In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. Ap of 2015

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

BETWEEN:-

MINISTER OF FINANCE

Plaintiff

-and-

Ap
(formerly known as Aa)

Defendant

RULING (REDACTED)

(In Chambers)

Application to set aside production order under International Cooperation (Tax Information Exchange Agreements) Act 2005 – whether material non-disclosure, and, if so, what should be its consequences – whether production order excessively broad – whether jurisdiction to order disclosure of privileged documents.

Date of hearing: 21st January 2016
Date of ruling: 23rd March 2016

Mr Wayne L Brown, Assistant Financial Secretary, for the Plaintiff
Mr Steven White, Cox Hallett Wilkinson Limited, for the Defendant

Introduction

1. By a summons dated 14th October 2015 the Defendant seeks review of a production order ("the Production Order") obtained *ex parte* by the Plaintiff following an application made pursuant to section 5(2) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act"). The Defendant wants the Production Order discharged or varied.

2. The Production Order was obtained pursuant to a request ("the Request") from the Government of the Republic of India ("the Government of India") to the Government of Bermuda which was received on 18th August 2015. The applicable TIEA between the Government of India and the Government of Bermuda is dated 7th October 2010 and entered into force on 3rd November 2010 ("the Agreement").

3. By a cross-summons dated 16th October 2015 the Plaintiff seeks an order, backed by a penal notice, that the Defendant comply with the Production Order to the extent that it has not already done so.

4. By an order dated 22nd October 2015 the Court granted the Defendant leave to seek a review of the Production Order and ordered that the Plaintiff disclose to the Defendant the documents filed with the Court on the Plaintiff's *ex parte* application.

Statutory framework

The 2005 Act

5. The 2005 Act contains the statutory mechanism by which Bermuda gives effect to requests for mutual legal assistance made pursuant to tax information exchange agreements, or "TIEAs", entered into by the Government of Bermuda.

6. Section 3(1) provides that the Plaintiff is the competent authority for Bermuda under the TIEAs. Section 3(2) provides that the Plaintiff may provide assistance to any requesting party according to the terms of the agreement with that party.

7. Section 4(1) provides that the Plaintiff may decline a request for assistance where there is provision in the applicable agreement for him to do so. Section 4(2) sets out a number of circumstances in which the Plaintiff may also decline a request for assistance. These include at section 4(2)(c) if the request pertains to information in the possession or control of a person other than the taxpayer that does not relate specifically to the tax affairs of the taxpayer; and at section 4(2)(d) if the information is protected from disclosure under the laws of Bermuda on the grounds of legal professional privilege.

8. Section 5(1) provides that where the Plaintiff has received a request in respect of which information from a person in Bermuda is required, the Financial Secretary may apply to the Supreme Court for a production order to be served upon the person referred to in the request directing him to deliver to the Plaintiff the information referred to in the request. Section 5(11) provides that for these purposes the Financial Secretary includes an Assistant Financial Secretary.

9. Section 5(2) provides that the Supreme Court may, if is satisfied that the conditions of the applicable TIEA are fulfilled, or alternatively that the Plaintiff's decision to honour a request is in the interest of Bermuda, make a

production order requiring the person referred to in the request: (a) to deliver to the Plaintiff the information referred to in the request; or (b) to give the Plaintiff access to such information, within 21 days or, pursuant to section 5(3), such other period as the Court may specify.

10. Section 5(6) provides that a person served with a production order under section 5(1) who is aggrieved by its service may seek review of the order within 21 days of its service. Section 5(6B) provides that the Court shall decide whether to grant the person a right of review. Section 5(6A) provides that a person served with a production order who wishes to view the documents filed with the Court on the application for the production order shall not be entitled as against the Plaintiff to disclosure of such documents until he has been granted a right of review under section 5(6B) and the Court has directed disclosure of such documents as it considers appropriate for the purposes of the review.

The Agreement

11. Article 1 of the Agreement sets out the object and scope of the Agreement.

> "*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 covered by the Agreement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of the information.*"

12. Article 4(2) of the Agreement glosses the meaning of "*relevant*".

> "*The term 'relevant' wherever used in the Agreement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant*

notwithstanding that a definite assessment of the pertinence of the information to an on-going investigation could only be made following the receipt of the information."

