Everything but the Kitchen Sink: The Evolution of the International Exchange of Information and Disclosure Rules on Tax Matters

Abstract

This paper investigates the purview of Article 26 (Exchange of Information) of the Organisation for Economic Co-operation Development (OECD) Model Tax Convention (MTC)) which empowers revenue authorities in two different jurisdictions to obtain taxpayer related information from each other. The operation of Article 26 is considered in light of the issues surrounding the non-disclosure of information in judicial reviews as well as New Zealand’s recent international commitment to implement the new global standard on Automatic Exchange of Information (AEOI).

To determine this, the paper examines the amendments made to Article 26 of the OECD MTC since its inception to ensure international currency on the exchange of information in tax matters, the secrecy obligations on the New Zealand tax authorities in disclosing the exchanged information under s 81 of the Tax Administration Act 1994; and the leading exchange of information cases in New Zealand. The paper further examines New Zealand’s recent international commitment to implement the G20 and OECD's "AEOI" in accordance with the Common Reporting Standard (CRS) due diligence; a significant shift in how jurisdictions share tax information and a step away from the traditional “exchange on request” model.

The paper demonstrates that, as evidenced by case law, the alternative approach to the strict rule of non-disclosure of information in judicial reviews protects the confidentiality obligations of tax authorities and maintains taxpayer confidence. The author hopes that this analytical paper will serve as a guide for policymakers to take the necessary steps to ensure that tax information secrecy is not sacrificed in the desire to achieve greater transparency.

1. Introduction

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

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

In addition to the above, Article 26 imposes a secrecy obligation on the revenue authorities in disclosing exchanged information to the taxpayer. This obligation has been extended to restrict pre-trial discovery to the litigant in judicial review proceedings. Therefore, the DTA not only serves a dual purpose of avoiding double taxation and preventing tax evasion, but it also serves as a double-edged sword allowing the DTA jurisdiction tax authorities to exert overwhelming power over New Zealand taxpayers while suppressing their ability to question the grounds for exercising these powers.

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

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\(^6\) OECD “*Base Erosion and Profit Shifting Project Explanatory Statement*” (OECD, 2015 Final Reports), “Early access to such (aggressive tax planning) information provides the opportunity to quickly respond to tax risks through informed risk assessment, audits or changes to legislation” at 18. [http://dx.doi.org.ezproxy.aut.ac.nz/10.1787/9789264263437-en](http://dx.doi.org.ezproxy.aut.ac.nz/10.1787/9789264263437-en)

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


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

interest. This suggests that further work is still required to achieve a genuinely workable Article 26 of the MTC.

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

The objective of this paper is to address the application of Article 26 of the MTC, which allows the revenue authorities in two different jurisdictions to obtain taxpayer related information from each other, and the issues surrounding the non-disclosure of information in judicial reviews. This study will attempt to seek alternatives to the strict rule of non-disclosure of such information in judicial reviews. The basis on which the alternative approach is sought would include protecting the revenue authority confidentiality obligations and maintaining taxpayer confidence. In addition, this paper will consider the implementation of the new standard on AEOI to critically assess whether it would protect taxpayers’ secrecy provisions under the TAA. At the same time, it will provide clarity to revenue authorities and taxpayers, and will enable revenue authorities to protect taxpayers’ confidentiality.

To explore this study’s key issue, the adopted methodology involved analysis of the relevant provisions of the applicable legislation, policies, guidelines, case law, OECD reports as well as Article 26 of the OECD MTC relating directly to the objective of this research.

The paper proceeds as follows; Section two provides a brief review of the literature relevant to taxpayers’ secrecy and exchange of information under bilateral treaties and implementation of the AEOI. Section three of the paper sets out a succinct review of relevant legislative provisions regarding New Zealand tax authorities’ information gathering powers and Article 26 of the OECD MTC. Section four of the paper reviews relevant legislative provisions regarding disclosure of information, judicial approach in New Zealand and need for change in disclosure

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12 D Bentley, Taxpayers’ Rights: An International Perspective (Bond University, Queensland, 1998).
14 On 8 March 2018 there are 117 jurisdictions representing G20 countries, all OECD countries, major financial centres and an increasing number of developing countries are participating in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. It was signed by Australia on 3 November 2011 and entry into force from 1 December 2012. Signed by New Zealand on 26 October 2012 and entry into force from 1 March 2014.
15 Common Reporting Standard (CRS), is a part of AEOI and ensures that the information collected and supplied is in a standard format.
16 The approach adopted for answering the research question was thematic analysis. Themes identified for the analysis included relevant sections in the Tax Administration Act 1994, relevant cases, Treaties for exchange of information, AEOI.
rules. Section five discusses the implementation of AEOI in New Zealand. Finally, Section six concludes by outlining the salient outcomes of the research.

2. Literature Review

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

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

According to Dipevens and Debelva, there has been an increase in the rights of the tax authorities with an increase in instruments to exchange information but there has been no increase in the taxpayer protection. Now with the implementation of new AEOI standard, taxpayers existing safeguards to privacy and confidentiality have been further removed to improve the efficiency of the process of exchange of information.

Nayoung Kwon’s study investigated hypothesised benefits of AEOI for New Zealand and the impact of AEOI on domestic laws and proposed legislative changes under the Taxation (Business Tax, Exchange of Information and Remedial Matters) Bill 2016. The study evaluates the cost and benefits of AEOI to New Zealand in terms of sovereignty, rights of taxpayers, administrative expense for Inland Revenue and financial institutions, and the impact of offshore tax evasion under AEOI. The study concluded that the implementation of AEOI will be less beneficial to New Zealand to eradicate tax evasion. The study reports that cost of AEOI to New Zealand in terms of the factors listed above outweigh the benefits of the AEOI. The study noted that the OECD’s implementation of AEOI has a direct impact on New Zealand legislation and the OECD is effectively redefining the monopoly of the state over tax policy.

