



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 472

IN THE MATTER of an Application for Judicial Review

AND IN THE MATTER of a Notice to Deliver Up Information dated 29th November 2012, pursuant to a Tax Information Exchange Agreement between the Republic of Argentina and Bermuda

BETWEEN:-

BUNGE LIMITED

Applicant

-v-

THE MINISTER OF FINANCE

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: 13th March 2013

Mr Jeffrey Elkinson and Mr Paul Smith, Conyers Dill & Pearman, for the Applicant

Ms Shakira Dill, Attorney General's Chambers, for the Respondent

Introduction

1. By a notice of motion dated 17th January 2013, the Applicant, Bunge Limited, seeks judicial review of the decision of the Respondent, the Minister of Finance, to issue a notice to deliver up information dated 29th November 2012 ("the Notice"). The Notice was issued pursuant to a request from the Government of Argentina ("the Request") under an Agreement between Bermuda and the Argentine Republic for the Exchange of Information Relating to Taxes dated 22nd August 2011 ("the Agreement"). The Applicant contends that the Request was invalid.
2. Leave to apply for judicial review was granted on 21st December 2012. The relief sought includes an order for mandamus to compel the production of the Request and an order for certiorari to quash the Notice. The production of the Request is sought so that the Applicant can better assess whether it complies with the requirements for a request that are set out in the Agreement.
3. This is a judgment on the application for mandamus. On 17th January 2013 the Court ordered that the application should be heard and determined separately, before the application for certiorari is heard.

Statutory framework

The International Co-operation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act")

4. The statutory authority to issue a request under the Agreement is to be found in the 2005 Act.

(1) Section 2 of the 2005 Act is headed “*Interpretation*”. It provides in material part:

“In this Act, unless the context otherwise requires –

‘agreement’ means a tax information exchange agreement ... entered into by the Government of Bermuda, as authorized by the Government of the United Kingdom, with another jurisdiction; but does not include –

.....

(b) the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on behalf of the Government of Bermuda) for the Exchange of Information with Respect to Taxes;

.....

‘Minister’ means the Minister of Finance or such other Minister as may be appointed to administer this Act;

‘requesting party’ means a party that makes a request for assistance under an agreement.”

(2) Section 3 of the 2005 Act is headed “*Duties of the Minister*”. It provides:

“(1) The Minister is the competent authority for Bermuda under the agreements.

(2) The Minister may provide assistance to any requesting party according to the terms of the agreement with that party.”

(3) Section 5 of the 2005 Act is headed “*Power to require information*”. It provides:

“(1) The Minister may, by notice in writing served on any person in Bermuda, require the person to provide any information that the Minister may require with respect to a request for assistance by a requesting party.”

(4) Section 8A of the 2005 Act provides:

“Nothing in this Act shall preclude the right of any person to apply for judicial review of any matter undertaken pursuant to this Act.”

5. Article 5 of the Agreement is headed *“Exchange of Information upon Request”*. It deals with the information to be contained in a request:

(1) Paragraph 1 provides:

“The competent authority of a requested party shall provide upon request in writing by the requesting party information for the purposes referred to in Article 1”.

(2) Paragraph 6 provides:

“The competent authority of the requesting party shall provide the following information to the competent authority of the requested party when making a request for information under this Agreement in order to demonstrate the relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) the period for which the information is requested;

(c) the nature and type of the information requested, including a description of the specific evidence sought and the form in which the requesting party would prefer to receive the information;

(d) the tax purposes for which the information is sought and the reasons for believing that the information requested is relevant to the administration or enforcement of the domestic laws of the requesting party;

(e) reasonable grounds for believing that the information requested is present in the territory of the requested party or is in the possession or control of a person subject to the jurisdiction of the requested party;

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

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

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

6. Article 7 of the Agreement is headed “*Possibility of Declining a Request*”. Paragraph 1 provides in material part:

“The competent authority of the requested party may decline to assist:

(a) where the request is not made in conformity with this Agreement.”

