



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2017: No. AA24

**In the matter of a request for exchange of information under the International Cooperation (Tax Information Exchange Agreements) Act 2005**

**BETWEEN:-**

**MINISTER OF FINANCE**

**Applicant**

**-and-**

**MNO**

**Defendant**

## **JUDGMENT**

**(In Chambers)**

*Application to set aside production order under International Cooperation (Tax Information Exchange Agreements) Act 2005 – whether Plaintiff failed to make full and frank disclosure – whether Request was adequately particularised – whether information requested was foreseeably relevant – whether information requested represented a trade, business, industrial, commercial or professional secret or trade process – whether Court was required to be satisfied that requesting State would comply with its treaty obligations to keep the requested information confidential – whether form of the Production Order was defective*

Date of hearing: 18<sup>th</sup> December 2017

Date of judgment: 27<sup>th</sup> December 2017

Mr Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Plaintiff

Mr Matthew Godfrey, Appleby (Bermuda) Limited, for the Defendant

## **Introduction**

1. On 6<sup>th</sup> January 2017 I made a production order against the Defendant. The order was made under section 5(2) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (“the 2005 Act”) on an application by the Plaintiff. The application was made pursuant to a request (“the Request”) from the Competent Authority of the Requesting State on behalf of that State’s tax authority (“the Tax Authority”). The Request was made under the Tax Information Exchange Agreement between Bermuda and the Requesting State (“the Agreement”).
2. On 28<sup>th</sup> July 2017, under section 5(6B) of the 2005 Act, I granted the Defendant a right of review of the production order. Pursuant to section 5(6A) of the 2005 Act, I directed that the Plaintiff disclose to the Defendant all the documents which he had placed before the Court on the *ex parte* application.
3. This is a judgment on the Defendant’s application for review. I have had the benefit of substantial skeleton arguments and admirably succinct oral submissions.

## **Background**

4. The Request concerns the affairs of a group of commercial entities (“the Group”). The Request explains that, through a smartphone application, the Group facilitates on-demand transportation services by connecting passengers with drivers of vehicles for hire as well as ridesharing services.

Thus the Group acts as an intermediary by matching available drivers with customers in need of transportation. Within the context of European Union law, the Group does not act merely as an intermediary but provides a transportation service. However in the present application nothing turns on that distinction.

5. The Tax Authority is conducting a tax audit of a Group member in the Requesting State, which provides marketing and support services to a Dutch Group member. The Dutch Group member pays the Group member in the Requesting State for these services at cost plus 8.5 per cent.
6. The Dutch Group member is the “*principal*” Group entity for the non-US market. It enters into contracts with drivers and customers, in return for which it receives a commission fee from drivers.
7. The Dutch Group member is said to be an indirect subsidiary of the Defendant, and the Defendant is registered in Bermuda. A Group member registered in the United States has allegedly licensed various intellectual property rights and intangible assets (eg knowhow, design, technology, website, marketing intangibles etc) to the Defendant, and the Defendant has allegedly sub-licensed them to the Dutch Group member.
8. Under the law of the Requesting State, transactions between companies in the same group must be priced as if they were carried out at arms’ length. The Tax Authority is concerned that the remuneration paid by the Dutch Group member to the Group member in the Requesting State may be artificially low and that it therefore fails to satisfy this requirement. In order to establish whether this is in fact the case, the Tax Authority seeks to obtain information about the pricing structure and distribution of profits between other the Group entities. The Group member in the Requesting State has explained to the Tax Authority that it is not in a position to provide the information which the Tax Authority requires. Hence the Request.

## **Grounds of objection**

9. The Defendant advanced eight grounds of objection. I shall address them each in turn. I shall not necessarily deal with each and every point raised under these headings, but I shall deal with the main points. I have however considered them all.
10. First, the Defendant complains that the Plaintiff had failed to make full and frank disclosure of all material matters which were known or ought to have been known by the Tax Authority. The Plaintiff has allegedly given inaccurate details of the corporate structure of which the Defendant forms part.
11. In particular, the Request does not state that the Defendant is registered in Bermuda as an overseas partnership under section 9(3) of the Overseas Partnership Act 1995 and that it is governed by the law of the Netherlands. The Defendant has exhibited a Certificate of Registration for an Overseas Partnership and a Certificate of Overseas Partnership evidencing to my satisfaction that this is its status. This is significant, the Defendant submits, because as a matter of Dutch law the Defendant has no legal personality and therefore cannot hold legal title to shares. Legal title to shares of companies in which the Defendant has economic ownership interests is held by its general partner, which is a Delaware limited liability company.
12. I accept that this is the case, but it does not take the Defendant very far. The relevance or irrelevance of the requested information is unaffected by whether the Dutch Group member is an indirect subsidiary of the Defendant on the one hand or of the Delaware company on the other, just as it is unaffected by whether the person to which the various intellectual property rights were licensed to and sub-licensed by was the Defendant or alternatively the Delaware company. What concerns the Tax Authority is the pricing and distribution of profits between the various the Group entities.
13. If, as the Defendant implies in its written submissions, the requested information is not in its possession or control but that of the Delaware

company, that would not be a reason to discharge the Production Order, although it might be a good reason why the Defendant was unable to provide the information requested.