13. There are a number of carve-outs to the Agreement. Eg:

    (1) Article 5(5) provides that the Contracting Parties are not obligated to provide ownership information with respect *inter alia* to publicly traded companies unless such information can be obtained without giving rise to disproportionate difficulties.

    (2) Article 7(1) provides that the competent authority of the requested Party may decline to assist *inter alia* (a) where the request is not made in conformity with the Agreement; or (b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty.

    (3) Article 7(2)(ii) provides that the Agreement shall not impose on a contracting party the obligation to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are: (a) produced for the purposes of seeking or providing legal advice, or (b) produced for the purposes of use in existing or contemplated legal proceedings.

14. Article 9 of the Agreement deals with confidentiality. It provides *inter alia* that any information received by a Contracting Party under the 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 the Agreement. Such persons or authorities are to use such information only for these purposes.

15. Article 12 of the Agreement provides that the Agreement shall have effect: (a) with respect to criminal tax matters, on the date on which it enters into force, ie 3rd November 2010; and (b) with respect to other matters, for taxable periods beginning on or after that date, or where there is no taxable period, for all charges to tax arising on or after that date.

The Request

16. The Request relates to the tax affairs of two Indian nationals resident in Mumbai: Mr B and Mr C ("the Subjects"). The tax purposes for which the information is requested are stated to be (i) determination, assessment and collection of taxes, and (ii) investigation or prosecution of tax matters. As to prosecution, the Request states that it is believed that the availability of the requested information would assist the Government of India in launching a criminal prosecution against the Subjects for a wilful attempt to evade taxes and related offences as prescribed in the Indian Income Tax Act 1961. A reply is stated to be urgent as a relevant limitation period expires on 31st March 2016. Information is sought for the period 1st April 1999 to 31st March 2015. The Request states that the information in the possession of the Indian Income-tax authorities clearly indicates that the Subjects had been actively engaged in setting up the Defendant.

17. Annexure A to the Request sets out the relevant background:

"*1. As per the information available with the Indian tax authorities, [the Subjects] are holding some accounts, either directly or indirectly including beneficially, with [Bank D], Geneva, Switzerland (Herein after referred to as [Bank D]) or have a beneficial ownership / legal relationship with persons located / registered in India / outside India, having accounts with [Bank D].*

2. The Indian tax authorities, in the course of their inquiries, have found that the income arising out of such banking or other transactions is not reported to Indian income-tax authorities as required under the Indian Income Tax Act, 1961. During the course of further investigations carried out by the Indian Income Tax Department, the subjects denied having any accounts in [Bank D] either directly or beneficially through other

entities / persons. The Indian tax authorities have exhausted all domestic means to get the information and have reason to believe that the subjects had income taxable in India which has not been reported / disclosed. The Indian tax authorities are seeking information from Bermuda to ascertain the taxable income of the subjects due to inadequacy of information with them. They are seeking information to ascertain true and correct nature and quantum of income to be taxed in India arising from transactions in such accounts with [Bank D] held either directly or through various maze of corporate / legal entities / trusts registered in various countries, including Bermuda.

3. The subjects are individuals residing in [partially redacted address] Mumbai. Investigation conducted by Indian Income-tax authorities revealed that there are legal entities in other countries maintaining various financial assets, including accounts in [Bank D] which are directly / indirectly related to the subjects or their associate concerns / entities / persons, and the information requested by the Indian Income-tax authorities is crucial for the determination of the income of the subjects referred above that are taxable in India.

4. The Indian Income Tax Department, based on investigations done so far, has reason to believe that [the Defendant] was used as a vehicle to own and administer various undisclosed assets located outside India belonging to Founder / Settler (Located in India), through Trustees / Directors located outside India for the purposes of beneficiaries, which may include family members of the Founder / Settler. The suspected structure of these entities is enclosed as ***Appendix 1****.*

5. Based on information, investigation and suspicion, it was found that the following persons are in the chain of entities / persons having a relationship with the Indian subjects.

*[There follows a table which identifies 13 'attorneys' for the Defendant ('****the 13 Attorneys****'). The meaning of 'attorneys' in this context is not altogether clear. The point appears to be that the 13 Attorneys are suspected of holding assets on behalf of the Subjects through the Defendant. Appendix 1, which is not easy to understand, appears to be making the same point.]*

6. The enquiries carried out by the Indian Income-tax authorities reveal that the above subjects have income / assets taxable in India which are not disclosed / reported to the Indian Income-tax authorities.

