



**IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2005 : No. 321**

**IN THE MATTER OF AN APPLICATION UNDER THE ADMINISTRATION OF
JUSTICE (PREROGATIVE WRITS) ACT 1978**

**AND IN THE MATTER OF NOTICES DATED 19TH JULY, 2005 PURSUANT TO
THE U.S.A. - BERMUDA TAX CONVENTION ACT 1986**

BETWEEN:

TERRY COXON

First Applicant

and

PASSPORT FINANCIAL INCORPORATED

Second Applicant

and

PASSPORT FINANCIAL (CAYMAN) LIMITED

Third Applicant

and

THE MINISTER OF FINANCE

First Respondent

and

GROSVENOR TRUST COMPANY LIMITED

Second Respondent

and

BERMUDA COMMERCIAL BANK LIMITED

Third Respondent

Mr. Mark Diel, Marshall Diel & Myers- Attorney for the Applicants
Mr. David Kesseram, Cox Hallett & Wilkinson and Ms. Debra-Lynn Goins,
Attorney General's Office - Attorneys for the Respondents

DECISION

1. In this matter the Applicants – Terry Coxon, Passport Financial Incorporated (PFI) and Passport Financial (Cayman) Limited (Cayman) seek orders to quash notices of the Minister of Finance (the Minister) dated 19th of July 2005 to Grosvenor Trust Company (Grosvenor) and the Bermuda Commercial Bank (the Bank) which were issued to them to deliver up information pursuant to Sections 4 and 5 of the U.S.A. – Bermuda Tax Convention Act 1986 (the Act).

2. In relation to Grosvenor Trust Company Limited the Notice seeks:
 - “(a) Complete copies of all forms submitted by U.S. taxpayers (including correspondence, electronic/paper) to establish a Passport Financial Protective Trust including but not limited to Form A18 “ADOPTION AGREEMENT”;
 - (b) All attachments to the Form A18 submitted by U.S. taxpayers including but not limited to, complete copies of every “Information For Trustee” questionnaire and “Transmittal Letter”;
 - and
 - (c) Payment documentation submitted by U.S. taxpayers for the Initial Grant to the Trust”; and
 - (d) Documentation evidencing all payments and all communications (including electronic) between Grosvenor Trust Company Limited and Terry Coxon, Passport Financial Incorporated, and Passport Financial (Cayman) Limited.”

3. The Notice seeks in relation to Bermuda Commercial Bank:
 - “(ii) 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 January 1, 1996, through to December 31, 2004.”

4. It is contended by the Applicants that:
 1. The Minister did not have the jurisdiction to issue the Notices;
 2. The facts upon which the Notices were issued were demonstrably wrong; and
 3. The requests are so wide ranging to amount to a fishing expedition.

5. **The relevant provisions of the Act:**
 - 3 (1) This Act has effect for the purpose of enforcing the giving of assistance by persons in Bermuda in connection with the performance of the obligations assumed by Bermuda under the Agreement.
 - (2) The Minister, in performing his functions under this Act, is not restricted by any law or any rule of law relating to confidentiality except as expressly provided in the Agreement.
Procedure in respect of a request is dealt with by Section 4:
 - 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 of 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 (sic) 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.

Section 5 deals with the Minister's 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 fiscal 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.

Article 5

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.

6. Mr. Diel carefully took the Court through Annex A the “Requests for information” signed by Robert H. Green, a Senior Tax Official of the United States designated and authorized by the Secretary of the Treasury of the United States to make such requests. The requests for information set out the particulars and Mr. Diel highlighted a number of areas in the particulars that in his view were problematic and he argued that the Minister should have been put on notice. For example, Mr. Diel pointed out that the fact that Cayman is not a taxpayer and that it is clear on the face of the document that the material sought is not relevant and there is no evidence of U.S. residency irrespective of the certification.

7. The record shows that a Senior Official of the US Treasury has certified that the information sought is necessary to determine tax liability under the various provisions of the Act and the Convention. The Minister acted on this information.
8. I take the submissions in the main from the written submissions of Counsel provided to the Court.

Mr. Diel submitted, inter-alia, that the request seems to assume that Article 5 is divided into two sections and the requests purport to be issued pursuant to the second sentence of Article 5 of the Tax Convention Act, which relates, to the fiscal laws of the United States other than tax evasion or fraud. The first sentence involves tax evasion or fraud.

