal offences under Section 277*". Mr Datar's Export Report in Reply agrees that section 5 of the 1961 Act requires an Indian tax resident to declare his worldwide income and that "*a deliberate failure to declare such income would constitute an offence under Sections 277 and 276C*". More specifically, he adds later in his Report "*that the requirement to report an interest as a beneficiary in an offshore trust only arose in 2014 from Assessment Year 2014-15 (Financial Year 2013-14).*" However, little more is made of section 277 and, although it requires proof of knowledge or belief, but not "*wilfully*" as is the case in other provisions in Chapter XXII of the 1961 Act (offences and prosecutions), the experts do not state expressly whether or not this offence would fall within the definition of "*criminal tax matters*" in Article 4(1)(f) of the TIEA, although, if it does, I can see that section 278E of the 1961 Act applies equally to it.

51. Section 276C of the 1961 Act, as amended, provides:

> "*(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable, or under reports his income, under this*

Act, he shall, without prejudice to any penalty that may be imposable on him under any other provisions of this Act, be punishable, –

(i) in a case where the amount sought to be evaded or tax on under-reported income exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and shall, in the discretion of the court, also be liable to a fine.

<u>Explanation</u>. – For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person–

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof."

Mr Mehta adds that "*any Indian taxpayer who evades taxes in India by wilfully failing to report his taxable income and fails to pay taxes thereon could be liable to criminal prosecution under Section 276C*", with which Mr Datar agrees.

52. I will quote quite extensively from paragraphs 34 to 44 of Mr Mehta's Legal Opinion because Mr Datar's Expert Report in Reply in relation to those paragraphs states:

"*These paragraphs discuss the operation of section 276C of the IT Act as a matter of Indian law. I do not disagree with their contents. Mr Mehta expresses the opinion that this reverse burden would not be found to be contrary to Indian public policy as unconstitutional, and I do not disagree. However, Mr Mehta also accepts – and I agree – that the effect of section 278E means a prosecutor is entitled to presume the necessary mental state and a criminal court is statutorily required to find such a mental state, unless the defendant disproves it beyond reasonable doubt.*"

Accordingly, having quoted section 276C of the 1961 Act, at para. 35 Mr Mehta writes:

"*From a bare perusal of the provisions of section 276C of the IT Act, it is clear that the said provisions can only be attracted in case of* ***wilful*** *attempt to evade tax or payment thereof, amongst others. Intention to evade tax or an act done with a motive or knowledge of tax evasion is therefore an important ingredient of section 276C of the IT Act. Such knowledge, intention or motive would refer to the culpable mental state of the taxpayer accused. In ordinary criminal jurisprudence, the burden of proving the culpable mental state or mens rea lies on the prosecution, unless the statute provides otherwise by providing for a statutory presumption of such mental state on the part of the accused in order to achieve the object of the statute. All presumptions raised by the courts must come under one of the three categories, as defined under Section 4 of the Evidence Act, namely:*

a. "may presume" (rebuttable);

b. "shall presume" (rebuttable); and

c. "conclusive presumptions" (irrebutable)."

He then explains, by reference to a decision of the Supreme Court of India, how each of these terms is to be approached, before concluding (at para. 37) that the words "*shall presume*", which feature in section 278E of the 1961 Act, mean that "*the Court must necessarily raise the presumption*"; there is no other option.

53. Section 278E of the 1961 Act, which was inserted in 1986, provides:

"*(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

Explanation.–In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

Mr Mehta's Legal Opinion further explains (at para. 39):

"*The scope and effect of section 278E of the IT Act was explained by the Central Board of Direct Taxes ("****CBDT****") in its Circular, issued in exercise of its power under section 119 of the IT Act, relevant part whereof is as follows:*

"By inserting a new section 278E, it has been provided that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The Explanation provides that "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe a fact. Further, that a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. By this amendment, a Court has to presume the existence of a criminal mental state on the

part of the accused in any prosecution requiring such a mental state. However, this presumption can be rebutted by the accused to prove that there was no intention, motive or knowledge of a fact or belief in or reason to believe a fact in respect of the act charged as an offence in that prosecution. As regards the degree of proving the absence of a culpable mental state, it has been provided that a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. This provision is based on the provisions contained in several other enactments dealing with economic offences such as section 138A of the Customs Act, 1962, section 9C of the Central Excises and Salt Act, 1944, section 94B of the Gold (Control) Act, 1968, and section 59 of the Foreign Exchange Regulation Act, 1973."

The Circular to which reference is made appears from a footnote to have been dated 18 July 1986. (The underlining appears in the text quoted by Mr Mehta.)

54. In para. 40, Mr Mehta explains that, as a matter of Indian law, section 278E has been scrutinised by the Constitutional Court, which concluded that the provision is not unconstitutional:

> "*The Constitutional validity of section 278E of the IT Act came under judicial scrutiny before the Constitutional Court in India in the case of* ***Selvi J. Jayalalitha vs. Union of India*** *[(2007) 288 ITR 225 (Mad)] wherein the Hon'ble Court ruled that the provisions of section 278E, raising a rebuttable presumption as to mens rea, were not unconstitutional. The Court observed that where the existence of mens rea is the basis for prosecution, the prosecution is bound to prove existence of mens rea on the part of accused; however, by introduction of Section 278E, which gives rise to presumption as to culpable mental state of accused, entire basis of accusatorial jurisprudence as accepted and recognized in India has been shifted. Therefore, the Hon'ble Court observed that words "wilfully" and other such words indicating culpable mental state would not become otiose simply because the accused was given an opportunity to prove lack of mental state on his part. Accordingly, the Hon'ble Court upheld the constitutional validity of the provisions of section 278E of the IT Act, noting that when the person concerned (accused) has the opportunity to rebut the presumption, it is hard to see how the provisions of section 278E of the IT Act is unconstitutional.*"

55. Drawing the various threads together, Mr Mehta, then sets out his overall opinion in para. 43:

> "*Pursuant to a conjoint reading of the language used in Section 278E of the IT Act and judicial precedents on the subject matter, I am of the view that:*
>
> *a) By virtue of Section 278E of the IT Act, once the prosecution establishes the commission of the act by the accused, Section 278E creates a rebuttable presumption regarding the existence of mens rea against the accused. Thus, by introduction of Section 278E, the ordinary rules of evidence (i.e. where the prosecution has to prove its case beyond reasonable doubt and the accused/defence has to prove its case by a mere preponderance of probabilities), stand altered;*
>
> *b) Thereafter, the burden of proof shifts to the accused to rebut this presumption i.e. to prove the absence of such mens rea;*

c) The accused will have to discharge its burden of proof beyond reasonable doubt."

56. In respect of the first sentence in para. 43(a), Mr Mehta adds in a footnote:

"*See para. 10: Dev Chand Kalyan Tandel vs. State of Gujarat & Anr. [AIR 1996 SC 2787]:*

10. Mr. K. Madhava Reddy urged that before the presumptions under Section 130-A(1) is attracted the prosecution must establish the basic ingredients of the offence for which charge has been framed and in the case in hand, the necessary ingredients of Section 135(1)(a) must be proved and then only the presumption under Section 138-A can be attracted. According to Mr. Reddy this is apparent from Sub-section (2) of Section 138-A of the Act. On a scrutiny of provisions of the Act particularly Section 138-A thereof and the object for which the aforesaid provision was inserted into the statute by Act No. 36 of 1973 it is difficult for us to accept the contention of Mr. K. Madhava Reddy. It is no doubt true that in a charge for violation of the provisions of Section 135(1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted to evade any duty chargeable on the goods or that violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under Section 138A and without such presumption and [sic] accused can be convicted under Section 135(1)(a). But the legislature having found it difficult to establish the necessary ingredients of such evasion of duty or prohibitions and the economic offences having grown in proportion beyond the control, came forward with the presumptions available under Section 138A of the Act. The main object of Section 138A is to raise a presumption as to culpable mental state on the part of the accused when he is prosecuted in a court of law."

57. Mr Mehta continues (at para. 46) with further explanation of the precedents:

"*Reliance in this regard can be placed upon the following judicial precedents of constitutional courts of India:*

*a. In **V.P. Punj vs. Asst. Commissioner of Income Tax & another** [94(2001)DLT156], while discussing Section 278E, the Delhi High Court observed that existence of mens rea is presumed by the court for the offences under the IT Act which require a culpable mental state, and it would be upon the accused to disprove such presumption beyond reasonable doubt.*

> *"7. By this section the rules of evidence stand altered. In any prosecution for any offence under this Act, the Court has to presume the existence of means [sic] rea. It is for the accused to prove to the contrary and that too beyond reasonable doubt. Further the Act also does not differentiate in any way between natural and juristic person."*

*b. Similarly, in **NK Jain v Union of India** [2002 254 ITR 388 (Delhi)] Delhi High Court in context of section 278E observed that*

> *"The rule of evidence thus stands changed by the above section. In the prosecution for an offence under this Act, it is for the accused to*

prove his defense, which he can do by cross-examining the prosecution witnesses or by leading defense evidence …"

*c. In **Sasi Enterprises v Assistant Commissioner of Income Tax** [(2014) 5 SCC 139], wherein the offence of wilful failure to furnish returns was said to be committed by the taxpayer, while answering a question as to "(5) What is the scope of Section 278E of the Act, and at what stage the presumption can be drawn by the Court?", the Supreme Court of India has held as follows:*

"30. Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The question is on whom the burden lies, either on the prosecution or the Assessee, under Section 278E to prove whether the Assessee has or has not committed wilful default in filing the returns. Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the Appellants have to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under Sections 142 and 148 of the Act.""

58. In his initial Opinion, Mr Datar states:

"*In my opinion, the prosecutor need not establish any culpable mental state. The moment the complaint is filed and the section involved requires the existence of a culpable mental state, it is automatically presumed that the assessee/accused did have the mental state. The prosecution does not have to do anything except making the accusation of offences requiring a culpable mental state.*"

Commenting on the standard of proof imposed upon the accused, he similarly highlights that a provision in like terms exists in the legislation to which Mr Mehta also refers and it is in respect of those provisions that there has been more case law, some of which he sets out:

"*(vi) In Krishnan v State [(2003) 7 SCC 56, 63], the court held that the expression "a reasonable doubt" will require the accused to point out actual and substantial doubts arising*

""A reasonable doubt" is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case."

(vii) In Mallappa Siddappa Alakanur v State of Karnataka [(2009) 14 SCC 748, 755], the Supreme Court once again considered the expression "beyond reasonable doubt" and said that such a doubt should be real and tangible and cannot be based on insignificant circumstances or minor aspects.

(viii) The expression "beyond reasonable doubt" has also come up for consideration before various High Courts. In Assistant Collector of Customs v A. Narayana Pillai [1994 (71) ELT 673, 674], the Madras High Court held that the rebuttal of the presumption of the existence of a culpable mental state need not be by direct evidence but can also be gathered from circumstances of the case.

(ix) In Jyoshna Alankar Bhandar v. State [1989 (40) ELT 326, 330], the Orissa High Court dealt with a case under section 98B of the Gold (Control) Act, 1968 which was identical to section 278E. Discussing the section, the Court held that:

> *"… so far as the provision is concerned, the roles of the prosecutor and of the accused are reversed by a statutory fiction to the effect that if the prosecution has been able to raise a doubt regarding the mental state of the accused, then it would not be held that the latter has been able to establish beyond reasonable doubt his own mental state of innocence. The extent of proof that is necessary to be adduced by the persons charged is to prove, as the only possible conclusion, his innocent state of the mind.""*

59. Both experts refer to the obligation imposed by section 5 of the 1961 Act, which covers the scope of total income of a resident Indian taxpayer:

> "(1) *Subject to the provisions of this Act, the total income of any previous year of a person who is resident includes all income from whatever source derived which–*
>
> *(a) is received or is deemed to be received in India in such year by or on behalf of such person; or*
>
> *(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or*
>
> *(c) accrues or arises to him outside India during such year:*
>
> *Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India. …*
>
> *Explanation 1.–Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.*
>
> *Explanation 2.–For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.*"

60. Mr Mehta adds (in para. 14) that:

> "*Accordingly, an Indian tax resident is required to report his global income in his tax returns in India. This mandatory statutory requirement always existed. However, with a view to make it more and explicitly clear, the Indian income tax returns were amended by the Indian Government with effect from assessment year 2012-2013 (which relates to income of financial year 2011-2012), pursuant to which Indian tax residents were required to furnish details of their foreign assets or bank accounts (including financial interest in any entity or bank accounts where they had signing authority) under "Schedule-FA".*"

Further, he explains (in para. 16):

"*While filing Indian tax returns, the taxpayers are required to furnish a written verification statement stating that to the best of the taxpayer's knowledge and belief, the information given in the return and schedules thereto is correct and complete and that the amount of total income and other particulars shown therein are truly stated and are in accordance with the provisions of the IT Act, in respect of income chargeable to Income-tax for the financial year relevant to the assessment year*."

His analysis results in his conclusion (at para. 20) that if the Applicant had not disclosed an interest in the offshore trusts or foreign companies in the Applicant's tax return and/or had concealed unaccounted income in such offshore trusts and companies and/or had not paid taxes on the income arising from such offshore interests, the Applicant could *inter alia* "*be subject to criminal prosecution under Sections 276C and 277 of the IT Act"*.