Ant Soone’s study examined whether the AEOI invades the privacy rights of the individual proportionally in Estonia. Contrastingly, Ant’s study reported that the AEOI serves as an efficient tool and information processes under automatic exchange are not considered to be an intervention into fundamental rights of the individual. The financial account information provided by the individual under AEOI is the information individual is required to provide as it is.

Sadiq and Sawyer’s study indicated that many of the developing Asia-Pacific countries will more likely face greater challenges in grappling with understanding the implications of the common reporting standard for AEOI for their tax administrations and required modifications in their domestic laws to enable an effective AEOI. 22 Dirkis and Bondfield’s study 23 examined the growth of international collaborative initiatives to improve transparency and exchange of information. Their study also concluded that the Australian tax authorities active involvement with the Joint International Tax Shelter Information Centre (JITSIC), Foreign Account Tax Compliance Act (FATCA) treaty with US and participation in the OECD Multilateral Convention, will be complex and resource intensive to manage. 24

Smith’s 25 study concluded that an increase in the DTA network has compelled New Zealand to adopt international tax norms which are defined by the OECD MTC and concede domestic tax policies and rules that departs from those norms.

To the best of the author’s knowledge, there is no study on the exchange of information in the context of disclosure of information by tax authorities which also considers the implementation of AEOI. Consequently, the present study addresses these gaps and contributes to the published literature by addressing the application of Article 26 of the OCED MTC and the issues surrounding the non-disclosure of information in judicial reviews. The present study also attempts to seek alternatives to the strict rule of non-disclosure of such information in judicial reviews. The article will now consider New Zealand’s tax authorities information gathering powers outside of the Double Tax Convention and within the Double Tax Convention.

3. Information gathering and enforcement powers of the New Zealand revenue authorities

3.1. Outside of the Double Tax Convention

In broad terms, a search is an examination of a person or property and can embrace a request for information. 26 Section 16 of the TAA and pt 4 of the Search and Surveillance Act 2012 (SSA) provides for “warrantless searches” and a right of access to “…the Commissioner and any officer of the Department authorised by the Commissioner in that behalf…”. Such access constitutes a “search” and the Commissioner carries out these “searches” to secure the record for evidential purposes. To exercise the power under s 16, the Commissioner or officer must provide consideration that the search is conducted out of necessity or relevance to the Inland Revenue Acts or for the purpose of carrying out other functions conferred on the Commissioner. Under this provision, the Commissioner is empowered to have full access to

26 K Tronc, C Crawford and D Smith, Search and Seizure in Australia and New Zealand, Law Book Co of Australasia (1996).
buildings, books, and documents, which may be under the control of a public authority, body corporate or any other persons. The definition of books and documents has also been recognised to include computer hard drives.\(^{27}\) The Commissioner’s right to “full and free access” under s 16 of the TAA seems to be the antithesis of the taxpayer’s reasonable expectation of privacy. Further, while the Commissioner must be mindful that in performing a search, s 6A(2) of the TAA requires him/her to exercise care, a failure to do so will not of itself render the search unreasonable. The law confers on the Commissioner the right to access premises and to remove documents, he/she is not required to exhaust other avenues of inquiry before access and removal will be considered reasonable. There are exceptions to warrantless searches. Under s 16(4) of the TAA, a search of a dwelling house requires a warrant to permit access\(^ {28}\) and under s 16C(2) of the TAA, a warrant is required for removal and retention of documents.

The decision in *Avowal Administrative Attorney v District Court at North Shore*\(^ {29}\) confirms that the power of the Commissioner to gather and obtain information under s 16 are very wide and are only subject to consideration of relevance. There has been a dramatic increase in the use of revenue authorities’ search power since 2007.\(^ {30}\) Tubb suggests:\(^ {31}\)

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

The Commissioner’s search powers are further extended under s 17 of the TAA, which imposes an unconditional obligation upon any person to furnish information or produce documents requested by the Commissioner for the enforcement or administration of the ITA or for any other purpose lawfully conferred on the Commissioner. The Court of Appeal had previously noted that s 17(1) is “expressed in the widest terms”\(^ {32}\) and that “nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended.”\(^ {33}\)

\(^{27}\) *Avowal v District Court*, above n 1, at 24,256.

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

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


\(^{31}\) G Tubb, “Commissioner of Inland Revenue’s powers of search and seizure”, NZLS Tax Conference, Auckland, 1 September 2011, at 215.

\(^{32}\) Commissioner of Inland Revenue v New Zealand Stock Exchange (1990) 12 NZTC 7259 per Richardson J at 7,262

\(^{33}\) Commissioner of Inland Revenue v New Zealand Stock Exchange (1990) 12 NZTC 7259 at 7,262.
In a recent High Court case, *Chatfield & Co Ltd v Commissioner of Inland Revenue*,[^34] Lang L J considered number of statements made in the Operational Statement[^35] and noted:[^36]  

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

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

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

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

### 3.2. Power to Enforce Revenue Laws of another country  

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

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

Martin’s study aptly pointed out that the State’s:[^39]  

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

According to Martin, the New Zealand ITA does not extend to foreign jurisdictions but rather restricts its application to “persons and transactions, which have a reasonably close legal and factual connection to New Zealand.”[^40] However, the Commissioner is entitled to know the income earning activities performed in New Zealand and decide accordingly whether they are

