

STATES OF JERSEY



DRAFT TAXATION (IMPLEMENTATION) (INTERNATIONAL TAX COMPLIANCE) (UNITED KINGDOM) (JERSEY) REGULATIONS 201- (P.67/2014): AMENDMENT

**Lodged au Greffe on 3rd June 2014
by Senator Sir P.M. Bailhache**

STATES GREFFE

DRAFT TAXATION (IMPLEMENTATION) (INTERNATIONAL TAX
COMPLIANCE) (UNITED KINGDOM) (JERSEY) REGULATIONS 201-
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PAGE 13, REGULATION 7 –

- (a) in paragraph (4) after the words “of the Agreement, except” insert the words “, if an Act under paragraph (7) is in force,”;
- (b) after paragraph (6) add the following paragraph –
 - “(7) A reporting Jersey financial institution shall be required to comply with paragraph (5) or (6) only from such date that may be specified by Act of the States.”.

SENATOR SIR P.M. BAILHACHE

REPORT

Introduction

The purpose of this amendment is to give members the opportunity to consider whether the implementation of part of the Inter-Governmental Agreement between the UK and Jersey (“the UK IGA”) in relation to persons who are resident but not domiciled in the UK (the “res non-doms”) should be deferred until such time as automatic exchange of information is universally accepted under what is known as the “Common Reporting Standard” (CRS). It is expected that the CRS will come into effect in 2–3 years’ time. “Domicile” is a legal term meaning, in effect, where a person has his permanent home. “Res non-dom” pay a flat rate tax (at present £50,000 per annum), and are thereafter not liable to UK tax, save to the extent that income from elsewhere is actually remitted to the UK. Jersey provides financial services to a large number of “res non-dom”, and such services represent an important part of some sectors of the finance industry.

Implementation of the totality of the UK IGA at this stage will cause economic damage to Jersey. The extent of that damage is uncertain, but there is no doubt that some companies, particularly smaller trust companies, will suffer a loss of business in addition to that which they have already suffered by reason of the signature of the UK IGA. That loss of business will naturally be reflected in lower tax revenues in Jersey.

The legal framework

It is important to understand the legal framework. Jersey, like the UK and many other European countries, has a constitutional rule that means that a treaty or international agreement signed by the government does not come into force until it has been ratified by the legislature. In the Jersey context, an international agreement signed by the Chief Minister or any other Minister does not come into force until it has been ratified by the States. This is an important constitutional protection. It means that no Minister can, on his own initiative, create obligations for Jersey people or businesses by signing an agreement with a foreign state.

Sometimes all that is needed to bring an international agreement into effect is that the States should by Act ratify the agreement. In many cases, however, the law needs to be changed in order to give effect to (or implement) the agreement. This is the case with all TIEAs, and is also the case with the UK IGA. The Chief Minister has therefore lodged 2 propositions, the first ([P.66/2014](#)) to ratify the UK IGA, and the second ([P.67/2014](#)) to implement the agreement by enacting Regulations under the [Taxation \(Implementation\) \(Jersey\) Law 2004](#).

By voting to ratify the UK IGA, the States Assembly does not create a domestic obligation in Jersey law to implement the agreement in full. The vote to approve the agreement concerns external relationships; the vote to adopt or to reject the Regulations is an act of domestic legislation. It sometimes happens that a legislature would not want to implement an international agreement without qualification. The choice of how far to implement an international agreement is a domestic legislative choice. The Taxation (Implementation) (Jersey) Law 2004 allows for partial or staged implementation of international agreements. The adoption of this Amendment would therefore be entirely lawful and in accordance with the 2004 Law. It is a matter of political choice.