7. In particular, [the Defendant] is a key entity related to subjects under investigation as the subjects are attorneys of [the Defendant]. It was used as a vehicle to shield /

administer the unaccounted assets from the Indian Income-tax Department by transferring the assets illegally and placing them under [the Defendant], created by / for the benefit of the Settler / his family members from India. The details of the three (3) bank accounts with [Bank D] [address] held in the name of [the Defendant] for whom the subjects are the attorneys other than those closed before February 2007, as available with Government of India are as below:-

*[There follows a table setting out the account numbers for three bank accounts ('**the Three Accounts**') held by the Defendant.]*

8. However, the Indian Government does not possess any details of the accounts relating to the above bank accounts, including the bank statements for the relevant period. It is very essential to have the complete details of the above bank accounts in the name of [the Defendant], including the bank statements from 01-04-1999 so as to arrive at correct income taxable in India as the subjects are the attorneys in all the above bank accounts and other portfolio accounts held by [the Defendant]. The Indian Income-tax Department tried all the legal routes to obtain such information from the subjects under investigation, but could not obtain the same as the subjects have been denying having any bank account directly or indirectly in [Bank D]. Hence, there is a reasonable belief that [the Defendant], registered in Bermuda is in possession of information that is foreseeably relevant for administration and enforcement of the domestic tax laws of India."

18. Annexure B to the Request sets out the information requested. Part I of Annexure B sets out a number of items of banking information and Part II sets out a number of items of non-banking information.

Grounds on which review is sought

19. The Defendant seeks review of the Production Order on four grounds:

(1) There was material non-disclosure by the Defendant when obtaining the Production Order.

(2) The breadth of material covered by the Production Order is too wide and includes material that is not foreseeably relevant.

(3) The period of time covered by the Production Order is too wide and includes material that is not foreseeably relevant.

(4) The Production Order seeks the production of material covered by legal professional privilege.

First ground: material non-disclosure

20. It is trite law that an applicant for an *ex parte* order has a duty to make full and frank disclosure to the court. The ambit of the duty is accurately summarised in Commercial Injunctions by Steven Gee QC, Fifth Edition, at para 9.001:

> "*Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider. It is part of the duty of an applicant for without notice relief to present the application fairly.*"

21. These principles are well recognised in Bermuda. See, eg, Locabail International Finance Limited v Manios [1988] Bda LR 26 CA, *per* da Costa JA at 16 – 19.

22. Where an application is made to the court pursuant to a letter of request, the applicant's duty of full and frank disclosure includes all material matters which are known or ought to be known by the requesting party. It is no answer to an allegation of non-disclosure that the applicant did not disclose such matters to the court because the requesting party did not disclose them to the applicant.

23. In re Stanford International Bank Ltd [2011] Ch 33 EWCA provides an apt illustration of this principle. It was alleged that a bank, incorporated in Antigua and Barbuda and with its registered offices there, had been involved

in a Ponzi scheme. The United States Department of Justice ("DOJ") issued a letter of request to the United Kingdom authorities requesting assistance by way of a restraint order over the assets of the bank and of S within the United Kingdom. Pursuant to that request the Serious Fraud Office ("SFO") obtained from a judge a restraint order under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

24. One week later a court in Antigua made a winding up order in respect of the bank and appointed liquidators. The liquidators applied for the restraint order to be discharged on the ground that, when the restraint order had been obtained, the DOJ, through the SFO, had misrepresented or not disclosed material facts. The liquidators' application was dismissed. They appealed.

25. A strong Court of Appeal (Sir Andrew Morritt C, Arden LJ, Hughes LJ (as he then was)) allowed the appeal in part. Sir Andrew Morritt at paras 88 – 93 had no doubt that there was substantial misrepresentation and non-disclosure of material matters when the *ex parte* application was made. This included both matters which were known to the DOJ and matters which would have been known to them had proper inquiries been made. Taken together, the matters which should have been disclosed but were not undermined the allegation made in the letter of request and the supporting witness statement filed by the SFO, which witness statement was in part misleading and incorrect, that there was an immediate risk of dissipation of the assets of the bank such as to warrant the grant of a restraint order unlimited in point of time on an *ex parte* application. In the circumstances, the public interest did not require the Court to make the restraint order made in the court below and the Court was entitled in its discretion to set it aside so that the SFO was deprived of any advantage it obtained by means of the non-disclosure and to mark its disapproval of the conduct of the SFO.