[^34]: *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289.  
[^35]: Operational statement (OS) 13/02: Section 17 Notices, [43] The OS outlines the procedures Inland Revenue will follow when issuing notices, including third party requests, under section 17. See: http://www.ird.govt.nz/technical-tax/op-statements/os-1302-see-17-notices.html.  
[^36]: *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289 at 43.  
[^37]: *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 118; *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614.  
[^38]: *Peter Buchanan Ltd. v. McVey* [1955] AC 516.  
[^39]: D Martin “Enforcing Tax Laws Offshore” NZ Tax Planning Reports (New Zealand, 6 December 1991) at [7].  
[^40]: D Martin “Enforcing Tax Laws Offshore”, NZ Tax Planning Reports (New Zealand, 6 December 1991) at [8].
taxable or not. The revenue authorities’ enforcement jurisdiction can only be exercised over persons that are residents of New Zealand, and incomes sourced from New Zealand. The criteria of falling within the definition of a resident are defined in ss YD 1 to YD 4 of the ITA.\textsuperscript{41}

The decision in \textit{Currie},\textsuperscript{42} illustrates the principle that revenue authorities cannot use their powers of inspection or interview to obtain information for the tax office of a foreign state.\textsuperscript{43} The Court concluded that the Australian revenue authorities acted \textit{ultra vires} in exercising Subdivision 353-10\textsuperscript{44} to obtain evidence for the purpose of providing assistance to New Zealand to enforce its revenue law.\textsuperscript{45} The Court specifically commented that revenue authorities cannot use their powers of inspection or interview to obtain information for the tax office of a foreign state.\textsuperscript{46}

New Zealand courts applied this restriction in \textit{Connor v Connor}\textsuperscript{47} and \textit{Von Wyl v Engeler}.\textsuperscript{48}

In the case of the S. S. “Lotus”,\textsuperscript{49} the Permanent Court of International Justice gave an important dictum on the parameters of a State’s enforcement jurisdiction. The Court concluded that a State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do. It further held that:\textsuperscript{50}

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

Further, in \textit{Government of India v Taylor}\textsuperscript{51} a domestic Court (as opposed to an international Court) emphasized the State’s limitation in enforcing its tax laws in foreign jurisdiction. In \textit{Government of India’s case} Viscount Simonds J noted:\textsuperscript{52}

\begin{quote}
“My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would, and should, entertain a suit by a foreign state to recover the tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J said in King of the Hellenes v Brostrom … It is perfectly elementary that a foreign government cannot come here — nor will the courts of other countries allow our
\end{quote}

\begin{footnotes}
\item[41] Income Tax Act 2007, ss YD 1, YD 2, YD 3 and YD 4.
\item[43] \textit{Currie v Deputy Commissioner}, above n 41.
\item[44] The Tax Administration Act 1953 (Australia)
\item[45] The Tax Administration Act 1953, Subdivision 353-10
\item[46] \textit{Currie v Deputy Commissioner}, above n 41.
\item[48] \textit{Von Wyl v Engeler} [1998] 3 NZLR 416.
\item[49] \textit{The Case of the S.S. “Lotus”} (France vs Turkey) [1927] P.C.I.J (Series A) No. 10.
\item[50] \textit{The Case of the S.S. “Lotus”} (France vs Turkey) [1927] P.C.I.J (Series A) No. 10 at 23 para 45.
\item[51] \textit{Government of India, Ministry of Finance (Revenue Division) v Taylor} [1955] AC 491 (LR HL) [Government of India’s case].
\item[52] Ibid, at 503.
\end{footnotes}
government to go there — and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to by the country to which he belongs.”

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

3.3. The OECD Model Tax Convention on Income and Capital

Initiated in 1956 by the Organisation for European Economic Co-operation, the MTC was a “collective project aimed at the development of uniform tax treaty provisions”. The first full draft of MTC was completed by the OECD in 1963 and was subsequently published in 1977. The MTC serves as a model used by countries in negotiation, application and interpretation of bilateral tax agreements. According to Appendix 1 of the OECD MTC, the OECD Working Party membership has grown from 15 countries, which were involved in drafting the first MTC in 1956, to 20-member countries by 1963, and by 2017 a total of 35-member countries, with 517 bilateral tax treaties.

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

The exchange of information between the jurisdictions have a long history. The 1963 initial draft MTC incorporated Article 26, a provision on the exchange of information in tax matters relevant for carrying out the provisions of the convention. The text of Article 26 and Commentary to the OECD MTC was revised and approved by the Committee on Fiscal Affairs of OECD in 1975. The revised version of Article 26 was incorporated into the 1977 MTC, however, it “did not in principle contain anything new in substance but some questions of interpretation of the earlier version were removed by additions to the commentaries.”

To prevent tax evasion the revision process intended to ensure that Article 26 should accurately reflect the obligation of Contracting States to supply information available concerning relevant facts from third countries. In the revised version, the application of Article 1’s effect on Article 26 was removed, which previously restricted the application of the MTC to residents of one or

56 As of July 2014.
both of the Contracting States. Furthermore, the application of Article 26 was extended beyond the standard request format of information to automatic and spontaneous exchanges of information. Automatic exchange of information is defined as the “systematic and periodic transmission of ‘bulk’ taxpayer information by the source country to the residence country concerning various categories of income.” Spontaneous exchange of information occurs in circumstances where information is made available to the other Contracting State due to its foreseeable relevance for tax purposes to that State without the latter having asked for it.

In 2005, changes to Article 26 wording were made with the purpose of clarifying doubts to its proper interpretation rather than to alter its substance. The Commentary to the 2005 MTC, acknowledges that the intention for revision is that Article 26 is to be interpreted as wide as possible while simultaneously restricting possible opportunistic behaviors of Contracting States. The standard for making requests under Article 26(1) requires the exchange of information to be “foreseeably relevant” to the corresponding Convention or to the domestic laws in place of what was previously a requirement of exchanging information that was deemed ‘necessary’; thus expanding the range of tax information that may be exchanged. It provides the opportunity for the treaty countries to exchange information that is foreseeably relevant for carrying out the provisions of DTA or to the administration or enforcement of the domestic laws concerning income tax as specified by national law for both parties. Secondly, the addition of para 4 clarifies the tax authorities indisputable obligation to obtain information for the Contracting States regardless of whether the providing State has a domestic tax interest in the information sought. Thirdly, the addition of Article 26(5) excludes interference from bank secrecy, which presents an obstacle to effective information exchange.