61. In Mr Datar's Expert Report in Reply, he agrees that this is an accurate summation of the effect of the 1961 Act, albeit he comments that the requirement to report an interest as a beneficiary in an offshore trust only arose from 2014, but disagrees that the Applicant's case meets these requirements, referring again to the analysis set out in his original Opinion in which he had referred to the position of a beneficiary under a discretionary trust:

"*If a person is a beneficiary under a discretionary trust, any amount that is payable to him is at the sole discretion of the trustees. The beneficiary has no right to receive any income. In CWT v Estate of Late HMM Vikram Sinhji of Gondal [(2015) 5 SCC 666, 672 (para 13)] the Supreme Court held as follows:-*

"A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour.""

Mr Datar then notes that there has been no statutory amendment reversing the position set out in this decision, which therefore "*holds the field*" and "*establishes that the interest of a beneficiary in a discretionary trust cannot be said to constitute income accrued or arisen under section 5 of the Income-tax Act, 1961. Nor is there any other provision under which tax can be levied on such an interest. Consequently, such an interest cannot give rise to any liability to tax on the part of such a beneficiary*."

62. However, Mr Mehta offers the view (in para. 22) that the Applicant's criminal tax liability could arise if, following the ITA's investigation, including considering information generated by its request to the Respondent:

"*ITA could substantiate that A had in fact:*

a) used unaccounted income to make investment in [X Limited]; and/or

b) concealed income in such offshore trusts and companies; and/or

c) failed to report [A's] interest in offshore trusts and companies in [A's] income tax returns; and/or

d) failed to reported [sic] and pay taxes on income earned through such offshore trusts or companies."

63. Mr Mehta further sets out his opinion on the admissibility of the Base Note, although Mr Datar questions why this is included when it is not an issue being challenged by the Applicant in these proceedings. Mr Mehta's conclusion is that the effect of decisions reached on section 5 of the Indian Evidence Act, 1872 is that if the evidence is relevant it will be admitted, even if obtained through an illegal search and seizure operation, because "*relevance*" and "*admissibility*" are treated as synonyms, which means that, even if stolen data, the Base Note will be found admissible.

64. In relation to the 16-year limitation period referred to by the ITA, Mr Datar refers to section 149 of the 1961 Act, which refers to when a notice under section 148, which operates where income has escaped assessment, can be given. In respect of "*income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax*", the period is not more than 16 years from the end of the relevant assessment year. Mr Datar explains:

> "*The effect of such a notice, if issued within the limitation period, is to commence assessment proceedings to establish how much tax is payable. Those proceedings are civil, and the outcome of the assessment (if it is found that more tax should have been paid) is a civil liability to pay the additional tax.*
>
> *The statute provides for no such limitation for criminal process and liability (for example under section 276C). The provisions concerning criminal liability operate without any 16 year restriction.*
>
> *Moreover, a civil liability established in the civil process is neither necessary nor sufficient for criminal process to follow. That is established by the judgment in P. Jayappan v S.K. Perumal, First Income Tax Officer Tuticorin [1984] Supp (1) SCC 437, in which it was held that criminal proceedings (including under s.276C) can be commenced without a civil assessment first having concluded and that the outcome of the civil assessment is not binding on the criminal court.*
>
> *In short, the 16-year limitation period is irrelevant to any criminal proceedings. It is relevant only to a particular type of proceedings under s.149 which is civil in nature.*"

65. I have set out the expert evidence in this case more fully than might have been thought strictly necessary as well as being conscious of the Court of Appeal's comment that the Respondent "*is unlikely in our judgment to be required to make an exhaustive investigation of the foreign law*" in order to be satisfied that a request received is in accordance with a TIEA because both parties have relied on the contents of the respective opinions. Those opinions assist on the basis that I accept the bulk of what is stated, especially where the experts have agreed, and regard their opinions as mostly helpful on the issues where they have a bearing. To the extent that there may have been minor disagreement, I accept the view expressed by Mr Datar that a beneficiary's interest in a discretionary trust does not, of itself, constitute something that falls within section 5 of the 1961 Act and so the obligation to report such an interest has not existed throughout the period specified in the Notice to T Limited, but only since 2014 (or thereabouts), meaning that Mr Mehta's opinion in para. 22(c) of his Legal Opinion should be read in such a time-limited fashion, rather than generally. However, aside from that, I accept the evidence before the Court and will apply it to the issues that fall to be determined.

Criminal tax matters

66. I am satisfied that the expert evidence provides a complete answer to the question of whether what is involved falls within the definition of "*criminal tax matters*" in paragraph 1(f) of Article 4 of the TIEA. Indeed, if I had had to approach this issue from first principles, I would reach the same conclusion. In my judgment, the offence in section 276C of the 1961 Act (and, to the extent that it is relevant, section 277) involves intentional conduct and the effect of section 278E is not, as suggested on behalf of the Applicant, to turn it into an offence that does not include a mental element.

67. It is apparent just from looking at section 276C of the 1961 Act that "*wilfully*" continues to be a constituent part of the offence. There is, therefore, a mental element meeting the requirements of the definition for there to be intentional conduct. That is confirmed in the Circular to which Mr Mehta referred: this element is presumed to exist unless and until it is disproved by the accused. The case to which Mr Mehta referred in the footnote, which I have quoted, speaks of establishing the ingredients of the offence in question, where the provision introducing a presumption that the mental element exists is shown to be a rule of evidence rather than affecting the substance of the offence. What section 278E of the 1961 Act has done is to shift the burden, but without affecting whether or not the mental element continues to operate as an essential ingredient of the offence. Mr Datar refers to the prosecutor not having to prove a mental state, but he does not go so far as to state that no mental state is required to exist. To that extent, I treat his opinion as relating more to the question of the issue of whether this should be regarded as acceptable than supporting the contention on behalf of the Applicant that the offence itself falls outside the definition of "*criminal tax matters*" in the TIEA.

68. The consequence is set out most clearly in *Selvi J Jayalalitha v Union of India* (2007) 288 ITR 225 (Madras). This case related to an offence under section 276CC of the 1961 Act (failure to furnish returns of income), but the context is much more about the constitutionality of section 278E and how that section falls to be read with an offence-creating provision. At para. 59, the High Court of Madras stated:

> "*Therefore, culpable mental state is a necessary element in this offence under section 276CC too and without it, there is no offence; the only difference is, the accused should prove the existence of circumstances which negate mens rea.*"

Further explanation is offered in para. 79, which I consider is applicable *mutatis mutandis* to the offence in section 276C:

> "*In the present case, the prosecution must prove that the assessee has failed to furnish the returns in due time, which in law he was bound to do. From the attendant circumstances and in the absence of any defence evidence to the contrary, it is open to the court to logically infer that there must have been a wilful disregard to comply with the legal requirement. But by the introduction of section 278E, this inference is made a presumption as to the existence of the culpable mental state on the part of the assessee. This does not mean that the court accepts the culpable mental state as an irrebuttable fact. All that the law requires is for the person or the assessee to prove that there were circumstances which prevented him from discharging his statutory duty.*"

69. The position is also spelt out in para. 96, which confirms that the mental element has not been eliminated:

"*It was also submitted on behalf of the petitioners that the offending provision renders the word 'wilfully' in section 276CC of the Act and other words indicating culpable mental state otiose. Such a situation would arise only if the accused was not given any opportunity to prove the lack of culpable mental state on his part. If section 278E had been otherwise worded as to exclude the requirement of culpable mental state, then we could accept the submission that the word 'wilfully' has been rendered otiose. On the other hand, it is only because the mens rea is still a requisite element of the offence under section 276CC that the legislation has required the petitioners to show that for compelling reasons, the petitioners could not file the returns in time. This itself only underscores the position that the element of mens rea has not been excluded because of the impugned provision.*"

70. I am not persuaded by the submissions made by Advocate Edwards on this issue because, in my opinion, he has conflated the distinct question of whether the offence (or offences) that could be the subject of investigation by the ITA involve intentional conduct with the other distinct question of whether it is contrary to public policy. For example, the submission is made at para. 80 of the initial Skeleton Argument that:

> "*Section 278E of the 1961 Act, as amended, cannot satisfy this requirement. It takes the ingredient of intentionality, and requires it to be presumed by operation of the statute, unless the defendant can disprove it beyond reasonable doubt. The statute presumes guilt unless disproven by the defendant. It does so on the essential ingredient singled out by Article 4(1)(f) of the TIEA. Moreover, it imposes the highest possible threshold known to law – disproof beyond reasonable doubt. It is no answer to say that intentionality (culpability) appears as a necessary ingredient of the offence on the Indian statute book. The same would be true if there were a necessary element of intentionality, but with a mandatory statutory deeming provision requiring it to be found in any case of default.*"

By reference to the expert evidence, the final sentence is misconceived. There is a distinction between a conclusive presumption, which is irrebuttable and the rebuttable "*shall presume*". Had the offence involved an irrebuttable presumption, there might have been merit in arguing that there is no longer any ingredient involving a mental element. However, the explanation offered is, in my view, clear that the ingredient still exists, as I think is acknowledged in Advocate Edwards' submissions, and section 278E replaces the previous approach of inviting the court trying such a case to draw inferences from actions as to what the accused's state of mind must have been with a statutory mechanism by which it is obliged to do so unless the accused proves differently.

71. I find further support for this conclusion in the OECD's commentary, *Agreement on Exchange of Information on Tax Matters*, to which reference is expressly permitted by Article 13 of the TIEA and the attached Protocol. That commentary states:

> "*35. Sub-paragraph o) defines criminal tax matters. Criminal tax matters are defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant Party. Criminal law provisions based on non-intentional conduct (e.g., provisions that involve strict liability or absolute liability) do not constitute criminal tax matters for purposes of the Agreement. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent. Sub-paragraph o) does not create an obligation on the part of the applicant Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.*

> *36. Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax; deliberate omissions of entries in books and records; deliberate inclusion of false or incorrect entries in books and records; interposition for the purposes of causing all or part of the wealth of another person to escape tax; or consenting or acquiescing to an offence. Tax crimes, like other crimes, are punished through fines, incarceration or both.*"

By reference to these principles, it is quite clear that the offence in section 276C is not an offence of strict or absolute liability. If it were, then there would be no scope at all for an accused person to argue that the mental element required by the offence does not exist. The offence is of a type referred to as being typical of the conduct that can be criminal tax matters for the purposes of the agreement.

72. For these reasons, I reject the Applicant's challenge based on his contention that what is involved is not a criminal tax matter (as set out, in particular, in para. 39(e) of the Amended Cause).

Public policy

73. However, that is not the end of the relevance of section 278E of the 1961 Act, because the next ground of challenge relates to whether the Respondent should have declined to assist the ITA relying on paragraph 1(c) of Article 7 of the TIEA on the basis that disclosure of the information to support an investigation in which that section plays a part should be considered as contrary to Guernsey public policy.

74. Advocate Edwards has drawn attention to the fact that section 278E creates a reverse burden of proof that would not be permitted as a matter of Guernsey law because it offends against the presumption of innocence. The particularly objectionable part of section 278E is that subsection (2) imposes a standard of proof on the defendant at a higher level than could be regarded as acceptable, requiring proof beyond reasonable doubt and not merely its existence on a preponderance of probability.

75. The starting point is to recognise the much-quoted words of Viscount Sankey LC in *Woolmington v DPP* [1935] AC 462. With fond echoes of *Rumpole of the Bailey*, the classic passage (at page 481) states:

> "*Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*"

This presumption of innocence, which applies equally in Guernsey law, is now given statutory force through the Human Rights (Bailiwick of Guernsey) Law, 2000, which gives effect to Article 6(2) of the European Convention on Human Rights ("*Everyone charged with a*

criminal offence shall be presumed innocent until proved guilty according to law"). As Advocate Edwards further points out, this is a widely accepted norm of international law, eg, Article 11 of the Universal Declaration of Human Rights provides that "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*"

76. It is acknowledged that there are instances where statute has imposed a reverse burden of proof on an accused. Whether or not this type of provision offended against Article 6, ECHR was an issue addressed in ***Sheldrake v DPP*** [2005] 1 AC 264. This case involved the defence available pursuant to section 5(2) of the Road Traffic Act 1988 to the offence of being in charge of a motor vehicle above the prescribed limit that there was no likelihood of the vehicle being driven while still over that limit. At para. 9 of the speech of Lord Bingham of Cornhill, the reason for the long-established presumption of innocence was explained as follows:

> "*There can be no doubt that the underlying rationale of the presumption in domestic law and in the Convention is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be. To ascertain the scope of the presumption under the Convention, domestic courts must have regard to the Strasbourg case law. It has been repeatedly recognised that the presumption of innocence is one of the elements of the fair criminal trial required by article 6(1): see, for example, Bernard v France (1998) 30 EHRR 808, para 37.*"

77. The standard of proof imposed on an accused subject to a reverse burden of proof in a criminal matter was discussed in ***R v Carr-Briant*** [1943] 1 KB 607, which concerned the defence available on a corruption charge to show that the payments were not corrupt. The conclusion (at page 612) was:

> "*In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved", the jury should be directed that it is for them to decide whether the contrary is proved, that the burden required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.*"

The route taken to reach that conclusion included referring to what the Privy Council had indicated in ***Sodeman v Regem*** [1936] WN 190, and Advocate Edwards highlights the reference made thereafter to "*public policy*" in this context:

> "*We agree with and adopt for the purpose of this judgment the language of Lord Hailsham L.C. in delivering the judgment of the Privy Council in Sodeman v Regem, where he said:*
>
> > *"The suggestion made by the petitioner was that the jury may have been misled by the judge's language into the impression that the burden of proof resting upon the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there was no doubt that the burden of proof for the defence was not so onerous … It was certainly plain that the burden in cases in which an accused had to prove insanity might fairly be stated as not being*

higher than the burden which rested upon a plaintiff or defendant in civil proceedings. That that was the law was not challenged."