The political background

The report to P.66/2014 sets out the background to the negotiations which led to the signature of the UK IGA, and it is unnecessary to repeat it all here. What the report does not state, however, is that the UK government was unwilling to consent to Jersey's entering an IGA with the USA (on essentially the same terms as the agreement between the USA and the UK), unless the IGA with the UK was executed beforehand. Under the terms of the 2009 entrustment to enter tax agreements granted by the UK government, the text of any IGA negotiated by Jersey must be approved by the UK before signature. That stance of the UK Government (requiring signature of the UK IGA before the US IGA could be approved) was of doubtful legality, but could not be resisted for practical reasons. A timely completion of the US IGA was very important to certain sectors of the financial services industry. The Government of Jersey was accordingly negotiating with the UK under significant constraints.

As the Chief Minister's report makes clear, the Jersey negotiators pressed for recognition of the importance to the local finance industry of the "res non-dom" market. Some limited concessions were made by the UK, and they are embodied in Annex IV of the IGA.

The position remains, however, that if a "res non-dom" conducts his business through Jersey, his right to the confidentiality of his affairs will not be respected in the same way as if his business were conducted through one of Jersey's main competitors, for example Switzerland or Singapore. Under Annex IV, Jersey financial institutions will be required to report the name, address, date of birth and National Insurance Number of every "res non-dom" with a reportable account, even if there have been no remittances to the UK, and no possibility, therefore, of any tax liability arising. If there have been remittances, the "res non-dom" with business in Jersey will even be in a worse position than taxpayers who are resident **and** domiciled in the UK, because such taxpayers do not have to report remittances of capital from abroad.

Many "res non-dom" are very sensitive, for reasons, amongst others, of security and a desire for privacy, to intrusions into their legitimate right to confidentiality. It is not a question of evading fiscal obligations in the UK.

Compliance with the IGA is expensive, and it is likely that much of that expense will be passed on by the financial institution to the client. Doing business in Jersey will therefore become more costly for "res non-dom" than if the business were conducted in a jurisdiction which has no such agreement with the UK.

There is strong evidence that the signature of the UK IGA has caused good business to move away from the Island, and that, if this amendment is not adopted, the implementation of the IGA would have additional damaging consequences. Some local trust companies, both large and small, have told me that "non-dom" clients are only now realising the implications for them, and that business is being lost on a daily basis, much of it to Switzerland. There is no doubt amongst these trust companies that potential new business will also be located elsewhere. Adoption of this amendment would avoid that risk for new business, and may re-assure existing clients, because financial institutions would not be required to report on the affairs of "res non-dom" until the CRS is in force, probably in 2016–17.

The UK government's stance

The UK government's stance appears to be that information about "res non-doms" is required because there is a possibility that some of them with accounts in Jersey may not be declaring remittances of income to the United Kingdom. Any such remittances would be liable to tax in the UK. Remittances of capital would not be liable to tax. Knowledge of such remittances would enable Her Majesty's Revenue and Customs (HMRC) to "risk-assess" the situation and challenge certain taxpayers to justify the exemption from tax that they had asserted in relation to those remittances.

It is possible that some "res non-doms" are cheating, and remitting, but not declaring, income that is liable to tax in the UK. Any such conduct would obviously be a criminal offence in the UK. There are doubtless thousands of taxpayers who are resident **and** domiciled in the UK, and who do not have accounts in Jersey, who also fail to declare income that is liable to tax. However, if any Jersey institution were aware that "res non-dom" clients were conducting themselves in that way, it too would be committing a criminal offence in Jersey. Assisting another to evade the payment of tax is a criminal offence. It seems unlikely, given the strict regulation of banks and trust and company service providers (not all of which exists in the UK), that very many "res non-dom" are evading their obligations in this way.

As HMRC will know, Jersey is strongly committed to suppressing tax evasion, and regularly gives assistance both in relation to criminal prosecutions and civil investigations. If HMRC has suspicions in relation to any individual UK taxpayer, there are existing agreements and legislative provisions that enable information and/or evidence to be obtained from Jersey.

The Government of Jersey's position

The position of the Government of Jersey is set out in the Chief Minister's report in the following terms.