Article 26(2) corresponds to the third and subsequent sentences of paragraph before 2005 amendment and requires that the information, which is obtained under the MTC to be treated as secret in the same way as information obtained under the domestic law of the state. Further, Article 26(2) allows information shared between the treaty countries to be used for other purposes, which comply with domestic laws under the provision in which the supplying State authorises such use. Additionally, para 2 of Article 26 was renumbered as para 3. The

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


66 Ibid, at 353.

67 Ibid.

68 Ibid.
rules surrounding the declination of exchanging information has remained comparatively unchanged in para 3. The limitation in Article 26(3) does not allow a state to decline supply of information on the grounds of bank secrecy laws. The rules establish three different circumstances that justify non-cooperation to the Article. This includes:

- processing requests that are inconsistent with domestic laws or practice;\(^{69}\) or
- where the requests are inconsistent with the administration of the Contracting State;\(^{70}\) or
- Where the supply of information would expose the commercial secret that is contrary to public policy.\(^{71}\)

Therefore, the MTC provides that the requested information should be in accordance with the domestic tax rules, no obligation to supply information which discloses trade secrets or contradict the public policy and may limit the convention by international law. The substance of the paragraph has not changed despite its different placement within the Article, while additions were made in an effort to achieve clarification. This limitation in the conventions, constraints powers of the revenue authorities to access the timely information from other jurisdiction, and also result in the unwillingness of government.\(^{72}\)

In July 2014, para 2 of Article 26 was amended to allow the competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use.\(^{73}\) Earlier it was an optional provision in paragraph 12.3 of the Commentary.

Lord Keith’s statement in Government of India v Taylor illustrates that powers of another State cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from the convention.\(^{74}\) In Stag Line, Lord Macmillan stated that the OECD clauses have an international currency and the domestic precedents should not control their interpretation but be construed on broad principles of general acceptation.\(^{75}\) It is clear from Lord Macmillan’s statement that the MTC falls under the definition of an international convention.

Since the exchange of international information to prevent tax fraud, avoidance and evasion is high on the political agenda, banking secrecy and tax havens in foreign countries are increasingly under pressure. Therefore, over the last few years, an enormous number of Tax

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\(^{69}\) Ibid.

\(^{70}\) Ibid.

\(^{71}\) Ibid.


\(^{74}\) Government of India, Ministry of Finance (Revenue Division) v Taylor [1955] AC 491 (LR HL).

\(^{75}\) Stag Line Ltd v Foscolo, Mango and Co [1932] AC 328 (HL) at 350.
Information Exchange Agreements (TIEAs) have been signed with countries where there are no double tax agreements, existence of banking secrecy laws or are considered ‘tax havens’.  

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

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

4. Disclosure of Information by Tax Authorities

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

4.1. New Zealand Legislative Provisions: Section 81 of TAA

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

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76 According to the Brief on the State of Play on the international tax transparency standards released by the Global Forum in September 2017 (available on the Global Forum’s website), “the number of bilateral exchange relationships under this instrument [Convention on Mutual Administrative Assistance in Tax Matters] amounts to more than 7,000” (p. 9).

77 Section 81 of the TAA 1994, and s 3C of the Taxation Administration Act 1953.


79 C Finlayson & F Shepherd, “Discovery” in Justice O’Regan (editor in chief), The Laws of New Zealand (On line updated to May 2017) para 2

80 Tax Administration Act 1994, s 81(1C).

81 Tax Administration Act 1994, s 81(1) and s 81(3).

82 Knight & Anor v Barnett & Ors [1991] 13 NZTC 8,014; 2 NZLR 30 (CA) 398 at 406.
taxpayer’s secret information can be disclosed. The IR’s Standard Practice Statement 11/07 provides detailed guidelines about process and factors that the Commissioner will take into consideration while disclosing the secret information.

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

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

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

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

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

Accordingly, the paper will now consider the judicial interpretation and application of Article 26(2) of OECD MTC in the light of taxpayers’ claims to secrecy under s 81 of TAA.

4.2. New Zealand’s judicial approach

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

The disclosure aspect of Article 26(2) was tested in the case of E R Squibb & Sons (NZ) Ltd v Commissioner of Inland Revenue (No3) [1991] 13 NZTC 8,174 (HC). At the time of judgment, the 1972 DTA was in force, which in essence is similar to the 1963 Draft Convention and the subsequent 1995 DTA signed with Australia.

The particulars of the case involved E R Squibb & Sons Ltd seeking production of documents from the Australian Tax Office (ATO) revealing the identity of an informant (on the grounds

83 Tax Administration Act 1994, s 81(BA). Specific exceptions to the secrecy requirements are under TAA ss 81(1B), (4), (8), 81A, 81B.


85 Tax Administration Act 1994, s 81(4)(a)

86 Tax Administration Act 1994, s 81(4)(k)

87 Tax Administration Act 1994, ss 88 and 81.

88 E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue (No3) [1991] 13 NZTC 8,174 (HC).
that until the identity of the informant was known it was unable to challenge the accuracy and reliability of the information disclosed) and those containing information about other taxpayers used to make the assessment (on the grounds that this information would help the taxpayer to challenge the method of calculating the extra tax). The New Zealand Commissioner argued that the documents were secret under Article 20 of the 1972 DTA,89 therefore the Court was precluded from disclosing them in the judicial review proceeding. The Court held that all of the classes of documents should be made available by the Department but only to a named tax advisor. The Judge said that "the modern approach to discovery, and indeed to civil litigation generally, is to require parties to put their cards on the table to the greatest extent possible".90 However, in allowing even limited disclosure of the name of the informant, information about other taxpayers and information supplied by the ATO, the Judge had pushed out the boundaries of discovery beyond tolerance level.