7. Article 8 of the Agreement is headed “*Confidentiality*”. Paragraph 1 provides:

“All information provided and received by the competent authorities of the contracting parties shall be kept confidential, in the same conditions as that obtained under its domestic laws or according to the confidentiality conditions applicable in the jurisdiction of the Party that provides such information if the second-mentioned conditions are more restrictive and shall be disclosed only to persons or authorities (including courts and administrative bodies) officially concerned with the purposes specified in Article 1 and used by such persons or authorities only for such purposes, including the determination of any appeal, or the oversight of the above. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings.”

The USA - Bermuda Tax Convention Act 1986 (“the 1986 Act”)

8. There is no authority to date on the production of a Notice to Produce under the 2005 Act. However there is authority on this question under the 1986

Act. This Act provides authority for the Minister to issue requests under the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland (on Behalf of the Government of Bermuda) and the Government of the United States of America Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters 1986 (“the Convention”).

9. The Applicant relies on one such authority: Lewis & Ness v Minister of Finance [2004] Bda LR 66, which was a decision of the Court of Appeal. It is necessary to consider the scheme of the 1986 Act in order to determine whether and to what extent Lewis & Ness is of assistance with respect to a request under the 2005 Act.

- (1) Section 2 of the 1986 Act is headed “*Interpretation*”. It provides in material part:

“In this Act, unless the context otherwise requires –

.....

‘the Notes’ means the notes exchanged on 11th July, 1986 between the U.K. Government and the U.S. Government concerning the Convention, ...

.....

‘request’ means an application made, pursuant to Article 5 and the Notes, for assistance;”.

- (2) Section 4 of the 1986 Act is headed “*Procedure in respect of a request*”. It provides:

“(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 or 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 information sought by the U.S. Government is relevant to the determination of the liability of the taxpayer; 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 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.”*

(3) Section 5 of the 1986 Act is headed “*Power to require production of information*”. It provides in material part:

“(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.

.....

(5) *A notice under this section must –*

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

- (4) Section 12 of the 1986 Act is headed “*Judicial review*”. It provides:

“For the avoidance of doubt, it is hereby declared that nothing in this Act excludes or restricts the right of any person aggrieved by the performance by the Minister of Finance or any other person of any function under this Act to challenge the performance by the Minister of Finance or any other person of any function under this Act to challenge the performance of that function, in so far as it affects him, either by seeking review of it by the Supreme Court and the grant, if thought fit by that Court, of an order under section 10 of the Administration of Justice (Prerogative writs) Act 1978 ... or by taking any other action which is lawfully available.”

10. The following provisions of the Convention are pertinent.

- (1) Article 1 is headed “*General Definitions*”. It provides in material part:

“In this Convention, unless the context otherwise requires:

.....

(h) The term ‘Covered Jurisdiction’ means the United States or Bermuda, as the context requires.”

- (2) Article 5 is headed “*Mutual Assistance in Tax Matters*”. It provides in material part:

“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 ...”

- (3) Article 6 is headed “*Confidentiality*”. It provides in material part:

“Any matters subject to assistance under Article 5 shall be treated as confidential in the same manner as such matters or items would be under the domestic laws of the Covered Jurisdiction requesting the assistance and, in any event, shall be disclosed only:

.....

(b) in the case of Bermuda, to the competent authority of Bermuda.

Such persons or authorities shall use such matters or items only for purposes of the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes. Such matters or items may be disclosed in public court proceedings or public decisions, but shall not be disclosed to any country other than one of the Covered Jurisdictions for any purpose.”

A comparison of the 2005 Act and the 1986 Act

11. The 2005 Act and the 1986 Act adopt different drafting techniques with respect to the requirements that must be satisfied before a Minister can issue a notice to deliver up information.
12. Under the 2005 Act:
 - (1) The Minister may provide assistance to any requesting party according to the terms of the agreement with that party.
 - (2) The terms of the Agreement require that the request is in writing and that, in order to demonstrate the relevance of the request, it contains certain specified pieces of information.
 - (3) A purported request that fails to provide the required information is not a request made in conformity with the Agreement, and is therefore not a request in relation to which the Minister may provide assistance.
13. Under the 1986 Act:
 - (1) The request must be in writing and contain certain specified pieces of information.
 - (2) The Minister cannot issue a notice to deliver up information unless these requirements are satisfied.