26. Sir Andrew Morritt concluded at paras 101 – 102 that the restraint order should be discharged with costs but a fresh order granted with effect from the date on which the judge in the court below had issued his ruling dismissing the application to discharge the restraint order.

27. Arden LJ at para 110 agreed with the judgment of Sir Andrew Morritt at paras 88 – 94. In her judgment there had, even now, been no frank explanation of exactly how much the DOJ knew about various items of material non-disclosure. However she would not have discharged the restraint order until the parties had the opportunity to argue whether, for purposes of the restraint order, the unsecured creditors of the bank had an interest in its assets.

28. Hughes LJ agreed at para 160 with the conclusion and most of the reasoning of Sir Andrew Morritt. He stated at para 190 that there were serious and material failures of the duty of candour in this case, and that it mattered not where the responsibility for this lay as between the DOJ and the SFO as their English agents and (presumably) advisors. As to the consequence of material non-disclosure, he stated at para 193:

> "*The principal question is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms: see eg Dormeuil Frères SA v Nicolian International (Textiles) Ltd [1988] 1 WLR 1362 , 1368. Once that question is answered in the affirmative, one comes to the consequential question whether the order made ought to be discharged.*"

29. I was referred to two decisions of the Court of Appeal in Bermuda under the U.S.A. – Bermuda Tax Convention Act 1986 ("the 1986 Act"). Under the 1986 Act as it then stood[1], upon receipt of a request that complied with the applicable TIEA the Minister would issue a notice to the person in possession of relevant information to produce the same. If the recipient wished to challenge the notice he could do so by way of judicial review.

30. In The Minister of Finance v Braswell [2002] Bda LR 51, Clough JA, giving the judgment of the Court of Appeal, held at para 71 that even if the relationship of the competent authority of the requesting US Government and the Minister as the competent authority in Bermuda could give rise to

[1] It has since been amended.

the same or an analogous duty as that of a litigant to make full and frank disclosure to the court on an *ex parte* application, the US Government was not in breach of that duty when submitting the request because the alleged non-disclosure was irrelevant to the Minister's decision whether to issue disclosure notices.

31. However, Clough JA stated at para 72 that, in the absence of direct authority on the point, the Court did not accept that the relationship of the two governments at the time the request was made did give rise to a duty, or a duty analogous to the duty, to make full and frank disclosure owed by a litigant when making an *ex parte* application to a court. Braswell is in that sense distinguishable from the instant case.

32. In Coxon v Minister of Finance [2007] Bda LR 78 the appellants alleged that the requests contained various factual errors upon which the Minister relied when deciding to issue notices. Although the appeal was not couched in terms of material non-disclosure, the implication was that the Minister had been misled. Nazareth J, giving the judgment of the Court, stated that the appeal assumed that the Minister had a duty to investigate the facts alleged in the request. However there was no such duty. The imposition of one would render the applicable TIEA unworkable and would require an understanding of the relevance and materiality of the facts alleged to the investigation of the taxpayer's liability, which would in turn require a knowledge of US tax law. The intention of the legislation was that the Minister should rely on the certification of the relevant US authority on these matters as the TIEA provided that a request must be signed by a senior official designated by the US Government. The Minister was therefore precluded from considering the correctness of the information placed before him.

33. As noted above, the 1986 Act contains a different scheme to the 2005 Act. Under the 2005 Act it would generally be impractical for the Court to seek to determine a dispute about any facts stated in the request, and the Court would not generally attempt to do so. However, if the party seeking review

of a production order can establish to the standard required on an application for summary judgment that a fact stated in the request is incorrect, then, when considering whether there has been full and frank disclosure, that is in my judgment something which the Court should properly take into account. When considering whether there has been full and frank disclosure, the Court can in any event take into account any fact or matter which the party seeking review claims to be material but which was not disclosed by the applicant for the production order.

34. In the present case there were three instances of material non-disclosure. I shall deal with two of them here and the third when considering whether the period of time covered by the Production Order is too wide.

35. First, the Request states that the Indian Government does not possess any details of the Three Accounts, including the bank statements for the relevant period, and, having tried all legal routes, is unable to obtain them. This is demonstrably incorrect. Pursuant to a previous production order dated 3rd February 2012 the Defendant filed an affidavit and exhibit dated 28th March 2012 including precisely this material, which were forwarded to the Government of India. This material forms the core of the material sought by the current Request.