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

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

The standing of the judgment made in Currie v Deputy Commissioner of Taxation94 was challenged in Avowal Administrative Attorneys Limited & Ors v Commissioner of Inland Revenue. 95 Avowal submitted that the DTA empowered the Commissioner to “…provide the ATO only with information already in his possession for New Zealand tax purposes but was not empowered to use his statutory powers to secure further information where recovery of

89 Article 26 was previously titled Article 20 in the Double Taxation Relief agreement between Australia and New Zealand, which was signed in 1972.
90 E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue (No3) [1991] 13 NZTC 8,174 (HC) at 8,179 per Eichelbaum J.
92 Ibid, at 9,152.
93 Ibid, at 9,159.
94 In Currie Finkelstein J decided that providing information to the New Zealand Inland Revenue was not permissible as Subdivision 353-10 of the Tax Administration Act 1953, must be exercised for the “purpose of inquiring whether there is any tax due under the Tax Act.”
95 Avowal Administrative Attorneys Ltd v District Court at North Shore [2010] 24 NZTC 24,252.
Australian tax was the dominant purpose.” However, the amendment to Article 26 by the inclusion of ‘obtain’ in the sub-cl 4 in the 2005 Protocol demonstrates that “the Commissioner’s authority in sharing information has been extended from what they were previously.” The Court held that while the pre-amendment DTA did not impose on the Commissioner, the ‘obligation’ of using its information-gathering powers to obtain information for the ATO as per the 2005 amended agreement, the Commissioner certainly had the ‘power’ to do so. Additionally, it is consistent with the 2003 Commentary to Article 26, which identified that “Contracting States often use the special examining or investigative powers provided by their laws for purposes of the application of their domestic taxes even though they do not themselves need the information for applying these taxes”.

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

The issues raised in the *Avowal* were clarified in the 2005 Protocol. Article 26(4) requires the Commissioner of the ATO and IR to use their information-gathering measures to obtain information for the requesting State. This obligation extends the functions of ATO and IR and enables them to extend their jurisdiction powers across the Trans-Tasman borders because the State is required to exercise their search powers even if they may not need the information for their own tax purposes. However, the format of a request requires the compliance of former

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

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

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


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


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

103 2005 Protocol to the 1995 Australia-New Zealand Double Taxation Relief Agreement.
paragraph (Article 26(3)) before it is accepted for processing but the limitation in Article 26(3) does not allow a state to decline supply of information on the grounds of bank secrecy.

The New Zealand Supreme Court moved from Squibb decision and took a different approach in Westpac Bank. In Westpac Bank the Court stated “Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner’s statutory functions.”

In Chatfield the High Court also stated that the legal landscape in relation to taxpayer secrecy has changed since Squibb and Avowal decision. The Court held that in disclosure of information from revenue authorities to taxpayers, there is a need for balancing the public interest in disclosure against the public interest in withholding and confidentiality. The decision in Squibb was prior to the introduction of the current “foreseeably relevant” term found in the current Article 26(1) of the OECD MTC. Additionally as mentioned earlier, on the basis of the OECD Commentary amended in 2012, Article 26(2) was amended in July 2014 to allow competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. Earlier this was an optional provision in paragraph 12.3 of the Commentary. Supporting confidentiality in Chatfield the Court concluded that the Korean request for information was not required to be disclosed to Chatfield. On appeal, the Court of Appeal also noted that discovery in judicial review cases is not as of right but is a matter of

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107 Westpac Banking Corporation Limited v CIR & Ors; ANZ National Bank Limited & Ors v CIR [2008] NZSC 24 at 69.

108 Chatfield & Co Ltd v Commissioner of Inland Revenue [2016] NZHC 1234, (2016) 27 NZTC 22-053, to be read in conjunction with Ellis J’s earlier judgment: Chatfield & Co Ltd v Commissioner of Inland Revenue [2015] NZHC 2099, (2015) 27 NZTC 22-024. Chatfield the accounting firm had sought a judicial review against the Commissioner decision to issue notice pursuant to s 17 of the TAA to furnish information about the 15 corporate clients that the company held on behalf of the clients. The Commissioner issued the notice as National Taxation Service (NTS) of the Republic of Korea requested information in pursuant to DTA between New Zealand and Korea.

109 Chatfield & Co Ltd v. Commissioner of Inland Revenue (2015) NZHC 2099;NZTC 22, 024 at [50 (c)]


discretion. However, recently in *Chatfield* judicial review the High court considered the interpretation of the Article 25 of DTA with Korea. Justice Wylie at High Court held that in the absence of any evidence suggesting that the Commissioner, as required by law had obtained confirmation from the as National Taxation Service (NTS) of Korea that it had exhausted all local remedies before making the DTA request, the Commissioner’s decision to issue the notices to Chatfield under s17 TAA is invalid.

Having considered the New Zealand’s judicial interpretation and application, the article will now outline the new international standard by the OECD for the exchange of information, a fundamental shift because it moves from a passive compliance to an active gathering and reporting.

### 4.3. Need for Change in Disclosure Rules

The rigid rule for non-disclosure of information exchanged under Article 26 was set by the Court of Appeal in the *Squibb* case. The decision was made through the interpretation of the DTA and is the binding judgment for the application of disclosures under the Article. However, Article 26(2) has undergone significant modifications. Considering the amendments to Article 26(2), commentary the courts have moved from *Squibb* and *Avowal* decision and took a different approach in *Westpac Bank* and *Chatfield* cases. The July 2014 amendments to MTC allow competent authorities to use information received for other purposes provided such use is allowed under the laws of both States and the competent authority of the supplying State authorises such use. The first part of Article 26(2) requires information exchanged under the Article to be treated under the domestic law of the receiving State. The second part fosters on the former by imposing restrictions on disclosure to taxpayers. Hence there is a need for balancing the public interest in disclosure against the public interest in withholding and confidentiality.