In so holding the Lord Chancellor was in agreement with the decision of the majority of the Supreme Court of Canada in Clark v. The King [(1921) 61 S.C.R. (Can.) 608,617], where Duff J., in the course of his judgment, expressed the view that the necessity for excluding doubt contained in the rule as to the onus on the prosecution in criminal cases might be regarded as an exception founded on considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption."

78. Advocate Edwards further prays in aid the approach taken in the English Court of Appeal in *R v Keogh* [2007] 1 WLR 1500, in which the statutory defences available under the Official Secrets Act 1989, by which an accused was required to prove that he did not know and had no reasonable cause to believe that the disclosure made related to defence or international relations or that it would be damaging, fell to be analysed. He has highlighted para. 20 of the judgment of the court given by Lord Phillips of Worth Matravers CJ:

> "*Thus, if the construction for which Mr Perry [for the Crown] contends were correct, the defendant would be required to disprove a substantial ingredient of the offence. It is plain that this would constitute a significant infringement of the presumption of innocence. It would not be fanciful to conceive of a situation in which a jury, conscientiously following judicial directions crafted in accordance with Mr Perry's submissions, would find a defendant guilty of an offence under section 2 despite entertaining reasonable doubt as to whether the defendant knew or had reasonable cause to believe that the document in question related to defence, or that its disclosure would be damaging. The same considerations apply in relation to a charge based on an alleged infringement of section 3.*"

As a result, the Court of Appeal concluded that there was an evidential burden only rather than a legal burden placed on an accused person, which was consistent with the approach taken in *R v Lambert* [2002] 2 AC 545 and following *R v Director of Public Prosecutions, ex p Kebilene* [2002] 2 AC 326.

79. Advocate Edwards submits that these cases show the limitations placed under English law on derogations against the presumption of innocence, which should be adopted and applied in Guernsey. It would offend against principle, and be so repugnant to Guernsey law, to assist in a matter where an accused could be convicted of an offence in another jurisdiction even where the court trying him could think it more likely than not that the accused did not have the requisite mental element, but were not so satisfied to the higher standard involved in section 278E of the 1961 Act requiring proof beyond reasonable doubt. In this regard, he drew attention to how the notion of public policy had been described in relation to recognition of foreign judgments in *Bamberski v Krombach* [2001] QB 709 by the European Court of Justice (at para. 37):

> "*Recourse to the public policy clause in article 27(1) of the [1968 Brussels] Convention can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order*

of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order."

80. Both Advocates have referred to the OECD Commentary (in para. 91) relating to this reason for declining a request, with Advocate Hill, in particular, drawing attention to the limited circumstances in which this should be relied upon:

> "*Paragraph 4 stipulates that Contracting Parties do not have to supply information the disclosure of which would be contrary to public policy (ordre public). "Public policy" and its French equivalent "ordre public" refer to information which concerns the vital interests of the Party itself. This exception can only be invoked in extreme cases. For instance, a case of public policy would arise if a tax investigation in the applicant Party were motivated by political or racial persecution. Reasons of public policy might also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested Party. Thus, issues of public policy should rarely arise in the context of requests for information that otherwise fall with the scope of this Agreement.*"

81. Advocate Hill also points out that there should be a degree of deference afforded to the fact that the reversal of the burden of proof created by section 278E of the 1961 Act has been held not to be unconstitutional in India. He did, however, concede that the provision offends against a Guernsey jurisprudential position, but suggested that Advocate Edwards' submission that it would be incumbent on Her Majesty's Procureur to advise that a similar provision proposed for enactment in Guernsey would breach Article 6(2), ECHR, was over-stating that obligation, albeit that careful consideration would be required before deciding one way or the other whether the shifted burden provable to a criminal standard would violate that Convention right. He drew a distinction between an offence with a mental element ingredient, as in the case of section 276C read with section 278E, and an offence of strict liability attracting the level of punishment involved of up to seven years' imprisonment.

82. In *Comptroller of Income Tax v BKW* (2013) ITLR 344, the Singapore High Court touched on public order, which in that jurisdiction was referred to as public interest, but found to be synonymous, although I find there is comparatively little to assist me, other than confirmation that the burden rests on the person asserting it should have been found, ie, the Applicant in this case. This case also involved a request made by the ITA under the terms of the double taxation convention, which arose following a raid on a company's premises in India. Although there is reference to a document identifying transactions occurring in Singapore and the response on behalf of the company as raising "*highly suspicious circumstances*" (para. 17), it is unclear whether the request made to Singapore for assistance was driven by a criminal tax matter. Unfortunately, there is no consideration of whether if there were a criminal investigation the same type of public interest/policy arising from the operation of section 278E of the 1961 Act was engaged.

83. The other case from Singapore to which my attention has been drawn (*Comptroller of Income Tax v AZP* [2012] SGHC 112) has been relied upon by Advocate Edwards more in the context of foreseeable relevance, to which I will turn in due course. However, this was a request for assistance that appears to involve a criminal investigation, because in para. 2 there is reference to acting "*in violation of India's tax laws*" and the suspicion "*that monies constituting the Indian national's undeclared income were remitted to the Accounts*" in respect of which information was sought. All that was said about public order/interest was a brief comment at the end of para. 14:

"*The third element of public interest (concerning national security) does not arise in this case. It was not alleged that the information sought would involve "national security interests, or sensitive information held in the vital interests" of Singapore (Singapore Parliamentary Debates, Official Report (19 October 2009) vol 86 at col 1620).*"

It appears, therefore, that an argument such as that advanced on behalf of the Applicant in the present case would not fall within the very limited parameters of what Singapore would treat as "*public interest*".

84. I take the view that, as set out in the OECD Commentary, the starting point is to note that public policy should only be used as the reason for declining to assist in extreme cases. As such, the Applicant has a high hurdle to surmount to establish that this is one of those rare cases where the Respondent should have decided that paragraph 1(c) of Article 7 entitled him to decline to assist the ITA. In other words, in order to demonstrate that the decision to issue the Notice to T Limited was *ultra vires* section 75C(2) of the 1975 Law as not in accordance with the provisions of the TIEA due to it being contrary to Guernsey's public policy, the Applicant has to show that it engages the vital interests of Guernsey. However, I do not regard the examples in the OECD Commentary as being exhaustive. It would be contrary to public policy if assistance were sought to investigate an offence that would be regarded as infringing a fundamental principle on which Guernsey law is based, ie, adopting the language used in *Bamberski v Krombach*, something we regard as essential to our legal order. I also consider that this approach is consistent with the generally accepted principle that public policy in such an international law context should be limited to cases where a failure to rely upon it would be repugnant to this Court's sense of morality and decency, potentially leading to injustice.

85. Accordingly, the first stage is to consider the extent to which a provision such as section 278E of the 1961 Act would, if contemplated in Guernsey's domestic law, offend against established principle. The cases to which Advocate Edwards has referred recognise that a reverse burden of proof in itself is not repugnant, and that each case has to be considered in light of the circumstances with which it is dealing. I have found the summary of the English cases given by Lord Phillips in the *Keogh* case the most helpful and, even though it is a long passage, refer to it in some detail:

"*6 To require a defendant to prove anything, whether positive or negative, in order to prove that he is not guilty of a crime might, on the face of it, appear to conflict with the presumption of innocence required by article 6. To interpret article 6 in this way would, however, conflict in some areas with the requirements of an effective criminal law and the European Court of Human Rights has not so interpreted the article. We do not propose to embark on our own analysis of the Strasbourg authorities to see in what circumstances a reverse burden of proof is compatible with article 6, for that task has already been undertaken by the House of Lords and it is to the House that this court should look for guidance, as did Aikens J. We propose to consider the same three decisions that he considered: R v Lambert [2002] 2 AC 545, R v Johnstone [2003] 1 WLR 1736 and Sheldrake v Director of Public Prosecutions [2005] 1 AC 264.*

7 In R v Lambert [2002] 2 AC 545 the House of Lords considered whether it would be compatible with article 6(2) to interpret provisions of the Misuse of Drugs Act 1971 as imposing on a defendant the burden of proving that he was unaware that the contents of a bag in his possession were prohibited drugs. They decided that it would not. What is significant for present purposes is that all members of the House expressed the view that the presumption of innocence required by article 6(2) was not

absolute but that a departure from that presumption must be justifiable. The House derived support for this view from the decision of the Strasbourg court in Salabiaku v France (1988) 13 EHRR 379. Lord Steyn commented [2002] 2 AC 545, para 34:

> *"a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed."*

8 Lord Hope of Craighead observed, at para 88:

> *"as the article 6(2) right is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality … It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute."*

9 Lord Clyde, at para 150, and Lord Hutton, at para 186, expressed similar views. Lord Slynn of Hadley, at para 17, inferentially agreed that article 6(2) was qualified and that a test of proportionality had to be applied to any departure from its requirement.

10 In R v Johnstone [2003] 1 WLR 1736 the House of Lords held that a reverse burden of proof imposed by section 92 of the Trade Marks Act 1994 was compatible with article 6(2). In the leading speech Lord Nicholls of Birkenhead, after citing Salabiaku's case observed, at para 47, that the derogation from the presumption of innocence required justification. He continued, at para 50:

> *"A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in R v Whyte (1988) 51 DLR (4th) 481,493. This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access."*

11 In Sheldrake's case [2005] 1 AC 264 Lord Bingham of Cornhill reviewed both the Strasbourg and the domestic authorities and summarised their effect at para 21 as follows:

> *"From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does*

not outlaw presumptions of fact or law but requires that these should be kept with reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

12 The essential effect of the authorities is summarised by Lord Bingham, at para 31:

"The task of the court is never to decide whether a reverse burden should be placed on a defendant but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence.""

86. In the absence of any Guernsey authority on this issue, I am content to regard this analysis as particularly persuasive as to the approach that this Court would take if faced directly with this issue. In doing so, I am conscious that I am not considering whether a provision enacted by the States of Deliberation unjustifiably infringes the presumption of innocence, but rather the more theoretical question of what the response would be if such a provision were to be enacted. It is by this means that I can reach a conclusion as to whether there is the degree of repugnancy that might engage paragraph 1(c) of Article 7 of the TIEA. I have noted, in particular, that this guidance involves considering whether the infringement is justifiable as reasonable and proportionate, which further requires an evaluation of whether the infringement goes further than is necessary. This was stated clearly in *Salabiaku v France* (1988) 13 EHRR 379 (at para. 28):

"*Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.*

Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

87. I have further noted the cases reviewed leading up to the summary of the principles contained in para. 21 of Lord Bingham's speech in the ***Sheldrake*** case (as quoted by Lord Phillips in ***Keogh***), which start with ***Salabiaku*** and then range through others including (at para. 15):

> "*The provision challenged in AG v Malta (Application No 16641/90) (unreported), 10 December 1991 imposed criminal liability on a director of a body which had committed a criminal offence "unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence". The Commission found the application to be manifestly ill-founded. It refers to the Salabiaku judgment, noted that the applicant was provided under the legislation with the possibility of exculpating himself, found that the Maltese courts enjoyed a genuine freedom of assessment and concluded that the provision had not been applied to the applicant in a manner incompatible with the presumption of innocence. A similar decision was reached by the court more recently in Brown v United Kingdom (Application No 44223/98) (unreported) 2 July 2002: article 6(2) of the Convention was not violated by a provision which enabled a newspaper proprietor or publisher to escape strict liability under section 4(5) of the Sexual Offences (Amendment) Act 1976 only if he proved, on the balance of probabilities, that he was in no way at fault in connection with the offending publication.*"

and also including (at para. 20):

> "*The decision of the court in Janosevic v Sweden (2002) 38 EHRR 473 rejected a complaint that the imposition of tax surcharges was incompatible with article 6(2) because (para 99) "an almost insurmountable burden of proof" was imposed on the taxpayer. The opportunity was taken to restate established principles. There was no need for the Swedish authorities to prove intent or negligence, but states might, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or negligence: para 100. There was, on the facts, an effective presumption against the taxpayer (para 100), and as decided in Salabiaku, at para 101,*
>
> > *"in employing presumptions in criminal law, the contracting states are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved."*
>
> *The court acknowledged, at para 102, that it was difficult for the taxpayer to rebut the presumption in question, but he was not without means of defence (para 102), and the court had regard to the financial interests of the state in tax matters and its dependence on the provision of correct and complete information by taxpayers (para 103) in concluding, at para 104, that the presumption was confined within reasonable limits.*"

88. There was also quite a full analysis of the position in the ***Jayalalitha*** case itself on whether section 278E of the 1961 Act offended against the presumption of innocence:

> "*86 An offence, as we ordinarily understand it, consists of a "how-when-where-who-why" framework. There are several stages as for instance, the intention, the planning, the preparation and the execution of the offence. Such an offence may be proved either by direct ocular evidence or by circumstantial evidence, where every link is in place, leading to the proof of guilt of the accused. This is not an offence like that. Many statutory offences do not fall within these parameters. Violations of the*

provisions of law either by doing what is forbidden or by not doing what is mandated, is the offence and the statute may insist upon the mens rea element or it may not. When the element of mens rea is part of the statutory offence, then what follows is that the particular act of omission or commission should be done with the intention, with "knowledge", "deliberately", "without reasonable cause" or as in the case of the impugned provision, "wilfully". The prosecution cannot indiscriminately launch proceedings as was alleged on behalf of the petitioners herein without proving or without establishing that the particular act was done or a particular duty was not done. In the instant case, the alleged act is – wilful failure to furnish in due time the return of income which they are required to furnish either – (a) under sub-section (1) of section 139 or (b) by notice given under section 142(1)(i) or section 148 or section 153A. Therefore, the prosecution will have to show that the assessee or the person has not furnished the return as above in due time. The prosecution will have to prove that notice was given under section 142(1) and yet, the return was not furnished. The prosecution will have to prove that notice was issued under section 148, where income has escaped assessment, requiring the assessee to furnish a return of his income in the prescribed format and verified in the prescribed manner and setting forth such other particulars and there was a default. The prosecution will have to prove that a notice was issued under section 153A requiring the person to furnish the return of income in respect of each assessment year falling within these assessment years referred to in clause (b), etc., as provided under the Act and there was a default. The burden of proving these lies on the prosecution.

