CIVIL APPEAL NO. 5 OF 2007

Between:

TERRY COXON	**First Appellant**
-And-	
PASSPORT FINANCIAL INC.	**Second Appellant**
-And-	
PASSPORT FINANCIAL (CAYMAN) LTD.	**Third Appellant**
-And-	
THE MINISTER OF FINANCE	**First Respondent**
-And-	
GROSVENOR TRUST COMPANY LIMITED	**Second Respondent**
-And-	
BERMUDA COMMERCIAL BANK LTD	**Third Respondent**

Before: Zacca, P.
Nazareth, JA
Ward, JA

Date of Hearing: **21st June 2007**
Date of Judgment: **4th July 2007**

Reasons for Judgment

Nazareth, JA

1. On 25th June 2007, we gave our decision dismissing this Appeal, with costs to the first respondent, ("the Minister"). We now give our reasons.

2. By Article 5 of the U.S.A. - Bermuda Tax Convention 1966 ("The Convention") the two countries undertook to provide mutual assistance in tax matters. The Convention was given legal effect in Bermuda by the enactment of the U.S.A. – Bermuda Tax Convention Act 1986 ("the Act"), in which the text of the Convention is set out as the First Schedule.

3. The US Government by a request ("the Request") sought information under the second sentence of Article 5 of the Convention from the Minister, which information was said to be in Bermuda, and that it might be or have been in the possession, custody or control of the second and third respondents. The information required was said to relate to the appellants. The Minister accordingly issued Notices pursuant to sections 4 and 5 of the Act to the second and third respondents for production of the information to him. The text of the Notice to the second respondent incorporating the pertinent facts is attached as an Annex to these Reasons as part of them. The Notice to the third respondent is in virtually identical terms save that the documents required are specified as follows:

> "From The Bermuda Commercial Bank Limited, all documents including but not limited to opening account contracts and signature cards, monthly bank statements, cancelled checks (front and back), deposit items, withdrawal items wire transfers and wire transfer instructions and correspondence (including electronic) for account number 068 01 026040 for the period beginning 1st January 1996 through 31st December 2004".

The appellants by originating summons sought orders of certiorari to quash the Minister's Notices. The proceedings came before Wade-Miller Acting Chief Justice. In a detailed judgment comprehensively addressing the submissions she rejected those made on behalf of the appellants and for the reasons she gave, accepted those of Mr. Kessaram, counsel for the first respondent. Accordingly she refused the appellant's application. The appellants then appealed to this Court. Their grounds of appeal are somewhat tersely set out in their Notice of Appeal, but amplified in their written submissions and their supplemental written submissions. It is convenient to approach them in the way adopted in Mr. Kessaram's written submissions.

4. THE APPELLANT'S CASE

Approached in that way the appeal can be said to be based upon 3 broad propositions –

(i) THE ARTICLE 5 PRECONDITION

That the second sentence of Article 5 is not an enabling section giving the U.S. Inland Revenue ("U.S. IRS") jurisdiction to issue the Requests. Before the US Government can make a request, a precondition of consultations between the US Government and the Bermuda Government must have taken place leading to agreement on appropriate conditions, methods, and techniques for providing assistance. There is no evidence that this process has been carried out. Any notice issued by the Minister pursuant to a request under the second sentence of Article 5 is therefore void as having been made without jurisdiction

(ii) VITIATING EFFECT OF INCORRECT FACTS

That a notice under the USA-Bermuda Tax Convention Act 1986 ("The Act") can be set aside in judicial review proceedings if it can be shown that the facts relied upon by the Minister in deciding to issue a notice are incorrect;

(iii) EFFECT OF ULTERIOR MOTIVE AND UNWORKABLE REQUEST

That a notice can be set aside in judicial review proceedings if it can be shown (a) that the request goes beyond the scope of the investigation by the US authorities and/or is made with an ulterior motive; or (b) is unworkable. It is submitted that in such circumstances, the Minister's decision would be so unreasonable as to amount to an error of law.