14. I conclude that the Request's misunderstanding of the legal nature of the Defendant is a material non-disclosure, but not one that is sufficiently serious to justify the Court in discharging the Production Order.
15. I should add that whatever its status in Dutch law, under Bermudian law the Defendant is a person within the meaning of the Interpretation Act 1951, which states that "*person*" includes any company or association or body of persons, whether corporate or unincorporated. This is material because section 5(2) of the 2005 Act provides that the addressee of a production order is "*the person referred to in the request*".
16. The Defendant further submits that the Request failed to disclose that the Tax Authority is also undertaking an audit of the Dutch Group member. But there is no reason why the Request should have done as the information sought by the Request is not for the purposes of that audit but for the audit of the Defendant.
17. Second, the Defendant complains that the Request fails to state "*to the fullest extent possible*" why the information sought is relevant to the determination of the tax liability of the Group member in the Requesting State under the laws of that State. The short answer to this point is that, although that requirement is to be found in some TIEAs, it is not to be found in this one. Article 5 of the Agreement provides that the competent authority of the Requesting Party shall provide certain specified information to the competent authority of the Requested Party, and article 5(d) provides that this information shall include the tax purposes for which the information is sought. The information provided in the Request satisfies this requirement – and would have satisfied the "*fullest extent possible test*" had there been one – in that the Court can infer from the request that the information sought is foreseeably relevant to the tax investigation which prompted the Request.

See Minister of Finance v AAA Group Limited [2016] SC (Bda) 75 Civ *per* Hellman J at para 53.

18. Third, the Defendant objects that the request pertains to information in the possession or control of a person other than the Defendant which does not relate “*specifically*” to the tax affairs of the Group member in the Requesting State. But the requirement is not “*specific*” relevance but “*foreseeable*” relevance, which is the standard of relevance in Article 1 of the OECD Model TIEA. See Minister of Finance v Ap [2016] Bda LR 34 SC *per* Hellman J at paras 46 — 50. As explained above, the information sought is foreseeably relevant in that it provides a comparator for the remuneration paid by the Dutch Group member to the Group member in the Requesting State.
19. Fourth, the Defendant submits that the information sought does not relate to the taxable period in respect of which the audit of the Group member in the Requesting State was being carried out, namely the financial years 2012, 2013 and 2014. The Request states that the tax involved is “*corporate tax*” and that the period covered by the request for information is 2013, 2014 and 2015.
20. The Defendant exhibited a letter from the Tax Authority to the legal representative of the Group member in the Requesting State dated 25<sup>th</sup> January 2017 together with an English language translation. The letter states that a letter of request has been sent to Bermuda and that it may result in a reassessment of the company’s tax liabilities. This is plainly a reference to the instant Request. The context of the Request is stated thus:

*“The [Group member in the Requesting State] is currently subject to a tax audit relating to all tax returns, filed or to be filed, in respect of the financial years ended 31 December 2012, 31 December 2013 and 31 December 2014 as well as VAT returns for the period from 1 January 2015 to 30 June 2015.”*
21. It is clear from the letter that the tax audit covers the period 31<sup>st</sup> December 2012 to 30<sup>th</sup> June 2015, but that the 2015 component of the audit relates only

to VAT. It is therefore surprising that the Request does not request information for 2012. Be that as it may, a determination of whether the fee charged by the Group member in the Requesting State for its services to the Dutch Group member is artificially low is in my judgment foreseeably relevant to an assessment of any VAT payable with respect to those services. I also note that one of the items requested relates specifically to the amount of compensation paid in 2015 and not in any other year. This leads me to reject the possibility that the request for information for 2013, 2014 and 2015 is a drafting error for 2012, 2013 and 2014. In this context, I take “*corporate tax*” to mean the tax payable by the corporation, ie the Group member in the Requesting State, rather than a particular type of tax.