87 Apart from these, before the introduction of section 278E, the prosecution also had to prove that the person or the assessee committed the above default "wilfully". Now, that responsibility has been lifted from the shoulders of the prosecution and placed on the person or the assessee. It is true that the section says that it is for the assessee to prove the absence of culpable mental state, but what exactly does this mean? It means that the assessee will have to prove the circumstances which prevented the assessee from filing the return as above in due time as per section 139(1) or in response to the notices under sections 142, 148 and 153A, as the case may be. Previously, it was the duty of the prosecution to prove the absence of such circumstances. Now, if there are circumstances which prevent an assessee from discharging his duty, as provided for under the Income-tax Act, it is something specially within his knowledge and he is required to prove it. The Indian Evidence Act and the law laid down by Indian courts as well as the courts elsewhere with regard to proof of facts specially within the knowledge of the accused provides that the burden must necessarily be cast on that person. At the same time, it was, of course, vehemently contended on behalf of the petitioners that in the present case, the presumption amounts to proof of guilt and it was submitted, and with much force, that the impugned provision is a legislative presumption of guilt. I am afraid not. The law does not presume and the law has not presumed that the assessee is guilty. The law has only asked the court to presume that nothing prevented the assessee from filing his return in accordance with law and in response to the notices and, therefore, the failure is wilful. If there were such compelling circumstances, it is always open to the assessee to prove them in accordance with law. That does not seem to be and cannot be a difficult thing to do. In fact, obviously, Parliament found that it was well nigh impossible for the prosecution to prove the absence of compelling circumstances which prevented the assessee from what in law the assessees were bound to, i.e., prove the negative, so in its wisdom, it decided that it would be easier and more practicable, and in the context of the objects sought to be achieved, to require the assessee to show those facts which would lead the court to infer that act 'A', namely filing the return in due time was not possible. If the assessee proves it, then the

prosecution will fail. Can it be said that this is arbitrary or unreasonable? I think not."

89. I am confident that, if there were to be a domestic challenge in India about the offence in section 276C of the 1961 Act (or even section 277), this line of reasoning would be adopted. As a result, I recognise that, as a matter of Indian domestic law, there would be a firm conclusion that a trial of the Applicant, were it ever to come to that, which engaged section 278E, read with section 276C (or, to the extent applicable, section 277) would be regarded as a fair trial. That likely outcome is, in my view, a significant factor for this Court to take into account.

90. The real difficulty, though, comes from the standard of proof required to rebut the presumed mental element. If a provision such as section 278E were to be enacted in Guernsey, but on the usual basis of requiring proof at no higher than a balance of probabilities (or preponderance of probability), I would conclude that it would not be found to violate article 6(2). Such a presumption is not prohibited as a matter of principle and so falls to be considered as to its reasonableness and its proportionality. In the context of an offence of attempted tax evasion through failing to report taxable income (and I am adopting here the summary given by Mr Mehta, with which Mr Datar agreed), short of an accused person making an admission, the prosecution will almost inevitably have to invite the Jurats to draw inferences that the accused had the required mental state of wilfulness, unless the legislature chose to introduce a statutory presumption to that end. As I understand the history of section 278E from the cases to which the experts have referred, this was the position prior to 1986 in India. Accordingly, were there to be a requirement on the part of a defendant in Guernsey to disprove an element of the offence, but without any reference to having to do so to the criminal standard of proof of beyond reasonable doubt, I think that the choice of the legislature would just fall within the ambit of the margin of appreciation to be afforded to it. In particular, the Court would have regard to what was said in *Janosevic v Sweden* (2004) 38 EHRR 22 about the presumption of innocence in the context of tax offences as being the most likely approach to be taken if the issue were to return to the Strasbourg court.

91. The presumption of innocence embodied in Article 6(2) of the European Convention and now incorporated into Guernsey law through the 2000 Law requires that those who constitute the court should not start with a preconceived idea that the accused has committed the offence charged. It further requires that the burden of proof is on the prosecution and that any doubt should operate to the benefit of the accused. This entails the prosecution being obliged to adduce evidence sufficient to convict the accused. Reverse burdens of proof chip away at those principles. It is, however, necessary to bear in mind the importance of what is at stake and the difficulty the prosecution would face in the absence of a presumption. I recognise that tax collection is the main source of income for the States of Guernsey. It is based on the accuracy of the information supplied by taxpayers. Given that the provision of that information is something about which the taxpayer in question is likely to be the most knowledgeable person, if it transpires that there are inaccuracies in the information provided, the starting point should be to reach the conclusion that those inaccuracies are due to an inexcusable act attributable to the taxpayer. One way of looking at such a presumption is that it formalises the rule of evidence that would otherwise depend on inviting a court to draw inferences from all the surrounding facts and circumstances. The next consideration is whether the accused is left with a suitable means to defend himself. Given the line of authority that I am satisfied would be used as guidance in the event of such a case arising, one outcome would be to conclude that the reverse burden creates no more than an evidential burden. However, even if it were found to be a legal burden, as I think is more likely to be the case, in the circumstances, I further think it would not be found to violate Article 6. This is because the balance struck in such a situation between the general public interest that the prosecution should be required to prove all elements of its case and the degree of infringement

of that protection arising from imposing upon an individual who can be expected to have particular knowledge about, and take responsibility for, the return of income provided to the Respondent would, in my view, fall within the reasonable limits afforded to the legislature under the applicable principles taken from the cases to which I have referred.

92. Having reached the conclusion that what might be termed a "common" reverse burden of proof provision in domestic law would most probably not be found to infringe Article 6(2) of the Convention, escalating the standard of proof required to beyond reasonable doubt would, I think, take such a presumption beyond the realms of what is proportionate. I have taken into account that this would introduce a level of proof on the part of an accused person matching that required from the Crown. As such, it would be so close to becoming a strict liability offence that I think it entirely proper to have regard to the type of offence it is, including the penalty to which a person convicted of it would be exposed. I have, therefore, reminded myself that both section 276C and 277 of the 1961 Act involve imprisonable offences and, in respect of the higher bracket of the amounts mentioned, carry up to seven years' imprisonment. I am conscious that the significance of the penalty attached to an offence is not always going to determine whether or not a court would be minded to find that the legislature must have intended there to be a mental element (eg, as in ***Sweet v Parsley*** [1970] AC 132, to which Lord Bingham referred in para. 6 of the ***Sheldrake*** case), and so scrutinise carefully whether or not the presumption of innocence has been undermined, but the fact that it carries such significant consequences following a finding of guilt is, in my view, a relevant factor in deciding how great a departure from the requirement that the prosecution prove all ingredients of the offence can be justified. If this were being considered solely in the context of what is permissible in domestic law, I would be inclined to the view that, if the States of Deliberation enacted a provision requiring a defendant to disprove the mental element of a tax offence to the criminal standard of proof, it would be found to go further than is necessary because the pendulum will have swung from any reasonable doubt operating in favour of the accused to the accused having to prove that no reasonable doubt existed in relation to his alleged wilfulness. I take the view that this is different to the conclusive presumption found, for example, in section 3(3)(b) of the Offences (Fixed Penalties) (Guernsey) Law, 2009, to which Advocate Hill helpfully drew my attention, because the offences with which that measure deals are of a much lower level of seriousness. In my judgment, a provision such as section 278E would be likely to offend against established principles applying to how to conduct a fair criminal trial in Guernsey. To that extent, I accept the submissions made by Advocate Edwards on behalf of the Applicant.

93. The next question, though, is the key one. It involves deciding whether that conclusion engages public policy for the purposes of paragraph 1(c) of Article 7 of the TIEA. I do not think it does. In my judgment, there is a difference between a public authority in Guernsey being asked to assist a criminal investigation being undertaken elsewhere under the terms of the TIEA and what would happen if this were a purely domestic law situation. In reaching this conclusion, I am drawing a very precise distinction between a domestic reverse burden requiring proof beyond reasonable doubt, which I am satisfied would be found to infringe a fundamental principle of domestic law, and the operation of such a provision in the domestic law of the requesting State, especially where that provision has already been found not to violate the Constitution in India. I take the view that it would adversely impact on principles of comity for this Court to find a provision in Indian law so repugnant that it provides a reason in Guernsey law for overriding the basis of the Respondent rendering assistance under the TIEA. It is for the Indian legislature to decide what evidential rules to enact and not for this Court to be critical about the choice made by that legislature. The rationale of the TIEA is to give assistance save in cases where such assistance should not be given, so my focus has been on the investigation rather than anything that might follow, which, if it were to reach that point, is the time when any further submissions may be capable of being advanced on behalf of the Applicant. In my opinion, it is proper to respect the way that a friendly country, which

is how India is viewed, has chosen to deal with problems it has faced about proving offences involving a mental element even if the solution found would most likely be found to be incompatible with fundamental principles of how the rule of law operates in Guernsey.

94. In particular, I have noted that the focus in the OECD Commentary is on the "*vital interests*" of the requested State. I am not persuaded that the provision of information in circumstances where any prosecution in India could well involve reliance on section 278E of the 1961 Act can be said to affect the vital interests of Guernsey. The approach referred to in the cases from Singapore I have mentioned indicates that reliance on paragraph 1(c) of Article 7 should be confined to cases where the assistance sought will strike at the vital interests of Guernsey. The Respondent's role is as a provider of information to assist an investigation in another country and what might happen at the conclusion of such an investigation is a matter of Indian domestic law and not something that has to be considered in the light of any impact on a fundamental principle of Guernsey law. If one compares the position if this were an investigation confined to Guernsey, it is readily apparent that the information-gathering powers of the Respondent could be used in that situation and further that any relevant material obtained could be shared with other investigators and the prosecution here in Guernsey. Accordingly, viewing the Respondent as no more than a participant in the investigation, there is nothing repugnant involved and so nothing contrary to Guernsey public policy. This explains why, in my view, public policy falls to be considered in the light of the act of supplying the information sought and not in relation to anything that may follow thereafter, unless there is a suggestion of persecution. There has been no suggestion that there is any political or racial persecution of the Applicant involved with the making of the request by the ITA. Indeed, the basis on which this ground of the challenge to the Notice is made relates only to the fact that, if such a situation arose in a domestic context, an accused person would be able to argue that the equivalent to section 278E, and especially subsection (2) thereof, should be found to be contrary to the European Convention. Whilst I agree that that would be the outcome, I think Advocate Edwards has overlooked the obligation in paragraph 1 of Article 5 of the TIEA to exchange information "*without regard to … whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.*" I take the view that this provision recognises that the requesting Party may take a different approach to the conduct it wishes to criminalise and that this arguably extends to the means by which such an offence is to be proved. The assessment of public policy does not involve considering whether, if the offence or offences being investigated were to be pursued under Guernsey law, the Applicant would be able to argue that a violation of Article 6(2) of the European Convention means that any prosecution cannot be pursued, but rather whether the supplying of information, as requested, itself strikes against a fundamental principle of Guernsey law. Having concluded that the mental element of the offence or offences involved remains, I have also reached the conclusion that the Respondent was not required to decline to assist with the December request on the ground of public policy and so his decision is not *ultra vires* on this basis.

95. I have undertaken a full review of the submissions made by Advocate Edwards because I considered it was important to set out why it is that I agreed with them as they applied to the standard of proof found in section 278E of the 1961 Act if such a provision existed, or was proposed, in Guernsey law. In other words, but for the unnecessarily high burden of proof involved, I would not even have found the probable Convention right violation. However, as I have explained, that is not the only element that has to be determined in order to find that the ITA's request could be declined on the ground of public policy. It would, of course, have been easier to have agreed with Advocate Hill's submission that the scheme of the TIEA, as explained in the OECD Commentary, does not require a requesting Party to prove that an element of intent is involved. However, in my view, that would not have adequately addressed the submissions made on behalf of the Applicant and, in a case where the issue of whether it is a criminal tax matter at all has been raised, and then coupled with public policy, I

consider it desirable to deal with these matters more comprehensively. Had Advocate Edwards' submissions found favour, it would have resulted in the Notice being set aside as not complying with the Respondent's obligations under the 1975 Law. It could also follow that it shows that the Respondent's approach of simply taking what the ITA told him at face value was unduly blinkered. That said, the simple answer to this aspect of the Applicant's case is that the public policy exception is one available in only very limited instances. If it were to operate in the manner suggested by Advocate Edwards, it would essentially mean that any request for assistance made by the ITA to any competent authority where Article 6(2) of the European Convention (or some equivalent provision) operates would be bound to be rejected if the offence being investigated would involve the application of the presumption found in section 278E. Given that that provision has operated for more than 30 years, if it had merit, I would have expected the issue to have been raised in respect of a request made to a different competent authority before now. No such example was offered by the Advocates and so I have proceeded on the basis that this is an entirely new argument. However, for the reasons I have given, I reject it as lacking merit.