9. In response, Mr. Kesseram joined issue on this principle, submitting that the Applicants seem to be suggesting that the convention simply obliges the Bermuda Government to provide “assistance”; and that compelling persons to produce documents goes beyond giving assistance. The Bermuda Government has interpreted its treaty obligation as requiring persons resident in Bermuda to produce documents and give information in a deposition pursuant to a notice issued by the Minister pursuant to a valid request.
10. Mr. Kesseram argued that it would be beyond the competence of the Court to question whether the legislation goes further than Bermuda’s obligation under the legislation. The Courts can only question whether the acts of the Minister comply with the Act.

This issue of the Minister’s authority as well as the Court’s jurisdiction is crucial to the outcome of the application. I agree with Mr. Kesseram’s point that the Court can only question whether the Minister’s acts comply with the 1986 Act. The role of the court is to examine the Minister’s decision to see if it conforms with the Act. The Court will be exceeding its jurisdiction if it goes beyond questioning the acts of the Minister.

11. Mr. Diel submitted, ‘inter-alia’, that the second sentence of Article 5 does not provide for the request made nor is it referenced to in Section 4 of the Convention. The second sentence of Article 5 sets up a consultative process as a pre-condition to providing assistance as appropriate and there is no evidence that this process has been engaged in or is complete.

12. Mr. Kesseram submitted that the general obligations Bermuda agreed to assume have been elaborated and given effect to by Section 3 (1) of the Act, which does not impose any pre-condition of consultation in respect of each notice. Section 5 states that where the Minister receives a request which complies with the requirements of Section 4, the Minister shall issue the notice.
13. The obligation imposed under Article 5 is a “general non-statutory obligation” between the parties to “develop appropriate conditions, methods and technique” at the commencement of the obligations between them and from time to time thereafter which will apply to all requests under the second sentence of Article 5 not to each individual request.”
In any event, argued Mr. Kesseram, if there was a legal obligation it is for the Applicants to prove that any consultation required to be performed before a request is issued has not been complied with.
14. As I understand Mr. Diel’s argument the Minister must carry out a consultative process in respect of each request. In my judgment, this is not correct. As Mr. Kesseram submitted whenever the Minister receives a request which complies with the requirements of Section 4 of the Act, the Minister shall by notice in writing direct the person to deliver to the Minister the information referred to in that paragraph. The Minister must issue the notice.
15. Further, Mr. Diel argued the Notices purport to be issued pursuant to the investigation of taxpayer(s). One of the alleged taxpayers is Passport Financial (Cayman) Limited which is a Cayman Company and is not a U.S. taxpayer (paragraph 3 of Mr. Coxon’s affidavit sworn 18th November 2005 refers). If it is shown that Passport Financial (Cayman) Limited is not a taxpayer the Notice must fail since neither the Court nor the Minister can conduct a “blue pencil” exercise to remove one “taxpayer” from a notice. If it is defective it must fail. In respect of Passport Financial (Cayman) Limited, Mr. Diel submitted, inter-alia, that it is clear from the request and the notices that the IRS is “guessing” and is seeking a “shopping list” of U.S. taxpayers so they may go and investigate them. The fact that a senior official of the United States Treasury certified that the documents are relevant and necessary does not stand up given the clear error of Passport Financial (Cayman) Limited as a U.S. taxpayer; and the narrative in the notices themselves.
16. The statement contained in paragraph 5 (3) of the first Coxon’s affidavit is to the effect that, despite the statements made in the Notices, the request cannot possibly be for the determination of his liability or that of the other

Applicants. The information sought could not be and is not relevant to any determination of tax liability. Rather, it is a transparent attempt by the IRS to obtain name and details of U.S. taxpayers who have created trusts in Bermuda with Grosvenor.

17. Finally, Mr. Diel submitted that it is self evident that the requests for information are beyond the scope of any enquiry into any of the “named” taxpayers. And in any event the requests are unreasonably broad and unworkable.
18. One must query how Grosvenor will be able to ascertain if someone is a U.S. taxpayer or not given the clear discrepancy of the issue of Passport Financial (Cayman) Limited. It is difficult to see how a Bermuda financial institution can determine who is or is not a U.S. taxpayer?
19. In the circumstances, Mr. Diel argued the Minister’s decision was illegal as there is no evidence that the condition precedent has been met; or that the requests relate to a U.S. taxpayer. Further, the requests were incompetent; consequently the Notices issued pursuant to those requests were illegal. In the circumstances, the Minister’s decision to issue the Notice was irrational, in that, no proper enquiry as to the requests which were flawed on their face were ever made.
20. Mr. Kesseram submitted that there are two decisions of the Minister at issue: the decision to issue the notice to Bermuda Commercial Bank and to the Grovesnor Trust. Mr. Kesseram accepts that the requests are issued under the second sentence of Article 5 of the Convention. He argued the article refers to providing “assistance as appropriate” in both first and second sentence requests.
21. Mr. Kesseram maintained that the requests do not state nor is it required to state under what U.S. fiscal law the liability of the applicant is believed to arise. Further, the Applicants have failed to discharge the legal and evidential burden of establishing the negative proposition that the information sought is irrelevant to their tax liability.
22. Additionally, the relevance of the information has been certified by the appropriate U.S. authority and a court cannot go behind such certification. Further, in light of the certification that the information sought is relevant to the determination of tax liability of the Applicants it is not open to the Applicants to submit that the investigation while purporting to be one thing, is in effect an investigation of the use of Passport Trust to avoid or evade U.S. taxes.