22. I therefore reject this ground of complaint, save that I shall limit the information sought for 2015 to the period of the VAT audit, ie 1<sup>st</sup> January 2015 to 30<sup>th</sup> June 2015. I cannot see that financial information for the remainder of 2015 is foreseeably relevant to the tax audits of the Group member in the Requesting State being undertaken by the Tax Authority.
23. Fifth, the Defendant asserts that the information requested is not relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters in relation to the Group member in the Requesting State. For the reasons given above I am satisfied that it is relevant.
24. Sixth, the Defendant complains that the information requested represents a trade, business, industrial, commercial or professional secret or trade process. This complaint relates to article 7(2) of the Agreement, which provides that the Agreement shall not impose upon a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process (“excluded material”). I agree that the Defendant should not be required to produce excluded material. In my judgment, however, most of the information requested does not fall within this category. To the extent that it does – and I have in mind some of the possible contents of the requested agreements

between various the Group entities – the Defendant can redact the requested information so that excluded material is excluded.

25. Seventh, the Defendant states that it is not satisfied that the Tax Authority would keep the information confidential or restrict its use to purposes permitted by the Agreement. However the Court proceeds on the assumption – one which underlies mutual legal assistance generally – that the requesting State will honour its treaty obligations. The relevant provisions of the Agreement are as follows.
26. Article 1 deals with the object and scope of the Agreement. It provides that the competent authorities of the Contracting Parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes and tax matters covered by the Agreement.
27. Article 8 deals with confidentiality. It bears repeating in full:
  - “1. All information received by the competent authority of a Contracting Party shall be kept confidential.*
  - 2. Information provided to the competent authority of the Requesting Party may be used for purposes other than the purposes stated in Article 1 with the prior express written consent of the Requested Party.*
  - 3. Information provided shall be disclosed only to persons or authorities (including judicial and administrative authorities) concerned with the purposes specified in this Agreement and used by such persons or authorities only for such purposes. For these purposes, information may be disclosed in public court proceedings or in judicial decisions.*
  - 4. Information provided to a Requesting Party under this Agreement may not be disclosed to any other jurisdiction.”*
28. Article 8(2) read in conjunction with article 1 means that the requesting State may only use the requested information for the tax purpose stated in the Request, and not for tax purposes generally or for non-tax purposes,



unless it obtains the prior express written consent of the requested State to do otherwise.

29. Turning to the 2005 Act, under section 5(2) a production order is made by the Court based on the information contained in the Request. The order is made to obtain the production of information for the purpose stated in the Request and not for any wider purpose. It would in my judgment circumvent the statutory scheme if the Minister were later to sanction the use of the information produced pursuant to a production order for a wider purpose without first reverting to the Court with a further request. There is no suggestion that the Minister would not return to the Court and I do not intend to seek an undertaking from him. But I propose to make the Production Order subject to the condition that the material disclosed is not to be used for any purpose other than that stated in the Request. A further request to use it for a wider purpose would be considered on its merits in accordance with the statutory scheme.
30. Eighth, the Defendant claims that the Production Order is lacking in clarity and makes statements as to the obligations of the recipient that are contrary to law. I am satisfied that the Production Order is not lacking in clarity. If the Defendant does not understand any of the requests in the Production Order then it can seek clarification from the Plaintiff or the Court. If the Defendant maintains that it cannot produce the information sought by a particular request within the Production Order because the request is based on a false premise, eg that the Defendant has shareholders and pays dividends in circumstances where the Defendant maintains that it does not, then the appropriate response to the request is a statement that the Defendant does not have the requested information together with a brief explanation as to why it does not.
31. On analysis, the Defendant's complaint that the Production Order makes statements as to the obligations of the recipient that are contrary to law is in fact a different complaint, one not included in the Defendant's Grounds of Objection, namely that the Production Order contains a penal notice warning

of the possible consequences of non-compliance with those obligations. I did not give the Defendant leave to pursue this point as I recently dealt with it at some length in Minister of Finance v AAA Group Limited at paras 63 – 73. Nothing in the Defendant’s written submissions caused me to doubt the correctness of the Court’s conclusion in that case that a Production Order may properly be endorsed with a penal notice. Indeed it almost invariably will be.

### **Summary**

32. The Defendant’s application to discharge the Production Order is dismissed. However the Production Order is varied so that the requirement to produce information for 2015 is limited to the period 1<sup>st</sup> January 2015 to 30<sup>th</sup> June 2015. For the avoidance of doubt, the information produced pursuant to the Production Order may be redacted to exclude any information which represents a trade, business, industrial, commercial or professional secret or trade process. The requesting State may not, without leave of the Court, use the information for any purpose other than that stated in the Request.
33. The time lag between the date of the Production Order and the date of this judgment was almost one year. That is far too long. In future the Court will play a more proactive role in the management of applications challenging production orders so as to ensure that they are heard expeditiously.
34. I shall hear the parties as to costs.

DATED this 27<sup>th</sup> day of December, 2017

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Hellman J