96. There is a second element, though, to the Applicant's challenge on the basis of public policy and that is that the Respondent failed to take the possibility of declining to assist on this ground into account at all. It is apparent from the evidence adduced on behalf of the Respondent that such a possibility did not cross the mind of the Compliance & International Manager when deciding to issue the Notice to T Limited because he does not set out in his Affidavit evidence that he considered the issue in this way. Paragraph 34 of his Second Affidavit shows that his consideration of this issue was of a more limited compass, although I accept that he did consider by reference to the OECD guidance whether paragraph 1(c) of Article 7 should be invoked. Similarly, when the Deputy Director considered the representations made on behalf of the Applicant in the letter from Advocate Edwards dated 21 September 2016, his attention was not drawn to this particular argument, for the simple reason that it was not rehearsed in this level of detail, and so he has not addressed it directly. He also reviewed the decision before upholding it, and so maintaining it, on the same basis as his colleague.

97. As a result, I am able to conclude that there has technically been a ***Wednesbury*** unreasonable decision here if I accept that the Respondent should have conducted any level of enquiry as to whether or not the possibility of relying on public policy arose. As I have just described it, the Respondent's approach to this question has, in my view, been "*unduly blinkered*". I take the view that the Respondent should give some consideration to the investigation with which he is being asked to assist, but he is obviously not required to descend into the level of detail set out in this judgment. In other words, it is open to me to making a finding that the Respondent should have sought such additional clarification as necessary about how the information requested links to the investigation of one or more offences. However, such a conclusion would not, in my view, assist the Applicant because, as I have explained, even if there had a more been detailed consideration given to the possibility of declining to assist using paragraph 1(c) of Article 7, the conclusion would inevitably have been that this did not provide the basis for doing so. In those circumstances, I do not need to consider further the Applicant's challenge on the basis of irrationality as it applies to public policy because I would not exercise the Court's discretion to set aside the Notice to T Limited on that basis in any event. In other words, even if everything that should have been taken into account had been taken into account by the Respondent on this issue, the outcome would have been unchanged.

98. For these reasons, I reject the Applicant's challenge based on his contention that the Respondent should have declined to assist the ITA on the ground that it was contrary to public policy (as set out, in particular, in paragraphs 39(c) and (d) and 40(a) of the Amended Cause).

Foreseeable relevance

99. This brings me to what has always been the Applicant's main ground for challenging the notice issued to T Limited, which relates to whether or not the material sought by it was foreseeably relevant to any alleged investigation into the Applicant. The term is used in Article 1 of the TIEA and, as the requesting competent authority, the ITA also had to comply with paragraph (6) of Article 5 when making the December request. If it did not do so, then the decision of the Respondent cannot have been lawful because the request did not comply with the requirements under the TIEA, which is what the Respondent must be satisfied about under section 75C(2) of the 1975 Law.

100. Foreseeable relevance is explained in the OECD Commentary (para. 3):

> "*The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.*"

It continues (in para. 4):

> "*The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to the on-going investigation can only be made following the receipt of the information.*"

Because of the time period for which information has been sought (see, eg, paragraph (2)(a) of Article 14), the only basis to consider foreseeable relevance in the present case is in relation to "*the investigation or prosecution of tax matters*".

101. The Applicant's position on this issue is that the Respondent did not properly scrutinise several major issues concerning the request and accepted what was put in the ITA's request at face value. This is particularly clear because the December request had evolved out of requests that had been identified by the Respondent as flawed and so incapable of being progressed. In those circumstances, it was incumbent upon the decision-taker to follow the general public law approach of asking himself the right questions and taking reasonable steps to acquaint himself with the relevant information to answer such a question correctly. What happened in this case fell short of what was required and so vitiates the decision to issue the Notice to T Limited.

102. The Applicant places considerable reliance on the discussion of these duties in the Cayman Islands' case, *MH Investments v CITIA* (*supra*), in which the doctrine set out by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 was adopted and applied to how a competent authority should assess a request made under a TIEA (see page 1065B):

> "*… the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

The question was posed as a generic way of describing *Wednesbury* unreasonableness. By way of a further example, Standlen J clarified the position in *R (RP) v London Borough of Brent* [2011] EWHC 3251 (Admin) (at para. 239), and I accept that this duty operates in the

same way as a matter of Guernsey public law. As in *MH Investments*, the issue requires consideration of whether the Respondent knew enough to conclude that the December request was foreseeably relevant or whether he should instead, as the Applicant suggests was necessary, have exercised the power in section 75C(3) of the 1975 Law to ask the ITA for further information, documents or particulars in support of its request.

103. Advocate Edwards suggests that the approach this Court should take in reviewing the Respondent's decision is to adopt the guidance given in *Iyadurai v Secretary of State for the Home Department* [1998] Imm AR 470 (at page 475):

> "*The court can do no more than inquire whether the Secretary of State has (i) taken adequate steps to inform himself of the position in the third country (ii) properly considered the information which is available to him and (iii) come to an opinion which is consistent with that information, recognising that it is his responsibility to evaluate the material which is available to him.*"

104. Advocate Edwards has also highlighted the way in which Quin J rejected the submissions he summarised in para. 177 ("*From a review of the respondent's letters to the applicants' Cayman Islands attorneys and its submissions, the Attorney General, and indeed, the respondent, seem to suggest that all the respondent had to do is satisfy itself that the request was certified by the ATO as being in compliance with the agreement and particularly the requirements of art 5*") and he suggests that this Court should similarly be critical of the Respondent's apparent satisfaction that a box-ticking exercise to check that the request meets the requirements suffices. Instead, he submits that there should be a similar obligation on the ITA as was set out in para. 204, which would ensure that its disclosure would be full and frank and that, where necessary, the Respondent should be prepared to ask further questions to ensure the 1975 Law is complied with and the rights of the Applicant, as the subject of the request, are not infringed. In order to establish foreseeable relevance, there has to be a link to an extant criminal investigation and the surrounding circumstances of the previous requests should have led to the Respondent seeking further clarification that such an investigation had actually been commenced.

105. In a case such as this, Advocate Edwards also submits that the standard of consideration required involves "*anxious scrutiny*" because of the potential otherwise for an individual's rights to be infringed (applying by analogy the comments made by the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, which was an asylum case). In other words, the Respondent cannot simply take at face value what the ITA tells him because to do so would side-step the requirement for there to be anxious scrutiny to ensure that Convention rights such as those available under Article 8, and possibly even Article 1 of Protocol 1, are not illusory. Further, in order to meet that requirement, there needed to be clear evidence that the request was genuinely directed to the investigation of a criminal tax matter. The reference to clear and specific evidence is taken from *Comptroller of Income Tax v AZP* (*supra*) and the need to ensure that the request is linked to the purpose set out derives from *R (Derrin Brother Properties Limited) v HMRC* [2014] EWHC 1152 (Admin) and the distinction drawn by Simler J at first instance between a widely-worded request in a slightly different context, which might be regarded as a fishing expedition and a request designed "*to secure the production of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position*" (para. 20).

106. The *AZP* case from Singapore has been cited as an example of where foreseeable relevance was not found. In Singapore, before the Comptroller of Income Tax can require a party to produce documents, an order must be sought from the court. In dismissing the application for orders, Choo Han Teck J explained (at para. 10) that the Comptroller was required "*to show some clear and specific evidence that there is a connection between the information requested*

and the enforcement of the requesting state's tax laws. Clear and specific evidence is necessary to prevent unwarranted disclosure of information that could not otherwise be sought from any party including the requested state." The conclusions as to why this standard of foreseeable relevance had not been satisfied were:

> "*12 In relation to Company X, the tax authority in India relied on an unsigned transfer instruction ("the first transfer instruction") allegedly issued by the Indian national as evidence that the Indian national remitted monies to Company X's bank accounts in Singapore. The tax authority in India also relied on the first transfer instruction as evidence of the connection between the Indian national and Company X. The Indian national has not admitted to any connection between him and Company X. The first transfer instruction was a letter dated 19 December 2005 instructing a bank in Switzerland ("Bank S") to transfer monies from an account held with a bank in New York to Account 1. The first transfer instruction was unsigned and it is unclear if the instructions were executed. Furthermore, even if the first transfer instruction was issued and executed, it was issued around 2005, which is outside the period for which Article 28(1) as amended by the Second Protocol applies (ie taxable periods beginning on or after 1 January 2008). The Comptroller had already stated in its letter dated 30 September 2011 that it could not provide the bank records and statements requested for the period before 1 January 2008, and this was accepted by the tax authority in India. The tax authority in India did not provide evidence of any transaction between Company X and the Indian national on or after 1 January 2008 in relation to Account 1. I therefore did not grant the information requested in relation to Account 1, given the lack of clear and specific evidence supporting the Request.*
>
> *13 In relation to Company Y, the tax authority in India also relied on an unsigned transfer instruction ("the second transfer instruction") as evidence that the Indian national remitted monies to Account 2. Again, the tax authority in India claimed that the second transfer instruction was evidence of the connection between Company Y and the Indian national for the purposes of the investigations. The second transfer instruction was a letter dated 16 July 2000 to Bank S to transfer monies to an account purportedly held by Company Y with a bank in Dubai. There was no evidence that monies had been transferred to or from Account 2 at all. In addition, there was no evidence of any transaction between Company Y and the Indian national on or after 1 January 2008 in relation to Account 2. I therefore also declined to grant an order for the information requested on Account 2. The Request and the supporting evidence was not sufficiently clear and specific for me to say that the information requested would be foreseeably relevant to the enforcement of India's tax laws and the ongoing investigations on the Indian national.*"

107. By way of contrast, Advocate Edwards also highlighted how a different conclusion can be reached, but through the same level of critical analysis of the evidence. This is found in para. 16 of the judgment of Andrew Ang J in the other case from Singapore, *Comptroller of Income Tax v BKW* (*supra*), which concerned a loose piece of paper giving details of a Singapore bank account held by one Indian taxpayer, discovered during a raid of premises of another Indian taxpayer:

> "*In my judgment, the information on the Paper regarding the Bank Account was significant. It contained all the details necessary for a transfer of funds, including SWIFT and bank codes. The level of detail contained in the Paper, viewed together with the fact that the Paper was found in [S]'s safe under the control of [S]'s associate vice president and his subordinate, was sufficient to establish a connection between the tax investigations on [S] and the Bank Account. Although the existence*

of actual dealings between [S] and [R] Ltd would have strengthened the Comptroller's case, this was not a prerequisite for an order under s 105J of the Income Tax Act. As mentioned, the relevant inquiry was whether disclosure was justified in the circumstances, taking into account the foreseeable relevance of the information requested. In this case, the Comptroller was not required to establish the existence of actual transactions when it sought the very information required to establish the existence of the transactions."

108. Advocate Edwards has also referred to *APEF Management Company 5 Limited v Comptroller of Taxes* [2013] JRC 262, in which the Royal Court of Jersey allowed an appeal against a notice on the ground that the information sought was not foreseeably relevant. That conclusion arose as a result of further evidence coming to light which showed that the suspicion that shares had been transferred for no value was actually an exchange of holdings for full value. Accordingly, it had become a speculative request with no nexus to the tax affairs of the individual concerned, and so "*an impermissible fishing expedition*" (para. 75). In that case, the court appears to have accepted the common position of counsel that the definition of foreseeable relevance set out in the OECD Commentary on Article 26 of its Model Tax Convention could not be improved upon.

109. In the Deputy Director's Second Affidavit, he also refers to the 2012 *Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, which offers a slightly expanded explanation of how to treat foreseeable relevance:

> "*5 ... The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information is not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are "fishing expeditions, i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.*"

I have further noted that para. 5.2 has been added to the Commentary, the first part of which reads:

> "*The standard of "foreseeable relevance" can be met both in cases dealing with one taxpayer (whether identified by name or otherwise) or several taxpayers (whether identified by name or otherwise). Where a Contracting State undertakes an investigation into a particular group of taxpayers in accordance with its laws, any*

request related to the investigation will typically serve "the administration or enforcement" of its domestic tax laws and thus comply with the requirements of paragraph 1, provided it meets the standard of "foreseeable relevance". However, where the request relates to a group of taxpayers not individually identified, it will often be more difficult to establish that the request is not a fishing expedition, as the requesting State cannot point to an ongoing investigation into the affairs of a particular taxpayer which in most cases by itself would dispel the notion of the request being random or speculative. In such cases it is therefore necessary that the requesting State provide a detailed description of the group and the specific facts and circumstances that have led to the request, an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis."