5. MINISTER'S RESPONSE

The Minister contends that the Notices are not liable to be set aside for the following reasons:

i. The Minister's power to issue a notice stems from the Act. So long as the Minister has complied with the requirements of the Act, the issuance of a notice will be valid. Under the Act as read with the Convention the Minister clearly had the power to issue the Notices pursuant to the Request under the second sentence of Article 5. In any event the burden is on the Appellants to show the lack of statutory authority to issue the Notices in this case. They have failed to do so.

ii. The Notices are not liable to be set aside on the basis of allegations that certain facts stated in the Requests are untrue. The Minister is entitled to rely on the certification by the appropriate US authority as to the facts required to be stated in a request and on their relevance to the investigation. The Minister does not have a separate statutory obligation to investigate the facts stated in a request to determine either their accuracy or their relevance.

iii. The documents sought by the Notices are *prima facie* relevant to the tax liability of the Appellants and cannot on the evidence before the Court or before the Minister at the relevant time be said to be outside the scope of the investigation. In any event, (as submitted in ii. above) the Minister does not have a separate statutory duty to investigate the relevance of the information sought and is entitled to rely on the certification by the appropriate US authority that the information sought is relevant to the investigation.

6. RELEVANT PROVISIONS OF THE CONVENTION AND ACT

Article 5 of the Convention

MUTUAL ASSISTANCE IN TAX MATTERS

The competent authorities of the Covered Jurisdictions shall provide assistance as appropriate in carrying out the laws of the respective Covered Jurisdictions relating to the prevention of tax fraud and the evasion of taxes. In addition, the competent authorities shall, through consultations, develop appropriate conditions, methods, and techniques for providing, and shall thereafter provide, assistance as appropriate in carrying out the fiscal laws of the respective Covered Jurisdictions other than those relating to tax fraud and the evasion of taxes.

SECTIONS 4 AND 5 OF THE ACT

PROCEDURE IN RESPECT OF A REQUEST

4 (1) A request must be in writing.

(2) A request must be signed by a senior official designated by the U.S. Government

(3) A request shall contain particulars indicating-

(a) that by the request the U.S. Government seeks information identified in the request; and

(b) that the information is in Bermuda and that a person in Bermuda has or may have the information in his possession, custody or control; and

(c) that the information relates to the carrying out of the laws of the United States mentioned in Article 5; and

(d) that the information relates to the affairs of a person in respect of whom the request has been made under the Agreement ("the taxpayer").; and

(e) where the request has been made pursuant to the first sentence of Article 5, that the taxpayer has, or is believed to have, done some act, or made some omission, justifying the making of that request in respect of him; and

(f) whether or not the taxpayer is a resident of Bermuda or the United States; and

(g) that the request relates to an examination of the taxpayer in relation to a taxable period of the taxpayer, being a period specified in the request, but so that, where a request, in seeking information relating to a taxable period so specified, also seeks information relating to a time outside that period. The request must establish the connection

between that period and that time.

(4) Subject to subsections (1), (2) and (3), a request shall be in such form as regulations may prescribe.

POWER TO REQUIRE PRODUCTION OF INFORMATION

5 (1) Subject to this section, where the Minister has received a request in respect of which the requirements of section 4 are fulfilled, he shall by notice in writing under this section served upon the person referred to in paragraph (b) of subsection (3) of that section direct him to deliver to the Minister the information referred to in that paragraph.

(2) For the purposes of subsections (3) and (4) of this section, a subsection (2) matter is a matter -
(a) with respect to which information is sought in a request; and

(b) which relates to a person who is not a resident either of Bermuda or of the United States, whether or not the requirements of section 4 are fulfilled in relation to the request.

(3) Where the Minister receives a request which seeks information with respect to a subsection (2) matter, he shall not issue a notice under this section to any person unless the Minister is satisfied that the information is necessary for the proper administration and enforcement of the laws of the United States.