36. Mr Brown has made submissions as to why the Request may overlap a previous request. But submissions are not evidence, and it is not for the Court to speculate. The Defendant does not object to providing the material again, and indeed by an affidavit dated 13th October 2015 has already done so. Nonetheless, if the Court had been made aware of the previous request it would not have ordered the provision of duplicate material without an explanation as to why it was sought.

37. The second material non-disclosure arose in the following way. The Request states that enquiries carried out by the Indian Income-tax authorities reveal that the Subjects have income / assets taxable in India which are not disclosed / reported to the Indian Income-tax authorities.

38. What the Request does not state is that the material provided pursuant to the previous request showed that no transactions were carried out on two of the Three Accounts. The third Account, which was opened in 2004 and fell to a zero balance in 2007, was funded by two payments totalling $US 35 million. They were credited to the account in the financial year 2004 – 05 but were relevant to the assessment year 2005 – 06.

39. Based on the material provided pursuant to the previous request, the Defendant's tax assessment for the assessment year 2005 – 06 was reopened on the ground that the Defendant had not filed full and true particulars of its income in its return of income filed for that period. (This may indicate that the previous request related to the Defendant and not the Subjects, which may in turn explain the need for a subsequent Request, but that is speculation.)

40. The reassessment was the subject of a written ruling by two Deputy Commissioners of Income Tax dated 16th March 2015. It concluded:

> "*3. During the course of the reassessment proceedings the assessee has filed relevant details to show the source of funds received in [the Third Account] in [Bank D], Geneva Branch. The assessee has filed details regarding the primary as well as secondary sources of funds received and has claimed that the receipts are business receipts of the group.*
>
> *4. The details filed by the assessee have been verified and placed on record. As per the details furnished by the assessee it appears that the money deposited in the [third Account] in [Bank D], Geneva Branch is sourced from business receipts of the group entities.*
>
> *5. Therefore, as there is no evidence to dispute the claims and submissions made by the assessee during the re-assessment proceedings to show that the deposits are sourced from business receipts of the group entities, the reassessment proceeding initiated u / s 147 is hereby dropped.*"

41. Failure to disclose that ruling was a serious instance of material non-disclosure. It was highly material to the Court's decision to make the Production Order. Indeed, had I been aware of it on the *ex parte* application,

I would not have made the Production Order without receipt of evidence explaining why the Indian Income-tax Department now sought to disregard its own findings as to the source of the monies deposited in the Third Account.

42. That these findings were made in the context of a tax assessment relating to the Defendant rather than the Subjects is nothing to the point. The fact that the Request sought material not merely for the determination, assessment and collection of taxes but also for the purposes of investigation or prosecution of tax matters does not explain why the findings were disregarded, particularly as it is reasonable to suppose that a criminal or regulatory offence would be more difficult to establish than a higher tax assessment.

43. Once the Plaintiff was alerted to the point by affidavit evidence filed by the Defendant, I would have expected the Plaintiff to file evidence providing an explanation not only as to why the findings were disregarded but also as to why the material non-disclosure had taken place. It could have obtained this evidence by making enquiries of the requesting State. Surprisingly, the Plaintiff chose not to file any such evidence.

44. There has, then, been a serious failure by the Plaintiff to discharge its duty of full and frank disclosure. This failure has been neither remedied nor explained. In the circumstances I am satisfied that the Production Order should be discharged.

Second ground: breadth of material

45. Although it is not strictly necessary for me to consider the Defendant's remaining grounds, I shall do so out of deference to the helpful submissions of the parties' representatives.

46. Under Article 1 of the Agreement, information supplied pursuant to the Article must be "*relevant*" to the administration and enforcement of the

domestic laws of the requesting Party concerning taxes covered by the Agreement, and in this case to the determination, assessment and collection of such taxes or the investigation or prosecution of tax matters.

47. It is common ground that what is relevant falls to be determined in accordance with the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") rather than common law, although in the present case at least this theoretical distinction may make little practical difference. Article 31 (General Rule of Interpretation) of the Vienna Convention provides:

"*(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose.*"

48. When construing a TIEA, 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 to find an ambiguity before turning to them. See the decision of the Supreme Court of Canada in Crown Forest Industries Ltd v Canada [1995] 2 SCR 802, 125 DLR (4^{th}) 485 at para 44, which was followed on this point by this Court in Bunge Limited v The Minister of Finance [2013] Bda LR 17 at para 22.