110. Advocate Hill suggested that there is a "*low bar*" for establishing foreseeable relevance, and highlighted the approach taken in Singapore in the ***BKW*** case, where the emphasis (taken from the OECD Commentary) was that it "*only requires a reasonable possibility that the information will be relevant at the time a request is made*". The conclusions reached in a broadly comparable situation in para. 14 also merited some consideration:

> "*Applying the first of these principles, I found that the requested information was foreseeably relevant to the administration or enforcement of Indian tax law. The taxpayer under investigation, [S], was clearly identified. The purpose of the EOI Request was also sufficiently elaborated upon: the Competent Authority of India needed the information to identify the person in India making cash payments to [S] and ascertain details of hidden transactions that might have potential income tax implications for [S] under domestic Indian tax law. In particular, the requested account-opening documents might shed light on the personalities involved in the operation of the Bank Account and the movement of funds out of Singapore. This, together with the requested bank statements, would enable the Indian tax authorities to ascertain the existence and details of hidden transactions … affecting [S]'s tax liability in India.*"

111. He also reminded me of what the Court of Appeal had said when giving leave in the present case (at para. 46 of its judgment):

> "*… the international agreement obviously has great importance in assessing the lawfulness – including the reasonableness – of the Director's actions. The discretion conferred on him is to be exercised so that Guernsey can comply with its international obligations and in that connection the OECD commentary on the Model Agreement may be helpful. It follows that any enquiry in Guernsey into whether in fact the request is foreseeably relevant to the requesting country's tax administration or enforcement of tax collection is likely to be of limited compass. While it is true that the Director must be satisfied that the request is in accordance with the TIEA, he is unlikely in our judgment to be required to make an exhaustive investigation of foreign law so to be satisfied. He is entitled to proceed on the assumption that the requesting state is acting lawfully, at least until material is put before him that this might not be the case, at which time he should make such enquiries as would be reasonable to satisfy himself that the request is a proper one to which effect should be given.*"

In the context of acting rationally, the Court of Appeal added (in para. 47) that it did not mean that the Respondent "*must examine critically the letter of request.*"

112. However, the guidance on which Advocate Hill relied in particular (and to which Advocate Edwards also referred) is that given by the Jersey Court of Appeal in *Volaw Trust & Corporate Services Ltd v Office of the Comptroller of Taxes* (2013) 17 ITLR 1. The issue was about how far beyond the assessment of the material contained in a letter of request the decision-maker should go and whether the approach from *Acturus Properties Ltd v Attorney General* 2001 JLR 43 concerning notices issued under the Investigation of Fraud (Jersey) Law 1991 could be adopted. Having rehearsed the argument that there was a duty to make further enquiries in order to check facts alleged in the request, at para. 22, the Court of Appeal cited (adding its own emphasis) what had been said on that question in the *Acturus* case:

> "*[51] We do not accept that the Attorney General is under any such duty. The whole point of the 1991 Law is that it is usually dealing with a criminal investigation rather than a prosecution. It is not necessarily known at that stage whether a crime has been committed and, if so, what crime and by whom. There is only a reasonable suspicion of a serious and complex fraud and evidence to justify or nullify that suspicion is sought. In Bertoli v Malone [1990-91] CILR, [1992] LRC (Const) 960, the Judicial Committee of the Privy Council approved the judgment of Georges JA in the Court of Appeal of the Cayman Islands. That case concerned a request for assistance made by criminal investigative authorities of the United States to the Cayman Mutual Legal Assistance Authority. In considering the duty of the Cayman Authority in relation to such a request for assistance from a foreign jurisdiction, the Court of Appeal said this (see [1990-91] CILR 58 at 71):*
>
> > *"The Authority, with the assistance of the Attorney General if needed, can no doubt decide whether the request is in conformity with the provisions of the Treaty or whether it is for a political offence or a purely military offence. In deciding whether there are reasonable grounds for believing that an offence has been committed and that the information sought relates to the offence, the Authority must assume the correctness of the information laid before him in the request. Clearly he cannot receive evidence to raise doubt as to this. Again these are matters of analysis and inference on which the Authority can competently and accurately arrive at a decision on the documents placed before him."*
>
> *[52] In our judgment, the position of the Attorney General is the same. He is entitled to assume the correctness of the information set out in the letter of request. It would not normally be appropriate for him to go back and query information given to him by a prosecuting authority of a friendly jurisdiction. That is not to say that the Attorney General, in order to ensure that orders made under the 1991 Law are not in terms which are wider than is required for the purposes of the investigation, cannot seek clarification or elaboration. For example it may be that the alleged connection with a particular company in Jersey is not sufficiently spelt out in the letter of request. But that is a matter of judgment for him when holding the balance between the need to investigate serious or complex fraud, wherever committed, and the need to limit forced disclosure of confidential information to what is necessary for the purposes of the investigation. He is entitled, as a matter of law, to assume the correctness of what he is told and is under no duty to request sight of the evidence upon which the information in the letter of request is based. Reverting therefore to the presumption of regularity, no evidence has been produced by the representors which cannot be reconciled with a reasonable decision on the Attorney General's part that there was a suspected offence involving serious or complex fraud."*

113. Applying those principles, at para. 23 the Court of Appeal stated:

> "*The considerations applied in the case of requests for assistance under the 1991 Law are not identical to those applicable in cases such as the present under the 2008 Regulations but they are of the same genus. The statutory provisions in each case decree that the threshold for intervention includes the belief on the part of the relevant officer that a certain state of affairs exists and entrusts the decision whether to exercise the powers in question on him alone; a rational basis for that belief and decision is necessary; but the context in each case is one in which it is, in the nature of things, that the full facts are unlikely to be known at the time when the request made is in relation to investigation, not determination. Acturus suggests that the officer (here the Comptroller) is not required to do more than assess, albeit after seeking clarification or elaboration, the sufficiency of the request in the light of the statutory criteria.*"

It added (at para. 28) that "*It is not, however, for a decision-maker to question the correctness of the material provided to it from outside the jurisdiction, as long as it is properly evaluated after, it may be, some probing for the purposes of clarification.*" It further added (at para. 32) that:

> "*… it does not seem to us possible to read into the Comptroller's decision making process a need to hold a mini-trial. The Comptroller has neither the power nor the facility to provide one. As long as he has reasonable grounds for his belief or opinion on the material, before him, he is empowered to act on that belief or opinion. Although the analogy is not exact, it seems to us that the situation confronting the Comptroller when faced with such representations is not un-akin to that which confronts a court when it has to consider whether a putative respondent's affidavit is sufficient to prevent what would otherwise be the grant of permission to apply for judicial review. In the familiar phrase such affidavit would have to constitute a 'knock-out blow' to have such effect. (Cf: Sharma v Antoine [2006] UKPC 57 at [14](6), [2007] 4 LRC 10 at 14(6), [2007] 1 WLR 780.) Fordham: Judicial Review Handbook (6th edn, 2012) ('Fordham') para 21.1.7(c), p 230. So too the representations would have to undermine what would otherwise be the Comptroller's reasonable belief or opinion before he could be inhibited from further action.*"

114. I am satisfied that this suite of decisions from elsewhere, read with the guidance offered in this case by the Court of Appeal, can properly inform the approach that this Court should take to the question of whether the Respondent was entitled to find that the standard of foreseeable relevance was met in this case. It is apparent that more than a mere box-ticking exercise is required. Instead, there must be a proper evaluation of the material provided by the ITA to ensure that the Respondent is satisfied of the matters of which he must be satisfied by section 75C(2) of the 1975 Law. That material must provide clear and sufficient evidence, but the Respondent is not required to engage in anything approaching a mini-trial in order to be satisfied that foreseeable relevance is made out. That evidence must demonstrate a genuine connection between the taxpayer concerned and the information sought for the purposes of the existing investigation, otherwise there is an increased likelihood that it is speculative and in the nature of a fishing expedition. However, unless given reason to think otherwise, the decision-maker can assume the correctness of what he is told and is under no obligation to ask the ITA to produce the material on which the information in the request made is based.

115. Although more information has been given to the Court about the Applicant than was given to the Respondent, I have attempted to put that additional information to one side and concentrate on what was known to the Respondent at the time the decision to issue the notice to T Limited was taken. The additional information has some relevance as it enables me to understand what more could have been found out had further enquiries been made, but that in itself does not mean that the approach taken by the Respondent was flawed. What matters

first is whether the information provided by the ITA was sufficient for the purposes of the TIEA and so of the 1975 Law. To that extent, the initial hurdle to surmount is whether paragraph (6) of Article 5 of the TIEA has been satisfied.

116. Although the Compliance & International Manager and the Deputy Director have both given evidence that they considered the December request in isolation, I do not accept their evidence on that point. I am satisfied that they will not have put completely out of their minds the way in which what became the December request evolved. Indeed, Advocate Hill submitted that there was nothing unusual in a request developing through a number of iterations. Accordingly, whilst I accept that they will have made an assessment as to whether the December request complied with the TIEA and the Law, to the extent that there were facts set out previously that had not been repeated, I find that they were facts known to the decision-maker when the Notice was issued to T Limited and so form the backcloth against which the assessment of compliance was undertaken. This is consistent with their inclusion on the TIEA Request Review Document as background information, from which I am satisfied that this background cannot be said to have been disregarded in its entirety.

117. This means that what was explained in the March request also has a bearing on the compliance question. It is clear from that earlier request that there was both a civil and a criminal aspect to what the ITA sought. In the context of the criminal aspect of the ongoing investigation, para 1(b) of the Annexure to that request explicitly referred to "*an intentional/wilful attempt to evade income tax and also making statements that are known to be false (or does not believe to be true)*". When read with the content of Box 12 in the December request referring to "*a complex multi-layered web of trust and companies to conceal [the Applicant's] unaccounted income*" there is, in my judgment, sufficient connection between the Applicant and an existing investigation into a criminal tax matter from which the purpose for which the information was being sought could be ascertained. In particular, I do not accept that it was incumbent on the Respondent to request sight of the Base Note, as Advocate Edwards suggested he should have done. The explanation given by the ITA referred (in the March request) to its investigation being "*In pursuance of information received by the Government of India, that the said tax payer has undisclosed and untaxed overseas assets with HSBC Bank, Geneva*" and the December request referred to the Applicant being "*one of the beneficial owners in the account in the name of [X Limited] with HSBC Bank, Geneva, Switzerland*". This suffices to piece together a connection between what the ITA already knew about the Applicant, X Limited and this bank account, from which the foreseeable relevance of the information sought becomes clear.

118. I also reject the arguments of the Applicant that the Respondent did no more than a box-ticking exercise. Looking at paragraph (6) of Article 5, there is no dispute that the identity of the Applicant as the person under investigation was stated and the Annexure set out in some detail the information requested and the time frames for it, which is an issue to which I will turn in due course. I have just explained why I am satisfied that the tax purpose was given with sufficient detail. The ITA repeated to the Respondent the information that had been supplied to it as a result of the earlier notice pursuant to section 75D of the 1975 Law, from which the grounds for believing that T Limited held details about X Limited and the trusts have been set out (and I will also deal separately with Advocate Edwards' submissions about the effect of that notice), but the March request, made prior to any information being supplied to the ITA referred to the information available to the ITA showing that the Applicant "*is a beneficiary of substantial investments in [X Limited]*" under a trusteeship and T Limited was identified as the corporate service provider. When taken together, I find that the grounds for believing T Limited would hold the information requested are established and that this name was known to the ITA without any input from the Respondent. The statements required by paragraph (6)(g) and (h) of the Article were provided. Accordingly, there was nothing required to be provided by the ITA to demonstrate the foreseeable relevance of the

information sought that was omitted and I am satisfied that the Respondent could proceed to evaluate that information rather than simply rejecting the request as being non-compliant.

119. In fact, having sight of the Base Note reinforces that conclusion. As I noted when summarising the facts, it appears to link the Applicant to X Limited, as well as to other persons named therein. The trusts are mentioned as being linked to X Limited. There is also a reference to a telephone call and a subsequent meeting, although that may or may not have been with the Applicant. At the very least, it shows why the ITA want to know more detail about whether or not this suspected link between the Applicant and X Limited existed. If the information sought shows no link, it would corroborate the answers that the Applicant has given when interviewed. However, if it supports what is suspected about the link existing, the ITA is likely to pursue its investigation down whatever other avenues are available to it. Without the information, the ITA is left with an incomplete investigation.

120. To the extent that Advocate Edwards criticises the Respondent for not requesting sight of this Base Note, suggesting that foreseeable relevance could not be established without him viewing the evidence on which the information supporting the December request was based, that argument lacks foundation. The guidance I have adopted makes clear that there is no obligation to seek this underlying evidence. I am content that there was nothing on the face of the request that means the Respondent should have queried the information given and requested clarification or elaboration. Indeed, once the material underpinning what has taken place is considered, I think it shows that the ITA is taking steps it is entitled to take as a result of nothing being elicited from the premises searches and the questioning of the Applicant and others. As I find to be the case from considering the evidence of both experts, there is a basis on which a criminal investigation into the offence found in section 276C or even section 277 of the 1961 Act can be justified, the only difference is that Mr Datar has assumed that what the Applicant has said must be accepted, whereas Mr Mehta views what has happened to date more objectively.

121. If the ITA is to be criticised for how it has described its investigation, I question whether the facts now known really show anything like "*a complex multi-layered web*". However, I do not think that this unduly elaborate description of those likely facts detracts from the type of investigation to which Mr Mehta referred being into whether the Applicant used unaccounted income to invest in X Limited or has concealed income through a non-Indian company and/or trust or has received some benefit for which the Applicant has not accounted in the returns previously made. Any of those matters would, in my view, be areas that can properly be investigated further by the ITA on the basis of the information it has provided to the Respondent. I take the view that it is important to bear in mind that the full facts are unlikely to be known at the time when the request was made and that is what the material sought is designed to clarify for the benefit of the ITA's investigation. Accordingly, I disagree with Advocate Edwards' suggestion that the Respondent should have made further enquiries about whether there really was a complex multi-layered web involved, because what matters is that there was, and still is, suspicion that the Applicant had concealed unaccounted income.