(4) Where the Minister receives a request which seeks information with respect to a matter which either –

(a) is a subsection (2) matter; or

(b) does not constitute a United States criminal or tax fraud investigation,

he shall not issue a notice under this section to any person unless the Minister receives certification from a senior official designated by the Secretary of the Treasury of the United States that the information sought by the request is relevant to and necessary for the determination of the tax liability of a United States taxpayer, or the criminal tax liability of a person under the laws of the United States.

(5) A notice under this section must –

(a) contain the pertinent details of the request to which the notice relates; and

(b) specify the time within which the information sought by the request is to be delivered to the Minister……
(The remainder of this section is not relevant)

7. CONSULTATIONS – WHETHER UNFULFILLED PRECONDITION

It is expedient to first dispose of the appellants' contentions that the consultations referred to in Article 5 are a precondition to the provision of the assistance sought. In the context of the general scheme of the Convention and Act, that is a contention we would approach with reserve. However that may be, we do not find it necessary to address it for it is plain that consultations must have been held. Consultations would obviously have had to have been held at the time of or before enactment to settle the contents of Article 4 in particular; and to have to continued for instance when section 4 (3)(e) was amended in 1999, and even more clearly when the Competent Authority Agreement was executed by the Competent Authorities of the two Governments "pursuant to Article 5 of the Convention [agreeing to] conditions, methods and techniques for facilitating information exchange between the two countries", i.e. in the very terms of Article 5; moreover it is not the treaty (i.e. the Convention) that is the law in Bermuda, but the Act, enacted to achieve that effect; this was not in question before this Court; also see e.g. *Lewis and Ness –v- Minister of Finance* (2004) Bda LR 66.

8. THE ALLEGED FACTUAL ERRORS

The Appellants claim that the following errors of fact were made among others in the Requests, and on the part of the Minister's staff:

1. The Request asserts that the three US taxpayers under investigation are US citizens and US residents, whereas the third appellant ("PFCL") was incorporated in Cayman and is clearly not a United States citizen; and neither is it a United States resident or a United States taxpayer.
2. Mr. Brown (assistant financial secretary at the time) asserted in his affidavit that PFCL is a United States taxpayer whereas PFCL does not and never has paid tax in the United States;
3. Mr. Brown also stated in his affidavit that Coxon is the largest shareholder of Passport Financial Inc. and that in 1996 he owned 25% of its shares; in 2005 Coxon owned no shares in Passport Financial Inc.
4. The Requests assert that the trust kits are sold for a minimum of $50,000 whereas in fact they are sold for $145;
5. The Requests assert that the kits are used by undisclosed US taxpayers to avoid or evade tax whereas tax avoidance is not illegal; and the notion that purchasers of the trust kits can be involved in tax evasion can only be mere speculation.

The Minister does not accept that the facts challenged are untrue. Mr. Kesseram submits that even if untrue, it has not been suggested that the US Government knew they were untrue at the time the requests were made or, that the Minister knew or ought to have known at the time of the decision that they were untrue. All that is said is that "had the Minister known" she would not or might not have issued that notice. The appellant's appeal on this point assumes that the Minister had a duty to investigate the facts alleged in a request from the U.S. Government under the Act. No such duty exists. Any such duty, he contends would render the Convention unworkable. It would be extremely onerous in terms of time and cost. Any such duty would also require an understanding of the relevance and materiality of the facts alleged to the investigation of the taxpayers' liability, which would require a knowledge of US tax law. For example, whether PFCL is resident in the U.S. involves an appreciation of what constitutes residency under U.S. tax law and knowledge of what significance (if any) residence has to liability under U.S. fiscal laws.