Historically, there was no general duty of disclosure in judicial reviews for several external reasons. The process of the disclosure can be "costly, time-consuming, oppressive and unnecessary". However, “everyone has right to be secure against unreasonable search” and without adequate disclosure, it is difficult for the taxpayer to be appropriately represented.

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

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

116 However, s 16(1) of the Tax Administration Act 1994 overrides any other Act, therefore there are no restrictions to conducting unreasonable searches.
The amended paragraph allows information to be disclosed in New Zealand courts and judicial review proceedings but not to the taxpayers themselves. While the paragraph itself does not clearly define whether reference is made to the information quantifying the details of the request (request) or the information made available as a response to the request (information). The Commentary applies secrecy obligations on “both information provided in a request and information transmitted in response to a request.”\textsuperscript{117} Baragwanath J also accepted that there is no “material difference between requests and information where the latter must include the former.”\textsuperscript{118}

There are justifications to distinguish between the request and information. Firstly, the type of information contained in the request and information supplied are comparatively dissimilar. The type of information contained in the request is essential for three purposes. It serves to communicate the criteria in identifying the relevant taxpayer(s), clarifying the information sought regarding these taxpayer(s) and the reason behind the necessity of the information.\textsuperscript{119}

In general, the request contains information for administrative purposes. Secondly, in circumstances similar to the \textit{Squibb} case, the request may contain sensitive information such as the identity of an informant. In other circumstances, other foreign taxpayers or entities may form a segment of the information but “mechanisms can generally be designed to protect such information in documents whilst still permitting the disclosure of the rest of the document.”\textsuperscript{120}

Through the perspective of the first part of Article 26(2), s 81(3) of the TAA allows the tax authorities to produce any information in court, where the matter was for the purpose of carrying into effect all Inland Revenue Acts administered by the authorities.\textsuperscript{121} Matters carried out for the purposes of the DTA fall under s BH1 of the ITA, which itself falls under s 81(3) of the TAA. The domestic rule does not subject the tax authorities to disclose the ‘request’ however; disclosure orders should not be “automatic” in judicial review cases. As an alternative, the more flexible and less prescriptive principle adopted by Lord Carswell in \textit{Tweed v Parades Commission} provides a suitable domestic approach to disclosure.\textsuperscript{122} Lord Carswell’s approach requires judging the “need for disclosure [by] taking into account the facts and circumstances.”\textsuperscript{123} Specifically, the judge would receive and inspect the documents to assess whether it would provide “sufficient extra assistance to the appellant’s case on proportionality over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case.”\textsuperscript{124}


\textsuperscript{118} \textit{Avowal’s case}, above n 54, at 21625.

\textsuperscript{119} See IV. Australian and New Zealand Double Taxation Agreement.


\textsuperscript{121} Tax Administration Act 1994, s 81(3)(i)


\textsuperscript{123} Tweed v Parades Commission for Northern Ireland [2006] UKHL 53; [2007] 1 AC 650 at [32].

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

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

As we have considered the judicial interpretation and application of disclosure of information and secrecy provisions, the paper will now consider the impact of implementation of AEOI on the secrecy provision under s 81 of TAA.

5. Automatic Exchange of Information (AEOI)

In response to the G20’s April 2009 call for action “to make it easier for developing countries to secure the benefits of the new co-operative tax system environment, including a multilateral approach for the exchange of information”, the OECD and Council of Europe amended the Multilateral Convention and developed a Protocol effective from June 2011. The Protocol ensures that the Multilateral Convention is consistent with agreed international standard on exchange of information for tax purposes developed by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and opened the membership of the Multilateral Convention for non-members of the OECD as well. The Multilateral Convention is now a truly global instrument. It allows countries to quickly update their tax treaty networks in line with the Base erosion and profit shifting (BEPS) measures. The countries can use either bilateral tax treaties or the Multilateral Convention to achieve AEOI. The Multilateral Convention contains strict rules on confidentiality and proper use of exchange of information. Instead of requesting to exchange information between tax authorities it permits automatic exchange of financial account information pursuant to the CRS (subject to the detailed terms agreed). The CRS Multilateral Competent Authority Agreement (subject to the detailed terms agreed).

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125 *Avowal Administration Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,616 (HC).
126 www.oecd.org/ctp/eoi/mutual
129 As of December 2017, 72 jurisdictions participate in the multilateral instrument, including 33 out of the 35 OECD Members with the exception of Estonia and the United States.
130 Common Reporting Standard (CRS), is a part of AEOI and ensures that the information collected and supplied is in a standard format. Common reporting Standards sets out the international rules for collecting and reporting of financial account information (identity and financial information) for exchange for financial institutions for participating jurisdiction.
131 Countries need to be party to an international legal agreement for exchanging information automatically. In addition to this, an extra agreement, called “Competent Authority Agreement” (CAA) has to be
MCAA”), is based on Article 6 of the Multilateral Convention. The agreement specifies the type of information to be exchanged as well as the time and manner of such exchanges.  

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

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

This research paper focus mainly on exchange that is made on request as this involves the application of tax authorities’ TAA, s16 powers. 

As of October 2017, 102 jurisdictions have committed to exchange the information, of which 49 Jurisdictions will be undertaking their first exchange by 2017. New Zealand has become a signatory to the Multilateral Convention which entered into force for New Zealand on 1 March 2014 and with effect from 1 July 2017 New Zealand has implemented AEOI and intends to complete its first information exchange under the regime by 30 September 2018. 