23. In so far as the Applicants argue that there is an improper motive behind the requests, this argument assumes that the Notices are a disguise to give the appearance of an investigation of tax liability when in effect they are being investigated for tax evasion or avoidance. Also, the Applicants assert that the information is of no relevance to their tax liability. Mr. Kesseram made the point that the Court is being asked to make inferences that go against the express statements of a senior official in the U.S. government relating to the purpose of the request and its relevance and is bona fides.
24. Mr. Kesseram maintained – as regard the Applicants’ submission that the information sought is irrelevant to their tax liability, are too wide and amount to a “fishing expedition” – that no evidence of U.S. law has been adduced in these proceedings to show that the information sought in Bermuda is irrelevant. Consequently, the validity of the request can only be assessed against the Treaty which simply refers to the fiscal laws of the U.S.A.
25. Still further Mr. Kesseram maintained as regards the Applicants’ reliance that the incorrect information relating to them is stated in the Requests and Notices. Mr. Kesseram observed that the fact that the information supplied to the Minister maybe wrong in some respects does not “per se” vitiate the Minister’s decision to issue with notices.
26. Further, the Minister does not accept that the information supplied to her was wrong. She does not take a position as she is not required to have a view as to its correctness. The correctness of the assertion is a matter for U.S. authority. No complaint can be levied against the Minister if she believed the assertions to be true at the time she issued the notice.
27. I accept Mr. Kesseram’s approach to the issues raised that this is not the case of the Minister exceeding the jurisdiction. In my view, the Minister is not required to decide on the merits of the person’s tax liability. Sections 4 and 5 recited above contemplate that once a request is made and the requirements of Section 4 fulfilled, under the Convention the Minister is obliged to direct the person to deliver the information referred to the Minister. It is no part of the Minister’s responsibility to determine who is liable to pay U.S. tax. If the person sought by the U.S. authorities comes within the letter of the legislation the Minister must issue the notice however great a hardship may appear.

28. The authorities referred to by Mr. Diel do not support the result that he seeks. In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at page 950, Lord Diplock conveniently classified under three heads the grounds on which administrative action was subject to control by judicial review, namely, illegality, irrationality and procedural impropriety. "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Texas) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

29. Mr. Diel maintained that the Minister has a basic common law duty which does not require expression in the statute to: sufficiently acquaint itself with relevant information, fairly presented and properly addressed; and a duty to act in a logical and reasoned fashion. The claimant does not have to demonstrate, as defendants sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the term irrationality generally means in this branch of the law is a decision which does not add up - in which there is an error of reasoning which robs the decision of logic. Mr. Diel said that the notion of irrationality or *Wednesbury* unreasonableness encompasses flawed logic received explicitly support from Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER at 158 in which the Court advocated a 'simple test', namely whether "the decision in question was one which a reasonable authority could reach."
- The notices, he argued, proceed upon flawed logic and just do not "add up." Despite the flaws appearing on the very face of the Notices, there is no evidence that there was any proper or reasonable enquiry. Accordingly the notices are irrational and unlawful.
30. Can the Ministers decision be successfully impugned on the ground of *Wednesbury* unreasonableness? I find no evidence that the Minister failed to take into account material factors which she should have scrutinized. In my judgment the Minister's decision can be reconciled with all the material factors and is supported by the evidence.
31. There are other submissions made and I bear in mind the authorities referred to by Counsel for the parties which were not mentioned in this decision. However, their relevance for the purposes of this application has been fully considered.
32. For the above reasons, I refuse the application. I shall hear the parties on costs if they so wish.

Dated this 31st day of January 2007.

The Hon. Justice Norma Wade-Miller
Acting Chief Justice