We accept these submissions, and that the intention of the legislation is that the Minister should rely on the certification of the relevant US authority on these matters. The relevant sections of the Act require that the request contain certain information and be certified by an appropriate person in the U.S. Government. Had the legislature sought to impose on the Minister a duty to investigate the facts alleged in the request, it would have expressly required that the Minister be satisfied of the correctness of the information. This was the approach, which we adopt, taken by Ground J (as he then was) in *Bermuda Trust Company Limited et al v. The Minister of Finance* [1996] Bda LR 45 in which he stated:

> "*…but a primary purpose of international arrangements such as the Convention has to be to avoid the need for the requesting state to become embroiled in litigation in the request jurisdiction. Moreover, to attempt to decide these issues would involve the Court in considerations of U.S. tax law, and procedure, and might also require it to venture upon a consideration of the very matters in respect of which the Request is made… The Court's function is to examine the decision to implement the request to see if it was taken in compliance with the relevant laws and if it was not, to consider what to do about it. …I think that that approach is inherent in the mechanisms embodied in such information exchange treaties, but if authority were needed I would rely upon the judgment of Georges JA in* Bertoli & Ors. V Malone *(1992)*

LRC (Cons) 960 (which was adopted "in toto" by the Privy Council on further appeal [see Ibid. at 979], at p.970:

> *'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 it in the request. Clearly, he cannot receive evidence to raise doubts as to this".*

The equivalent of the Cayman 'authority' in Bermuda under the Convention would be the Minister. If the Minister is precluded from considering the correctness of the information laid before him, then a fortiori the Court in reviewing his decision must also be restricted from doing so."

And at page 10 of his judgment:

In my judgment the purpose of having a senior official sign a request is that it is a substitute for further verification of the factual matters in the request. The signatory makes himself responsible for the truth of the contents of the request and for its bona fides: he stands behind it".

We add that some of the allegations of factual error appear on their face to have some substance. However, they are of very limited relevance, if any, to the decision to issue the Notices, which clearly has to be dealt with in accordance with sections 4 and 5, as construed above.

9. ALLEGED ULTERIOR PURPOSE OF INVESTIGATION

It is further submitted by the Appellants that the request goes beyond an investigation of the named US taxpayers and that in fact the US Government is pursuing an investigation of the US tax liability of persons who participated in the Passport Trust scheme ("the participants"); or that the request is simply too wide.

The ulterior purpose of the investigation, it is said, is self-evidently to obtain a shopping list of U.S. taxpayers who set up a trust, under the guise of an investigation into the appellants. This, it is argued, ought to have been clear to the Minister, who therefore acted unreasonably in issuing the notices in the circumstances.

The factual basis for this contention appears to be that the request seeks the production of documents submitted "by U.S. taxpayers … *to establish a Passport Financial Protective Trust*"; and "*Payment documentation submitted by U.S. taxpayers for the 'Initial Grant to the Trust'*".

As can be seen in the Notices, however, the Requests also state clearly that they relate to the examination of a taxable period of the taxpayers for the years 1996 through 2004 inclusive; and that the Competent Authority has certified that the Requests are necessary for the determination of the tax liability of the United States taxpayers i.e. the three appellants.

As pointed out on behalf of the Minister, it is not suggested by the appellants that the information sought is only relevant to the U.S. tax liability of the participants and not relevant at all to the actual or potential tax liability of the appellants, the operators of the scheme. The facts bearing on their potential liability are stated in the Requests and mirrored in the Notices. There is no evidence of the ulterior purpose alleged, and we do not accept that it is self-evident.

Furthermore, this Court, in *The Minister of Finance –v- Braswell and others* [2002] Bda LR, declined to accept that the Minister is empowered to concern himself with the propriety of the manner of an IRS investigation in the U.S. In addition, the Minister is entitled to rely on the certification of the competent authority in the U.S.

In the result the appellants' foregoing submissions on the scope and purpose of the requests fail and must be rejected. They are, however, relied upon by the appellants in their general submissions on judicial review. Those submissions are also posited upon the unworkability of the request, to which we now turn.