AEOI, the new international standard will result in significant amounts of tax information being shared regularly and automatically around the world and has been described as a significant step towards achieving global tax transparency by obliging those who are best fit to identify the real persons hiding behind these entities (mechanisms) widely used for tax evasion. The AEOI standards are based on United States’ FATCA standard and are designed to benefit all the participating jurisdictions. It is a fundamental shift because it moves from a passive signed. CAA (MCAA) where all parties sign up to the same agreement, which eventually allows for a widespread exchange of information. Countries can choose bilateral CAAs to hinder exchanges with a wider audience. The Bahamas and Singapore are choosing bilateral CAAs. See http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/  


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


Foreign Account Tax Compliance Act (US) was enacted in 2010 by US that implements automatic exchange of information between US and 113 jurisdiction with which US signed Intergovernmental Agreements. FATCA aims to reduce tax evasion by US citizens, tax residents and entities. FATCA imposes reporting and due diligence obligation on Financial institution and certain other non-financial foreign entities to supply US resident account holder information to Inland Revenue Service. See: https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx  

FATCA was designed to benefit US only. Policy and Strategy, Inland Revenue Special Report on Automatic Exchange of Information (February 2017) at 7. The definition of “foreign account information –sharing agreement” in s YA1 of the New Zealand Income Tax has been modified to include both FATCA and CRS.
compliance to an active gathering and reporting. AEOI standards requires all financial institutions pursuant to due diligence standards, to identify from their financial accounts those accounts that are held or controlled by non-residents. From these non-residents accounts financial institutions are required to collect CRS-compliant\textsuperscript{139} identity, tax residency and financial information of the tax residents in reportable jurisdictions\textsuperscript{140} and provide the information to the relevant revenue authorities.\textsuperscript{141} New Zealand has adopted a wider approach option to the due diligence procedure and the legislation requires financial institution to report all of the information (all financial accounts held or controlled by a non-residents) to the Commissioner.\textsuperscript{142} Therefore, under the wider approach, the Commissioner will receive information for all financial accounts held or controlled by residents of reportable jurisdiction as well non-residents.\textsuperscript{143} Hence the responsibility of sorting and filtering information is on the shoulder of the Commissioner. A regulation-making power for determining New Zealand’s reportable jurisdictions is provided in Section 226D of the TAA.\textsuperscript{144}

The information collected by the revenue authorities from financial institutions under CRS may also be used for purposes other than AEOI.\textsuperscript{145} However, the Commissioner can only use this information for matters consistent with his/her statutory role and obligations.\textsuperscript{146} In order to implement the AEOI, New Zealand has adopted the approach to incorporate the CRS directly into domestic law.\textsuperscript{147}

Additionally, with the implementation of AEOI, the Commissioner will have the responsibility of determining the information to be exchanged with other jurisdictions and the new section 91AAU of the TAA empowers the Commissioner to make a determination about whether the particular jurisdiction is a participating jurisdiction.\textsuperscript{148} It also authorises Commissioner to limit, amend, suspend or withdraw a determination.

\textsuperscript{139} The CRS contains the reporting and due diligence standards that underpin AEOI. A jurisdiction that is party to the Convention must require Financial Institutions resident in that jurisdiction to comply with CRS.

\textsuperscript{140} A reportable jurisdiction is one that also wants to receive CRS information. Not all participating jurisdictions will be reportable jurisdictions. For example, some smaller participating jurisdictions that are international finance centres may not have a tax system and therefore have no need to receive information.


\textsuperscript{143} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017) at 16.

\textsuperscript{144} The reportable jurisdictions are the jurisdictions that New Zealand tax authorities will exchange CRS information with.

\textsuperscript{145} Inland Revenue Guidance on the Common Reporting Standard for Automatic Exchange of Information (June 2017) at 9.

\textsuperscript{146} Inland Revenue Guidance on the Common Reporting Standard for Automatic Exchange of Information (June 2017) at 9.

\textsuperscript{147} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017) at 57.

\textsuperscript{148} A participating jurisdiction is one that has implemented AEOI and provides CRS information to other jurisdiction.
With the implementation of AEOI, tax authorities now have extensive powers to obtain information from other jurisdictions and share the information with different agencies within the country and with overseas tax authorities. Therefore it appears that the secrecy provision in the existing legislation are being relaxed.\textsuperscript{149} Further, there are concerns about confidentiality and data security as there will exchange of sensitive information that is personal and financial, and the jurisdiction with which information is exchanged may not have adequate administration and technology system in place to ensure that the information exchanged is kept secure and is not used for other purposes.\textsuperscript{150} The only safeguard provided by New Zealand legislators is that when there is a breach in exchange of information, the Commissioner has been authorised to determine under new section 91AAV of the TAA to suspend that jurisdiction as a reportable jurisdiction on a temporary basis. The determinations made by the Commissioner under s 91AAV of the TAA \textsuperscript{151} will need to be confirmed by Order in Council or it will lapse.\textsuperscript{152} However, under developed and developing countries legislators may struggle to integrate the CRS changes with the existing legislative framework and to provide guidance notes on the implementation of the CRS.

6. Conclusion

In the era of globalisation and rapid growth of e-commerce, there has been an increase in cross-border commercial and financial transactions, as well as international rules and practices to ensure their effectiveness. This research shows that the current MTC allows for disclosure of information detailed in the information request, however, the Court of Appeal decision of \textit{E R Squibb & Sons (New Zealand) Ltd v Commissioner of Inland Revenue} has set the precedent for non-disclosure\textsuperscript{153} and currently courts have moved from \textit{Squibb} judgment, and an appropriate system for disclosure had not been introduced.