- (3) The notice must contain the “*pertinent details*” of the request, ie the specified information that the request must contain.
14. Thus, in the case of both Acts, the request must be in writing and must contain certain specified pieces of information. Under the scheme of the 2005 Act those requirements are set out in the Agreement; under the scheme of the 1986 Act they are set out in the Act.
15. Although the 2005 Act and the 1986 Act adopt different drafting techniques to achieve the same end, for the purposes of this application those differences are not material. However, the 1986 Act, unlike the 2005 Act, contains a provision that the notice must contain the pertinent details of the request. The wording of the confidentiality provisions in the treaties underpinning the respective Acts is different, but in both treaties those provisions are of the same or comparable strength.

Lewis & Ness

16. Lewis & Ness is authority for a preliminary point which does not appear to be in dispute. As the Court of Appeal stated at paragraph 31:
- “Although the purpose of the Act is to give effect in Bermuda to the treaty obligations undertaken by Bermuda towards the United States, the Convention itself does not have the force of law in Bermuda. Bermudian law depends upon the true construction of the Act and the Regulations, but they should be interpreted with due regard to the provisions of the Convention, and its purposes.”*
17. The Court of Appeal repeated this point in Coxon v Minister of Finance [2007] Bd LR 78 at paragraph 8. It is in conformity to the principle that the legislature is presumed to legislate in accordance with Bermuda’s international treaty obligations. But even where it is necessary to refer to a treaty in order to interpret a statute, as it is necessary to refer to the Agreement to construe “*the terms of the agreement*” under section 3(2) of the 2005 Act, it is not the treaty but the statute which forms part of domestic

law. See the speech of Lord Hoffmann in the House of Lords at paragraph 27 of R v Lyons [2003] 1 AC 976.

18. In Lewis & Ness the appellant submitted that the person on whom the notice is served should have the right to see the request from which the notice is derived. This is so that the person can determine whether the requirements for the issue of the notice have been satisfied. The Court of Appeal agreed.

“55. We conclude in relation to the second submission, therefore, that whilst the Act does not expressly require the Minister to produce the request to the person on whom a section 5 notice is served, nevertheless the notice has to include pertinent details of the request, meaning that it must set out relevant parts of the request in detail, including the matters required by section 4 and its definition of the information which the person on whom the notice is served is required to produce.

56. Mr. Kessaram's primary submission is that the requests are confidential inter-governmental documents which Article 6 of the Convention requires to be kept as such. We can assume that the phrase “Any matters subject to assistance under Article 5” does include the contents of a request, specifically the nature of the information to which the request relates, and that the Minister is under a general obligation to maintain their confidentiality. But this obligation cannot extend, in the Court's view, to keeping the contents confidential from the person to whom it is intended that a section 5 (1) notice shall be given. The recipient of the notice is entitled to be given “pertinent details” of the contents of the request, and the notice states that the request contains the particulars listed in section 4 (3). The object of the exercise is to inform him of the relevant parts of the contents of the request. They are not to be kept confidential from him.

57. In summary, therefore, the Minister is not required to keep the contents of the request confidential from the recipient of a section 5 notice, to the extent that the contents are relevant to the requirements of section 4. The Act does not expressly oblige him to produce the request, but the recipient is told by the notice what the relevant contents are. Without seeing the request, he cannot know whether the Minister's statement is correct, or not.

58. We accept Mr. Elkinson's submission that in these circumstances both fairness and justice require that the recipient should be entitled to see the inter-governmental request, to the extent that its contents are relevant to the question whether the requirements of section 4 were satisfied and, in particular, whether the information required by the notice was identified as such in the request. The inherent jurisdiction of the Court, in our view,

permits it to recognize and enforce this right. This is not an order for discovery. The claim in these proceedings, upon analysis, is for judicial review of the Minister's decision to deny the Appellants the right, which we hold that they have, to see the relevant parts of the requests, defined as above. It is not suggested that the Minister will suffer any prejudice from producing the copies of the request, redacted in this way, and we hold that an order for mandamus be made accordingly in the present case.

59. We note that the Queen's Bench Divisional Court, in Evans and Lord v Director of the Serious Fraud Office, indicated that an order for production of an inter-governmental request might be made in certain circumstances, though not in that particular case (judgment para. 12–13). This, together with the Pinochet decision, confirms that the Court has power to make the order when “the requirements of justice” so require. Evans and Lord involved consideration of a treaty and of a statute which were in materially different terms from those in the present case. Our decision is limited to the Act and the Convention which are relevant here.”