10. ALLEGED UNWORKABILITY OF REQUEST

The Appellants' submission in this respect is expressed in the following way:

> "*In relation to the request for complete copies of all forms submitted by 'U.S. taxpayers' one must query how Grosvenor will be able to ascertain is someone is a U.S. taxpayer or not. Given the clear discrepancy of the issue of Passport Financial (Cayman) Ltd. It is difficult to see how a Bermuda financial institution can determine who is or is not a U.S. taxpayer".*

The Passport Trust scheme was marketed in the U.S. as a scheme to avoid U.S. tax. $50,000 had to be invested. There would have been documentation and correspondence. It is difficult to conceive of subscribers who were not taxpayers and whose status in that respect could not be ascertained with reasonable ease by the operators. The request was for "complete copies of all forms submitted by U.S. taxpayers (including correspondence, electronic paper) to establish a Passport Financial Protection Trust." The submission goes to that seeking judicial review. In that respect, it would not have been unreasonable for the Minister to assume the participants in the scheme were U.S. taxpayers, and that the request was workable.

11. JUDICIAL REVIEW- IRRATIONALITY

In broad terms, section 12 confirms that nothing in the Act excludes or restricts the right to judicial review, and this was accepted by the Acting Chief Justice who carefully and fully addressed the appellants' submissions in that respect. On the issue whether the Minister's decision to issue the Notices could be impugned on the ground of *Wednesbury* unreasonableness, she found that there was no evidence that the Minister failed to take account of factors she should have, and that in her judgment the Minister's decision could be reconciled with the material factors and was supported by evidence.

Submissions not dissimilar to those made to the Acting Chief Justice were made to us. They were based upon the alleged factual errors, alleged ulterior purpose of the investigation, and the alleged unworkability of the Requests, which we have rejected. Accordingly, we do not have to adumbrate and address the detailed and lengthy submissions replete with copious authorities contending for a desired formulation of irrationality or *Wednesbury* unreasonableness. It suffices to outline that formulation, which is to the effect that a decision would be *Wednesbury* unreasonable if it disclosed an error of reasoning which robbed the decision of its logical integrity; if such an error could be shown then it was not necessary for the applicant to demonstrate that the decision maker was "temporarily unhinged (*R –v- Parliamentary Commissioner for the Administration ex. P Balchin* [1998] 1

PLR 1). Put another way, irrationality and *Wednesbury* unreasonableness encompass flawed logic.

The submission concludes with the following words:

> *"So had the Minister known (i) the true facts; and/or (ii) in any event reviewed and appreciated the scope and unworkability of the requests no notice would or ought to have been issued."*

It is unfortunate that counsel for the appellants did not identify the error of reasoning or flawed logic that was relied upon. His concluding submissions points to (i) ignorance of the true facts, and/or (ii) failure to review and appreciate the scope and workability of the Requests being the errors of reasoning or flawed logic.

These matters have already been addressed. It is not suggested that they present any impediment to the Minister's compliance with Section 4 or any of the other provisions of the Act. Even if the required reliance upon certification were disregarded, we are unable to see how the Minister's decision to issue the Notices could be said to be irrational or *Wednesbury* unreasonable. Specifically with respect to Counsel's desired formulation, we are unable to detect any flawed logic or error of reasoning.

12. CONCLUSION

For all the reasons I have endeavoured to set out, the appeal had to be dismissed.

13. THE FIRST RESPONDENT'S NOTICE

The Acting Chief Justice did not grant the Minister her costs. The Minister sought to have the decision not to grant her costs overturned.
The Acting Chief Justice's reasoning was that the appellants' had good reasons to bring their application. It was, she rightly said, fairly complicated and it certainly wasn't frivolous or vexatious. There did, on the face of those matters, appear to be a number of errors, even if minor, in the Requests. These would, in all probability, have aggrieved and prompted the appellants to bring their application. While we might not have made the same decision we feel that in light of those considerations the decision on costs below should not be disturbed.