"17. Prior to the global application of the CRS, some new and existing "res non-dom" business could be lost to other jurisdictions, although this is difficult to quantify. At the same time, Jersey is committed to assisting the United Kingdom in fighting tax evasion; and not to provide the United Kingdom with the information they require would be seen as inconsistent with that commitment. In signing an IGA, including Annex IV, all 3 Crown Dependencies agreed that a sufficiently mutually acceptable balance had been struck between their interests and those of the United Kingdom.".

Contrary to that statement, I do not believe that a fair balance has been struck between the interests of the UK and the interests of Jersey. That is perhaps not surprising in view of the circumstances in which the negotiations were being conducted. The possibility that a very small minority of UK "res non-dom" may not be declaring remittances of income from Jersey is not, in my view, a sufficient justification for causing economic damage to the Island, and for breaching the confidentiality of the affairs of the vast majority of "res non-dom" who conduct their affairs lawfully, paying tax in the UK in strict accordance with their legal obligations. Such people rely upon Jersey to uphold their legitimate rights, and I do not believe that the UK IGA is consistent with that tacit commitment which we have given to them. If we are willing to legislate for breaching the confidentiality of "res non-dom" in this way, questions

are bound to be asked about our willingness to respect the confidentiality of the affairs of other investors who are neither resident nor domiciled in the United Kingdom.

It is true that Guernsey and the Isle of Man appear not to share these concerns, but I am given to understand that their business models are different, and that fewer “res non-doms” conduct their affairs through those Crown Dependencies. In any event, each Crown Dependency must conduct its own negotiations with the UK government as it sees fit.

The straw that broke the camel’s back

I do not believe, as stated above, that a fair balance has been struck. However, the final straw was the refusal of the UK government to agree to amend the standard tax return submitted by UK taxpayers so as to require notification from them, in the case of “res non-dom”, of the same information as would be requested under the IGA. Such a requirement would not have met the objection regarding breaches of confidentiality, but would have removed the incentive to locate business away from Jersey to a jurisdiction without any agreement with the UK. What is in prospect, if the UK IGA is implemented in full at this stage, is that Jersey financial institutions will be required to provide information about the affairs of “res non-dom” that the UK government is not prepared itself to seek from its own taxpayers. This is unreasonable and, in my view, unacceptable. No explanation has been offered by the UK government for this refusal, but the obvious inference to be drawn is that the UK does not wish to risk upsetting the “res non-dom” by asking questions that might drive business away from the UK. At the same time, Jersey is expected to provide this information at the cost of considerable potential damage to its own economic interests.

Furthermore, the UK approach is contrary to established international rules. Countries are expected, in the context of exchange of information, to use their best endeavours to obtain the information using their own systems of law and practice before making requests of other countries under international agreements. Article 5.5 of the OECD model Tax Information Exchange Agreement provides –

“The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information –

...

- (g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.”

It can hardly be said that requesting the same information of taxpayers in the UK that Jersey is expected to provide “would give rise to disproportionate difficulties”.

Conclusion

I invite members to adopt the amendment in order to protect the economic interests of Jersey. The UK Government will not protect Jersey's economic interests, nor should we expect it to do so. Only members of this Assembly are in a position to protect Jersey's interests and, in my view, they have a duty to do so. Adopting the amendment would not in any sense be an endorsement of tax evasion. On the contrary, Jersey has shown in countless different ways a determination to assist other countries, including the UK, to recover from their citizens what is lawfully due by way of tax. H.M. Treasury has apparently expressed suspicion, but has no evidence, that "res non-doms" with business in Jersey are evading their fiscal obligations. On the other hand, there is strong evidence that implementing the totality of the UK IGA at this stage would be damaging, and perhaps seriously damaging, to Jersey's economy. The appropriate time to implement that part of the IGA dealing with "res non-dom" is when the Common Reporting Standard is in force, and all countries will stand on a level playing-field.

Financial and manpower implications

There are no financial or manpower implications for the States arising from this amendment.