19. The Applicant submits that Lewis & Ness is in all material respects indistinguishable from the present case. The Respondent disagrees, submitting that the confidentiality argument raised by the Crown in Lewis & Ness was defeated in that case because under the 1986 Act the notice was required to contain the pertinent details of the request. He further submits that, as there is no such requirement under the 2005 Act, the confidentiality provisions of the Agreement should prevail. Before ruling on this issue, it is necessary to examine those confidentiality provisions in more detail.

Confidentiality

20. The Respondent referred me to a body of material produced by the Organisation for Economic Co-operation and Development (“the OECD”) with respect to mutual legal assistance in tax matters. To assist in construing this material, the Respondent referred me to passages from a decision of the Supreme Court of Canada: Crown Forest Industries Ltd v Canada [1995] 2 SCR 802, 125 DLR (4th) 485. The Court stated at paragraph 22:

“In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties.”

21. The Court at paragraph 43 cited with approval the following statement from Gladdens Estate (JN) v R 1 CTC 163 at 166 – 167:

“Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned.”

22. In reviewing the purpose and intentions of the Canada - United States Tax Convention (1980), the Court made extensive use of extrinsic materials, stating at paragraph 44:

“... in ascertaining these goals and intentions, a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity before turning to such materials.”

23. The Court specifically authorised reference to the OECD Model Tax Convention with respect to Taxes on Income and Capital (“the OECD Model Convention”) to which I was referred in the instant case (see below).

24. These passages from Crown Forest Industries Ltd v Canada were relied on at first instance by the Federal Court of Canada (Trial Division) in Pacific Network Services Ltd v Minister of National Revenue 2002 FCT 1158, in which the Court noted at paragraph 40:

“The Commentaries to the Model Convention have been drafted and agreed upon by the experts appointed to the Committee on Fiscal Affairs by the governments of member countries and are intended to illustrate or interpret its provisions.”

25. Article 8 of the Agreement is modelled on Article 8 of the OECD Agreement on Exchange of Information on Tax Matters (“the OECD Agreement”). The OECD Agreement was developed by the OECD Global Forum Working Group on Effective Exchange of Information (“the Global

Forum”). The Global Forum is the multilateral framework within which work in the area of transparency and exchange of information has been carried out by both OECD and non-OECD economies since 2000.

26. The Introduction to the OECD Agreement states at paragraph 3:

“The Agreement represents the standard of effective exchange of information for the purposes of the OECD’s initiative on harmful tax practices.”

Although the Introduction goes on to note at paragraph 4:

“This Agreement is not a binding instrument ...”

27. Article 8 of the OECD Agreement is headed “Confidentiality”. It provides:

“Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.”

28. There is a Commentary to Article 8 at paragraphs 94 – 97 of the OECD Agreement.

“94. Ensuring that adequate protection is provided to information received from another Contracting Party is essential to any exchange of information instrument relating to tax matters. Exchange of information for tax matters must always be coupled with stringent safeguards to ensure that the information is used only for the purposes specified in Article 1 of the Agreement. Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information which it obtains in the course of their co-operation. The Contracting Parties must have such safeguards in place. Some Contracting Parties may prefer to use the term ‘secret’, rather than the term ‘confidential’, in this Article. The

terms are considered synonymous and interchangeable for purposes of this Article and Contracting Parties are free to use either term.

95. The first sentence provides that any information received pursuant to this Agreement by a Contracting Party must be treated as confidential. Information may be received by both the applicant Party and the requested Party.

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

97. The third sentence precludes disclosure by the applicant Party of the information to a third Party unless express written consent is given by the Contracting Party that supplied the information. The request for consent to pass on the information to a third party is not to be considered a normal request for information for the purposes of this Agreement.”

29. I was also referred to an update to Article 26 of the OECD Model Convention and its Commentary. “*Keeping it Safe – the OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*”, published on 23rd July 2012, notes at paragraph 1.2 that the OECD Agreement and the OECD Model Convention are similar as they both require that information is kept confidential and limit the persons to whom the information can be disclosed and the purposes for which the information may be used.