122. The TIEA Request Review Document also demonstrates that the Respondent engaged in more than a box-ticking exercise. It is apparent that "*open source information*" was viewed. I infer that this was done as a means of ensuring that it was reasonable to place reliance on what the ITA put in its request. That open source information confirmed that there was a suspicion that the Applicant's family had hidden bank accounts in Switzerland, which was what the December request asserted. The search warrant, to which reference was also made in that request, could logically be seen in that context. In my opinion, this supports the Respondent's contention that there was a proper evaluation of the information provided.

123. It is slightly more troubling, though, that the December request also referred to the 1961 Act allowing assessments of the last 16 years in respect of foreign assets or income. I accept Mr Datar's evidence that this points towards a civil matter and has no bearing on a criminal investigation. Because the inclusion of this reference in the December request produces an element of ambiguity as to whether the purpose of the request continued to be mixed civil and criminal, Advocate Edwards submits that the Respondent was obliged to seek further clarification from the ITA and his failure to do so makes the decision to issue the Notice unlawful.

124. Although it is unfortunate that this reference was included, I am satisfied that the Respondent was entitled to disregard this. I think it is important here to recognise that this was the final evolution of what had started a year earlier and so it is impossible to view it in complete isolation. The sequence of events shows that the earliest requests could not be progressed because of deficiencies that were pointed out to the ITA. Those deficiencies included a lack of clarity as to whether the time frame for the information sought preceded the coming into force of the TIEA and, if so, whether the investigation concerned criminal tax matters or not for the purposes of Article 14. It is clear from the exchanges of correspondence that the ITA knew that a request seeking information relating to times prior to the entry into force of the TIEA could only be required by the Respondent if it were a criminal tax matter. That confirmation was forthcoming in the December request and it is only this aspect of referring to the 16-year period, which I find has been carried forward without sufficient care being taken to ensure that it was still applicable, that raises any question in this regard. The evidence on behalf of the Respondent is that at the time the request was made this reference to a statute of limitations could have had a bearing on a criminal investigation and it is only Mr Datar's expert opinion that now explains differently. I have concluded, therefore, that this is an issue that makes no difference to the lawfulness of the Notice because it has no direct bearing on whether or not this was a request made in the context of a criminal tax matter and so, rather than being obliged to seek further clarification, the Respondent could treat it as not being of relevance to the decision he had to make. Put another way, this is not a case where there was no rational basis for concluding that the request had not been made in respect of a criminal tax matter.

125. This issue shades into a further criticism made by Advocate Edwards about what he terms the "re-labelling" of the request from civil to criminal. He argues that the Respondent should have queried what had changed to warrant that re-categorisation of the request and that the switch in the December request should not have been accepted at face value. He also suggests that, whilst some assistance between competent authorities is permissible, the amount of assistance given in this case was too great. I think that point relates more to the information gathered as a result of the notice under section 75D of the Law and so will deal with it when I address that final ground of the Applicant's challenge.

126. I do not find this criticism has any merit. It overlooks the reality of what happened between December 2014 and the December request a year later. The Respondent, quite properly in my view under the terms of the TIEA, drew attention to the inconsistency apparent on the face of earlier requests that sought historic information whilst also indicating that the purpose of the request was the determination, assessment and collection of taxes. Applying Article 14 of the TIEA would have resulted in the Respondent declining to assist for the straightforward reason that the information sought could not be required for that purpose. The Respondent could not be satisfied that the test in section 75C(2) had been met. In such a situation, there was not even any discretion left to the Respondent. Consequently, a rather protracted dialogue followed, which I consider was intended to ascertain whether the request was for that purpose or not, with an explanation being offered that if it was it would not enable assistance to be given. In this way, the criminal investigation involving the Applicant emerged and it was more a consequence of further requests being made without the benefit of additional guidance

that led to the requests made in September 2015 being received before the final December request. In an ideal world, requests received would be perfect from the outset. However, it seems from what the Deputy Director explains that in his experience both in Guernsey and as a peer reviewer that there will be occasions, like in this case, where there has to be some toing and froing between the competent authorities to polish the letter of request into something capable of being progressed. I accept the explanation given that there is nothing untoward in this process and that it is fairly commonplace. The December request clarified, to the Respondent's satisfaction, that the tax purpose for which the information was required by the ITA was only the investigation or prosecution of tax matters, as set out in Box 11. Box 6 included reference to suspected fraud and that the information is essential for prosecution, albeit that it added reference to appeal proceedings and penalty proceedings. In those circumstances, I find that the clear tax purpose specified had by then become the criminal tax matters required to be consistent with seeking the historic information mentioned and that this could justifiably be regarded as taking precedence over any reference that might, in the absence of that clear confirmation, be thought to reflect a non-criminal investigation.

127. The final matter raised by Advocate Edwards on the question of foreseeable relevance relates to the use to which the information requested could be put once received. He submits that the Respondent misdirected himself by thinking that it could only be used for the limited purpose of prosecution whereas, as confirmed in the first instance decision in *Volaw Trust & Corporate Services Ltd v Office of the Comptroller of Taxes* (2013) 16 ITLR 758, there is nothing in the TIEA preventing the use of the information provided for a criminal tax matter purpose from being used for another purpose. To that extent, he submits that the Respondent acted irrationally by incorrectly taking into account that there was only this limited use that could be made of the information that would be provided as a result of the Notice. The explanation given in *Volaw* is at para. 94:

> "*To put the matter another way, the sole function of the reference to 'criminal tax matter' in art 10 and the related definition in art 3(1)(f) is to define the criterion which, if satisfied, allows a request to be made for the production of pre-TIEA information. The words say nothing and imply nothing by way of limitation on the use to which such information may thereafter be put. If (1) the purpose for which the information is required falls within the scope described in art 1 and (2) the matter concerns tax and is one 'involving intentional conduct whether before or after the entry into force of this Agreement which is liable to prosecution under the criminal law of the requesting Party', then it is legitimate for a request to be made and to extend to pre-TIEA information. The two considerations are independent of one another.*"

The Royal Court of Jersey treated this allegation as being one of bad faith levelled against the requesting State's competent authority (see, eg, para. 96) and concluded (at para. 113):

> "*Whatever the explanation, the matter is again nowhere near sufficient to justify a conclusion that there was bad faith at work on the part of the Norwegian authorities. All other considerations apart, there would have to be compelling evidence available to the court before it would be justified in making such a finding in a context such as the present, particularly where no allegation to that effect was made in either appellant's notice of appeal. The proper place for this charge to be pursued, if at all, is in the Norwegian courts where, if necessary, the matter could be more effectively explored.*"

128. I find myself reaching a similar conclusion in the present case. As I understand the submissions made by Advocate Edwards, the Applicant believes that the ITA has an ulterior motive that has nothing to do with any possible prosecution of the Applicant. This is borne

out by the previous letters of request referring to the determination, assessment and collection of taxes. As such, switching the December request to ticking the purpose as being the investigation or prosecution of tax matters is no more than a subterfuge to enable the historic (or, adopting the language used in *Volaw*, pre-TIEA) information to be provided to it, which would then be used to re-visit any assessment of the Applicant's liability to income tax in India within the time-frame permitted by the statute of limitation. There may not have been an explicit allegation of bad faith, but the substance of what is alleged against the ITA as the requesting Party's competent authority can only, in my view, be considered as if it were. Advocate Edwards suggests that the Respondent should have been alive to this issue and so chosen not to exercise his discretion in favour of issuing the Notice to T Limited on the basis of the December request.

129. I do not find that the Respondent acted irrationally. The sequence of events that I have already described shows that the dialogue between the competent authorities had identified that the effect of Article 14 of the TIEA meant that only a clear request based on the investigation or prosecution of tax matters could be progressed by the Respondent. However, the re-labelling, as Advocate Edwards describes it, was not a complete switch from one basis to the other, because the March request in Box 11 referred also to "*The assessee may be liable for prosecution*". I take the view that this was a mixed request and what the Respondent sought was clarity that it was properly a criminal tax matter request, which was then forthcoming. There was, however, this earlier reference to a criminal investigation on the face of the letter of request, which reduces the strength of any suggestion that there was a change of position in order to get historic information that would otherwise not have been available to the ITA. I do not think that this amounts to the type of compelling evidence that would be needed to show that the Respondent failed to act appropriately.

130. This ground of the Applicant's challenge is founded on what the Deputy Director stated in part of para. 63 of his Second Affidavit:

> "*It is, of course, possible that, at the time of making the request the Competent Authority of the requesting Party may consider that, based on the information available to them at that time (which by the very fact that they are seeking to make a request for the exchange of information would lead to the conclusion that they did not have all the information available to them), if their suspicions were confirmed as a result of receiving the requested information they would prosecute the taxpayer, however, upon receipt of the information they determine that their suspicions were unfounded that the taxpayer had not acted intentionally this would not invalidate the transmission of the data, it would however effect the ability of the requesting Party to use the information (as its use would be restricted to the purpose for which it was originally sought, which in that scenario would have been for the investigation or prosecution of a tax matter).*"

As explained in *Volaw*, this view is wrong in law because the use to which information disclosed pursuant to the December request could be put by the ITA goes wider than what the Deputy Director stated could be the case. As set out in para. 39(g) of the Amended Cause, the Applicant alleges that this error "*infected the Director's approach to the safeguards in the TIEA*",

131. The position set out in *Volaw* is supported by the content of the OECD Commentary (at para. 96) dealing with the confidentiality provision, ie, Article 9 of the TIEA:

> "*The information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement. This means*

that the information may also be communicated to the taxpayer, his proxy or to a witness. The Agreement only permits but does not require disclosure of the information to the taxpayer. In fact, there may be cases in which information is given in confidence to the requested Party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. The competent authorities concerned should discuss such cases with a view to finding a mutually acceptable mechanism for addressing them. The competent authorities of the applicant Party need no authorisation, consent or other form of approval for the provision of the information received to any of the persons or authorities identified. The references to "public court proceedings" and to "judicial decisions" in this paragraph extend to include proceedings and decisions which, while not formally being "judicial", are of a similar character. An example would be an administrative tribunal reaching decisions on tax matters that may be binding or may be appealed to a court or a further tribunal."

There is a more expansive commentary on this issue in the *Update to Article 26 of the OECD Model Tax Convention and Its Commentary*, which confirms that there is scope for even wider dissemination with authorisation, but does not detract from the overall position that receipt on the basis of one purpose permits use for another purpose without any further consent being sought.

132. In my opinion, this makes it clear that, once information is received in respect of any of the purposes covered by Article 1 of the TIEA, it can be used, subject always to the terms of Article 9, for any of the other purposes in that Article. It may appear that this defeats the distinction drawn in Article 14, but I am satisfied that the purpose of that distinction operates in relation to the time-frame in respect of which material can be sought in the first place, as explained in ***Volaw***. If the request is not in respect of a criminal tax matter, the permissible time-frame is governed by the date the TIEA entered into force but, as soon as the Respondent is satisfied that it is a criminal tax matter request, historic information can also be sought by the Requesting Party. On the basis that the explanation given by the Director represents the general approach of the Respondent, which I find that it does, it follows that the Respondent has misunderstood the use to which the information sought can be put by the ITA. In other words, he has failed to take into account something he should have taken into account. The next question, though, is whether that error undermines the Respondent's decision to issue the Notice to T Limited, which I will turn to once I have considered the final basis on which the Applicant challenges that notice, which relates to the consequences of the prior section 75D notice.

The section 75D notice

133. The notice issued by the Deputy Director on 30 July 2015 to T Limited under section 75D(5)(a) of the 1975 Law is not itself being challenged in these proceedings in the sense of any direct relief in relation to it being sought, but Advocate Edwards argues that it was *ultra vires* and so what has happened thereafter in respect of the December request is fatally flawed. The submission runs that if it were permissible for the Respondent to provide information to the competent authority of a requesting Party, such as the ITA, so as to render compliant a request that would otherwise continue to be defective, it necessarily infects the evaluation of that information when it is received back. As it was put in reply, the Applicant contends that the Respondent cannot have the power to obtain and supply information to a requesting Party, who has made no compliant request, and where the Respondent's statutory duties would preclude providing information acceding to such a request, so as then to facilitate a request for information.

134. On the lawfulness of this notice, Advocate Edwards raises two points of statutory construction. The first is that paragraph (a) in section 75D(5) makes no mention of the third purpose given in section 75B(1) of implementing an approved international agreement, which Advocate Edwards suggests was a deliberate omission by the legislature. The second is that the Respondent must intend to give a notice under section 75A or 75B before a notice can be given under section 75D(5) and, on the face of the notice, all that is stated is that the Deputy Director was "*currently considering issuing a notice to [T Limited] under section 75B*".

135. Advocate Hill's response to these arguments is that the first misconstrues the Law. The power exists when there is an intention to give a notice under *inter alia* section 75B. Such a notice can be for the purpose of implementing an approved international agreement and so the power found in section 75D(5) can then be exercised before any such notice pursuant to section 75B is given. In relation to the second argument, Advocate Hill submits that the Respondent can be shown to have had the requisite intent to issue a notice because he then did so.

136. I agree with Advocate Edwards' second argument. In my judgment, the scheme of sections 75B and 75D(5) show that, at the time the section 75D(5) notice is given, the Respondent must have already decided to issue a notice under, in this case, section 75B. I think it is important to have regard to the whole of that subsection to see what the Respondent is actually empowered to do in those circumstances. Paragraphs (b) and (c) are directed at ensuring that there is no risk to the integrity of the information that the Respondent will require to be produced under the terms of the substantive notice. When viewed in that context, paragraph (a) can be seen as a means by which the scope of the notice the Respondent has already decided to issue can potentially be honed. Having regard to the position in relation to the March requests, which is what the Respondent had received at that stage, it is apparent that the Respondent would not have issued a notice under section 75B as a result of those requests. Advocate Hill's submission on this question of intention fails take into account that the Notice actually issued was a response to the December request and not as a result of the March request. I am further satisfied that there is a difference between considering to do something and intending to do it. The notice dated 30 July 2015 from the Deputy Director to T Limited is, on its face, *ultra vires* the power conferred on the Respondent by section 75D(6). Put simply, it was premature and should not have been issued in that form at that time.