It appears that the counter-argument against disclosure is that confidentiality is an essential feature of all tax authorities. Although the equivalent domestic laws are not as stringent as the DTA, it also does not allow for the dilution of confidentiality obligations.\textsuperscript{154} The recent decision of the High Court in \textit{Chatfield}\textsuperscript{155} is the recognition that the pendulum has swung too far in favour of the tax authorities.

In substitution to the rigid rule currently set by the \textit{Squibb} case, Lord Carswell’s principle in \textit{Tweed v Parades Commission} proves to be an appealing option.\textsuperscript{156} The principle requires an assessment of documents by a judge to decide whether the disclosure would provide sufficient assistance to the appellant’s case over the summary of information already provided. In

\begin{itemize}
  \item \textsuperscript{149} \url{http://www.ey.com/nz/en/services/tax/ey-tax-watch-edition-10-november-2015-proposed-changes-to-inland-revenues-powers}
  \item \textsuperscript{150} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017) at 18.
  \item \textsuperscript{151} Tax Administration Act 1994, s 91AAV.
  \item \textsuperscript{152} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017) at 18.
  \item \textsuperscript{153} \textit{Commissioner v Squibb}’s case, above n 71.
  \item \textsuperscript{154} Tax Administration Act 1994, s 81(4)(a).
  \item \textsuperscript{155} \textit{Chatfield & Co Ltd v Commissioner of Inland Revenue} [2017] NZHC 3289.
  \item \textsuperscript{156} \textit{Tweed v Parades Commission for Northern Ireland} [2006] UKHL 53; [2007] 1 AC 650 at [2].
\end{itemize}
addition, the 2017 OECD Commentary to the MTC allows for the disclosure of information to the taxpayer when the judicial authorities decide for such to occur.\textsuperscript{157}

It is submitted by the author that when the information is decided to be highly confidential or if there were a lack of mechanisms to protect sensitive details, the approach suggested by Baragwanath J in the \textit{Avowal} case\textsuperscript{158} could be effectively employed. This requires a special counsel appointed by the Crown acting on behalf of the taxpayer, with obligations of non-disclosure to the applicants while representing in the best interest of them.

Although Article 26 appears to be overwhelming, nevertheless the implementation of Lord Carswell’s principle and Baragwanath J’s approach to the Article would give rise to a balance between taxpayer confidence and tax authority confidentiality.

Further, Article 26(3) of the MTC allows a State to decline to exchange information that discloses trade secrets or contradict the public policy. It appears that due to this limitation the Commissioner’s powers to access the information from other jurisdictions faces constraints about timely information, the unwillingness of government.\textsuperscript{159} It seems that Article 26(3) represents government protection of industry and wider public interests but at the same time it acts as conduit for unwilling governments to limit the Commissioner’s powers to access information from other jurisdictions in a timely manner.

Overall, it appears that by joining the Multilateral Convention and adopting the AEOI standards with enactments in domestic legislation and procedures, New Zealand has taken a step forward to combat tax evasion and avoidance.\textsuperscript{160} The AEOI agreement will have a significant impact on the volume of data that moves between jurisdictions and there is a potential for tax authorities to cross-check domestic tax compliance based on information received under AEOI from other jurisdictions. However, the effective use of this broad information-collection power by the Commissioner under AEOI without compromising the taxpayer’s privacy rights could be debatable. Under AEOI, the information reported to the tax authorities will include both residents as well as non-resident information and the responsibility of filtering the information for determining which information to be exchanged with other jurisdiction will be obligated on tax authorities.\textsuperscript{161}

The New Zealand TAA and ITA has been amended recently to integrate the CRS changes with the existing legislative framework for FATCA (where possible) to provide regulatory powers to the Commissioner to make determinations about which jurisdiction will be a participating jurisdiction and which information is relevant for exchange with other jurisdiction. These amendments have broadened the powers of the Commissioner.\textsuperscript{162} Tax authorities will also receive information about tax residents’ offshore investments and assets. Based on the above,\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{158} \textit{Avowal Administration Attorneys Ltd v District Court at North Shore} (2007) 23 NZTC 21,616 (HC).
\item \textsuperscript{159} M.Dirkis and B Bondfield “The developing international framework and practice for the exchange of tax related information: evolution or change?” (2013) 11:2 \textit{eJournal of Tax Research} 115-137.
\item \textsuperscript{160} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017).
\item \textsuperscript{161} Policy and Strategy, Inland Revenue \textit{Special Report on Automatic Exchange of Information} (February 2017).
\item \textsuperscript{162} Tax administration Act 1994, s 91AAU, s 91AAV.
\end{itemize}
it is relevant to mention that the tax authorities being a custodian of the huge amount of information need to be careful and implement proper safeguards when determining the release of information or determining whether particular information is relevant. The author wishes to emphasise that to make the tax system equitable, the challenge for tax authorities is to keep up with these changes and to establish a legal and administrative environment that ensures confidentiality in the relationship between taxpayers and tax authorities and proper use of information exchanged. The tax authorities have information available to them (such as in relation to other taxpayers' affairs and as provided under DTA and AEOI) to which the taxpayer has no access and which the taxpayer is therefore unable to analyse and refute. This creates an imbalance in favour of the tax authorities as the onus of proof in tax cases is on the taxpayer. It may be however that this imbalance can never be addressed as it relates to public interest immunity and the secrecy provisions must continue to deny discovery of certain information in order to protect the tax base.

That said, the study, therefore, calls for further investigation into the necessity of balancing taxpayers’ rights to confidentiality against better use of information obtained to protect public revenue. Future research in this area is clearly warranted.

The court considered the interpretation of the Article 25 of DTA with Korea. The court held that in the absence of any evidence suggesting that the Commissioner, as required by law had obtained confirmation from the NTS that it had exhausted all local remedies before making the DTA request, the Commissioner’s decision to issue the 17 TAA notices to Chatfield is invalid.

[