30. Article 26 is headed “*Exchange of Information*” and is similar to Article 8 of the OECD Agreement. It provides at paragraph 2:

“Any information received under paragraph 1 [ie pursuant to a request under the Model Convention] by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such purposes under the laws of both States and the competent authority of the supplying State authorises such use.”

31. The Commentary to paragraph 2 of Article 26 includes paragraph 11, which provides in material part:

32. *“Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. **Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies.**”* [Emphasis in original.]

33. I was also referred to the following documents prepared for the OECD by the Global Forum: “*Peer Review Report – Phase 1 – Legal and Regulatory Framework – Bermuda*”, 2010, at paragraph C.3; “*Terms of Reference To*

Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes (“*Terms of Reference*”), 2010, at paragraph C.3.1; and the draft “*Peer Review Report – Phase 2 – Implementation of the Standards in Practice*”, 2012, at paragraph C.3. All these documents stress the importance of maintaining confidentiality with respect to material supplied by the requesting State to the requested State. To illustrate the point it will suffice to quote paragraph C.3.1 from the “*Terms of Reference*”:

“Information exchange mechanisms should provide that any information received should be treated as confidential and, unless otherwise agreed by the jurisdictions concerned, may be disclosed only to person or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the exchange of information clause. Such persons or authorities shall use the information only for such purposes. Jurisdictions should ensure that safeguards are in place to protect the confidentiality of information exchanged.”

34. The OECD material provides helpful guidance when interpreting Article 8 of the Agreement.

Decision

35. I am satisfied that Article 8 of the Agreement applies to information supplied by both the requested State and the requesting State. I am also satisfied that the Government of Bermuda’s treaty obligations require that Article 8 is interpreted as restrictively against disclosure to the subject of a notice as domestic law permits. However the prohibition on disclosure under those treaty obligations is not absolute. Information can, eg, be disclosed in proceedings in court.
36. In the circumstances, I find that Lewis & Ness is no less applicable to requests under the 2005 Act as it is to requests under the 1986 Act. Fairness and justice require that the respondents to requests under both Acts have the opportunity to satisfy themselves that a request satisfies the relevant statutory requirements and to challenge that request if it does not.

37. The Applicant referred me to Lord Atkin's famous dissenting judgment in the House of Lords in Liversidge v Anderson [1942] AC 206 at 247 to the effect that a Minister's say so is not sufficient to establish that a power has been exercised in compliance with an Act. Although I concur with Lord Atkin's reasoning I do not rely upon his judgment as it was dissenting.
38. An applicant's right of access to the information contained in a request is not unfettered. As the Court of Appeal suggested in Lewis & Ness, a respondent can redact the request to exclude information that is not only confidential but also sensitive, eg because its disclosure would prejudice the investigation or proceedings pursuant to which the request was made. This approach strikes a fair balance between the competing claims of the parties.
39. I therefore make an order for mandamus that the Respondent must produce to the Applicant so much of the Request as is necessary to show that the statutory requirements for the Request have been complied with, but redacted to exclude any sensitive material.
40. However an order in those terms may not be sufficient to resolve the matter, for the requesting State has indicated in an email to the Respondent sent on 17th January 2013:

"We state under sworn statement that, maintaining confidentiality and avoiding the disclosure of the terms of the information exchange request is essential for the success of tax audit proceedings that are being carried out in this company."

The Court has not been supplied with any reasons supporting this assertion.

41. If the requesting State objects to the production of so much of the Request as is necessary to establish that the statutory requirements for the Request have been complied with, the Court will need to examine the unredacted Request. I anticipate that it would do so at a hearing in the absence of the Applicant. The purpose of the examination would be for the Court to determine whether the Request is valid, and, if so, what part, or further part, if any, of the Request should be produced to the Applicant if the Request is to proceed.

42. In light of such ruling, the Respondent would need to consider with the requesting State whether to produce to the Applicant so much of the Request as the Court has directed or alternatively whether to abandon the Request.
43. Before any such hearing took place, I should hear the parties on an inter partes basis as to the appropriate procedure to adopt at the hearing.
44. I shall hear the parties as to costs.

Dated this 13th day of March, 2013 _____

Hellman J