137. I do not, however, agree with the narrow construction that Advocate Edwards attempts to place on the relationship between section 75D(5) and sections 75A and 75B and prefer the approach suggested by Advocate Hill. All that section 75D(5) requires is that the Respondent "*intends to give a notice to a person under section 75A or 75B*". Because section 75B includes a notice for the purpose of the implementation of an approved international agreement, it follows that the powers in section 75D(5) are exercisable in response to receipt of a request under a TIEA. However, I do agree with a contention that has not been made quite in this way by Advocate Edwards, but which follows from the line of reasoning that he has expounded, that the power actually conferred on the Respondent is more limited than the power the Deputy Director has purported to exercise. Once the Respondent has decided that he will be issuing a notice, ie, has formed the requisite intent, rather than still thinking about whether or not to do so (which is how I regard "*considering*"), the power in para. (a) is to require the recipient of the notice to tell the Respondent "*what documents and information he has in his possession or power which are or may be relevant to the liability to tax to which the notice under section 75A or 75B would relate or the amount thereof, or to the enforcement of any such liability and the collection and recovery of any amount due*". The section 75D notice refers to this power in similar terms and also refers to the TIEA. However, there has been no suggestion that the information sought under this notice relates to any liability to tax and, at the time the notice was given to T Limited, the Respondent was continuing to liaise

with the ITA over the distinction between it being a criminal tax matter and a non-criminal tax matter, where the information requested under the extant March request could not have been required because of the terms of Article 14 of the TIEA. Accordingly, the giving of the notice in the terms in which it was given did not, in any event, correspond with the matters to which a notice under section 75B "*would relate*". To that extent, I agree with Advocate Edwards that there does appear to be a lacuna in the wording in section 75D(5)(a) to reflect the changes that were made to section 75B by the Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013, which means that the Respondent's power is probably not as broad as the Deputy Director thought it was.

138. As a result, I accept the submission made on behalf of the Applicant that the Respondent should not have issued he notice pursuant to section 75D(5) of the 1975 Law to T Limited but only on the ground that the notice itself shows that the Deputy Director had not then decided to issue a notice under section 75A or, as was the case here, section 75B so that the power was not then available. Advocate Edwards submits that the consequences of the section 75D(5) notice being *ultra vires* are serious because the earlier request, ie, the March request, was converted from one in which the safeguards afforded to protect taxpayers were missing into a request, ie, the December request, that the Respondent could respond to positively, but only as a result of the unlawful provision of further information to the ITA. In those circumstances, he suggests that the safeguards would become meaningless. The only proper conclusion is that everything following this unlawful action should be treated as having no effect.

139. In response, Advocate Hill suggested that such a "*fruits of the poisoned tree*" argument is itself subject to exceptions and not an absolute doctrine. He submitted that, even if the exercise of the power in section 75D(5) were found to be unlawful, the product of that notice, being the information provided by T Limited could still be used by the Respondent in further stages because it became information that the Respondent then had knowledge about.

140. I take the view that it is unnecessary in this case to rely on such a doctrine and any exception to it. The information provided to the ITA in the Compliance & International Manager's letter dated 17 September 2015, following the section 75D(5) notice did not, I find, add anything that the ITA needed in order to comply with paragraph (6) of Article 5 of the TIEA. This is apparent from undertaking an analysis of what was in the March request. Apart from the ambiguity relating to the tax purpose, and so the period for which the information was being requested, the identity of the person under examination or investigation was already known and the name of the person believed to be in possession or control of the requested information was already known. Although it is fair to say that there was some helpful additional detail, the essential components of what was required for a compliant request was already known to the ITA. As such, I do not find that the information relayed in that letter was then repeated back to the Respondent so as to convert a non-compliant request into a compliant one. The principal difference between the March request and the December request was that the latter clarified that the tax purpose was the investigation or prosecution of tax matters. This change was not as a result of any of the information contained in the letter sent following the receipt of preliminary information from T Limited. Accordingly, the nexus on which Advocate Edwards relies does not, in my view, exist to make everything following the section 75D(5) notice taint the later letter of request.

141. The second basis on which Advocate Edwards challenges the use to which the information obtained *ultra vires* was put, is to suggest that the Respondent's evaluation of the December request was necessarily flawed because it was infected by that earlier unlawful action. Again, I do not accept that submission. All that I think can be said in relation to the initial response from T Limited is that the Respondent knew that T Limited held some information that would be provided in the event that a notice under section 75B of the 1975 Law were to be given. Even without that knowledge, the terms of the TIEA are such that the Respondent would still

have been minded to give the Notice on the basis of the request made to him by the ITA. If it were to turn out that T Limited responded by saying it had nothing, that would then be relayed to the ITA. So the prior knowledge that something will be provided does not affect the lawfulness, including the rationality, of a decision to give the Notice in the first place. Although the TIEA Request Review Document states (in Box 10) that the ITA repeated the information provided to it in the letter of 17 September 2015, I do not regard that as amounting to engaging in too superficial an evaluation of whether or not the Respondent should accede to the December request. As I have already mentioned, the reference made just before this to viewing open source information satisfies me that the facts underpinning the request were checked on behalf of the Respondent, which would have been unaffected by reference to anything gleaned from T Limited in response to the section 75D(5) notice. In the absence of a causative link, I do not find that the information relayed to the ITA and repeated in the December request means that the Respondent has acted irrationally when reviewing that request because this information was not what made the December 2015 request compliant with the terms of the TIEA.

142. Another factor on this issue is the way in which section 75B(3) of the 1975 Law indicates that a person on whom a notice is to be served should generally be given the opportunity to furnish the information sought voluntarily, unless that would prejudice the Respondent's enquiry. In the present case, I think this means that it was open to the Respondent to engage in a level of informal discussion with T Limited to see how best to deal with the ITA's request. I think this can extend to asking the potential recipient of a notice whether it is something that will be capable of being complied with. Such an approach would be consistent with how I understand some investigations are undertaken in the domestic context involving those in the regulated financial services sector being asked formally to produce material to assist those pursuing possible offending. I do not think there is anything wrong in investigators making such informal approaches. Had the discussions had with T Limited not involved the giving of a notice under section 75D(5), I doubt that this ground of the Applicant's challenge would even have been capable of being advanced.

143. For these reasons, although I agree with the submissions of Advocate Edwards in support of what is set out in para. 40D(a) of the Amended Cause (but not para. 40D(b)), I reject the challenge based on para. 40C of the Amended Cause that this necessarily means that the Respondent's decision to issue the Notice to T Limited was tainted by this prior obtaining of information when doing so was *ultra vires* the Respondent's powers in section 75D(5) of the 1975 Law. The causal link between the information relayed to the ITA and the provision by the ITA of a TIEA-compliant request has not been shown.

Summary

144. I have covered in detail each of the grounds advanced on behalf of the Applicant for why the Notice given to T Limited should be set aside. In doing so, I have rejected the contention that the Respondent should have concluded that the December request was not in respect of a criminal tax matter. The possible offending that is the subject of the investigation into the Applicant has been shown through the experts' evidence to involve intentional conduct. Accordingly, the time limitations in Article 14 of the TIEA in respect of anything that is not a criminal tax matter do not operate. I have also rejected the Applicant's contention that paragraph 1(c) of Article 7 of the TIEA should have been relied upon by the Respondent as the basis for declining to assist the ITA. This follows from my conclusion that assisting the ITA with its investigation of the Applicant does not affect the vital interests of Guernsey. I have also satisfied myself that, in general, the Respondent did not fall into error in determining that the standard of foreseeable relevance in relation to the ITA's investigation had been met. There was, in my view, sufficient evidence, being clear and specific evidence, establishing that the request was being made in respect of the investigation into the

Applicant's possible links to X Limited and the Y Trust and the Z Trust. I am also satisfied that the Respondent has asked himself the right questions. The Respondent had concerns initially that the ITA's request was not made in the context of a criminal tax matter. It was only once that clarification was given to the Respondent's satisfaction that paragraph 6(d) of Article 5, read with Article 14, was complied with. In that overall context, it matters not whether there might only be a limited basis for believing that the material sought by the December request will provide the answers that the ITA apparently hopes will be forthcoming, because what matters is whether there was a reasonable possibility that the information will be relevant at the time the December request was made and it is immaterial whether what is actually provided turns out to be relevant. I take the view that, as with any investigation, as much benefit can be derived from material that confirms the truth of what has already been said by and on behalf of the Applicant as if it is material that then gives rise to further lines of enquiry on behalf of the ITA. In other words, the very purpose of seeking assistance is so the ITA is in a better position to appreciate all the facts. I have also rejected the Applicant's submission that the Respondent's provision of information to the ITA resulting from what T Limited told him pursuant to the notice given pursuant to section 75D(5) thereafter taints everything that followed and, in particular, meant that the December request could not be processed under the TIEA. I agree that such a notice could not lawfully have been given when it was given, but have failed to identify that anything so provided and subsequently relied upon was information that was essential before the December request could lawfully be progressed by the Respondent.

145. As a result, I do not find that the Respondent failed to comply with section 75C(2) of the 1975 Law. Instead, I am satisfied that the ITA's December request was made in accordance with the provisions of, and for the purposes of, the TIEA. There is, however, the one issue remaining of whether the Applicant's challenge should succeed on the basis that the Respondent has acted irrationally to the extent that the Notice must be set aside.

146. What has become clear through considering carefully all the material relied upon by both parties is that the way the Respondent has approached the ITA's series of requests has not been perfect. That is not, though, particularly surprising, because picking over what took place with the fine-tooth comb in the way that Advocate Edwards has conducted the Applicant's case is inevitably different from how the Respondent will approach his day-to-day tasks. I have already stated that I could have concluded that the evaluation of whether section 278E of the 1961 Act might have given grounds for declining to assist was not as complete as I think it could have been. However, even a detailed analysis of that issue would not have resulted in the Respondent having good reason to decline to assist, so I would not set aside the Notice on that basis. Similarly, the section 75D(5) notice should not have been issued, but there was, in my opinion, nothing done irrationally by the Respondent subsequently, and so no basis for setting aside the Notice. That leaves just the one aspect where I have found that the Respondent did take into account something he should not have taken into account, namely the misunderstanding that the material to be supplied pursuant to the December request was restricted to the purpose for which it was originally sought.

147. The first thing to note about that finding is that it relates to the review undertaken by the Deputy Director, rather than the original decision of the Compliance & International Manager to issue the Notice. As such, it arguably relates more to the decision not to withdraw the Notice than to give it. However, I get the impression that it is a view held by all those who can perform the function of the competent authority, so I do not regard that difference as being of any real relevance.

148. The comment made by the Deputy Director within para. 63 of his Second Affidavit is a surprising one because it differs from the way it is explained in the OECD Commentary, which he exhibited. I further think that it is reasonable to draw the inference that cases on

TIEAs decided in Jersey would be amongst those most likely to be considered by the Respondent as informing the approach to be taken here in Guernsey. I take that view in particular because of the common membership of the Courts of Appeal in both Bailiwicks. As such, what has been relied upon by Advocate Edwards from the ***Volaw*** case seems likely to have been something that the Deputy Director and his colleagues would be aware about. Despite the Commentary and this case, the Deputy Director has still given his understanding about the limited use to which any material transmitted to the ITA could be put in his evidence and it results in my finding that this demonstrates a form of ***Wednesbury*** unreasonableness.

149. Although the usual consequence of such a finding would be to set aside the decision and remit it, this is a discretionary remedy and I have decided that this is not the course of action that I should follow in this case. I have reached that conclusion because I am satisfied that to do so would not change the Respondent's overall decision to confirm that the Notice should stand. In particular, I do not think that this misunderstanding of the uses to which the material provided pursuant to the Notice could be put means that the Respondent would have declined to assist the ITA by issuing that Notice. There is nothing here that undermines the general rights and safeguards secured to persons like the Applicant. As set out in the Commentary, the premise of the TIEA is to enable information to be provided to the widest possible extent. Even if the Deputy Director (and so the Respondent) had not misunderstood the consequences as explained, eg, in ***Volaw***, I am clear that there was no basis for declining to assist the ITA. This is because foreseeable relevance linking to the investigation or prosecution of a tax matter had been established. As soon as that was established, the other terms of the TIEA, especially Article 5, were met and it was clear that the information sought by the December request was not available in India, and supplying the information would not be contrary to Guernsey's vital interests or otherwise contrary to its public policy, there was no basis on which the decline to assist. Accordingly, although the position is not as clear cut as it was on the issue of public policy, I am satisfied that it will serve no purpose to set aside the Notice and require the Respondent to re-consider how to respond to the December request in the light of knowing that the information supplied might be used by the ITA for something other than the investigation or prosecution of the Applicant. Accordingly, I decline to grant the Applicant the relief sought, even though there has been this technical finding of unreasonableness.

Conclusion

150. For all the reasons set out in this judgment, the Applicant's action is dismissed. This means that the Notice issued to T Limited dated 30 August 2016 is not set aside and any of the permanent relief sought will not be granted. I will now deal with any consequential applications that follow, including in respect of costs.