49. The relevant extrinsic material in the present case includes the Commentary to Article 1 of the OECD Model TIEA:

"3. *The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant party concerning the taxes covered by the Agreement. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement.*

4. The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the

pertinence of the information to an on-going investigation can only be made following receipt of the information."

50. In my judgment "*relevant*" in the Agreement has the same meaning as "*foreseeably relevant*" in Article 1 of the OECD Model TIEA.

51. The standard of foreseeable relevance is also adopted for the exchange of information under Article 26 of the OECD Model Tax Convention. I take it as axiomatic that "*foreseeably relevant*" means the same thing in both Conventions: it would make no sense for the phrase to have different meanings when both Conventions are part of the same global system of treaties on taxation.

52. The Commentary to Article 26 is more extensive than the Commentary to Article 1. It states *inter alia* that:

"*In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. … At the same time, paragraph 1 [of Article 26] does not obligate the requested State to provide information in response to requests that are 'fishing expeditions', i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.*"

53. I was referred to two decisions of the Singapore High Court in which the phrase "*foreseeably relevant*" as it occurred in Article 28 of the Singapore-India double taxation convention was subject to judicial interpretation. It is fair to characterise their approach as being quite stringent.

54. In Comptroller of Income Tax v AZP 14 ITLR 1155; [2012] SGHC 112, Choo Han Teck J stated at para 10:

"*The first requirement of foreseeable relevance requires the Comptroller (on behalf of the requesting state) to show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws. Clear and specific evidence is necessary to prevent unwarranted disclosure of*

information that could not otherwise be sought from any party including the requested state."

55. In Comptroller of Income Tax v BJY 16 ITLR 324; [2013] SGHC 173, Andrew Ang J stated at para 28:

"*Since the requested information need only be foreseeably relevant, the requesting state need not show that the requested information is demonstrably relevant for carrying out the provisions of the DTA [Double Taxation Agreement] or to the administration or enforcement of its domestic tax laws. However, it must at the very least explain why the particular information requested is thought to be possibly relevant.*"

56. In the present case, the range of the material sought by the Plaintiff was very wide. To take but two examples, it included details of all movable and immovable assets held by the Defendant since its incorporation and complete details of its Indian operations. The Defendant has filed unchallenged affidavit evidence from its senior corporate counsel, Mr E, that it is not a "typical" Bermuda holding company, incorporated simply to hold shares in operating subsidiaries established elsewhere, but an international operating company with offices in 12 countries, assets worldwide, and a consolidated turnover for the financial year ending 31st March 2015 of US$ 264 million. Considered in this context, I regard elements of the Request, such as the examples which I have just cited, as being a fishing expedition.

57. On the other hand, I do not accept the Defendant's submission that the only foreseeably relevant material requested is that which relates to the Three Accounts. Eg had I not discharged the Production Order I would have held that any material relating to transactions carried out or authorised by or on behalf of any of the 13 Attorneys, and details of any office or senior management position held by them in the Defendant, was also foreseeably relevant.

58. I need not consider the breadth of the material further.

Third ground: period of time too wide

59. Mr E's affidavit evidence, while noting that information is requested for the period commencing 1st April 1999 to date, asserts that prior to 2004, when it was acquired by Company F, the Defendant was a public company listed on NASDAQ. He has exhibited various documents which provide independent corroboration for this assertion. The Plaintiff has not filed any evidence in reply to contradict it and did not seek to dispute it at the hearing.

60. In light of this material, I read the statement in the Request that the information in the possession of the Indian Income Tax Authorities clearly indicates that the Subjects had been actively engaged in setting up the Defendant as referring to its merger rather than its incorporation. I regard the failure of the Request to make this clear as a further instance of material non-disclosure. In the premises I agree with Mr E that the only possible interest of the Subjects in the Defendant prior to the merger would have been as holders of publicly traded stock. However details of any such shareholdings would be foreseeably relevant to the investigation. I am not satisfied that the provision of such information would have given rise to disproportionate difficulties on the part of the Defendant.

61. Mr E states that the first of the Accounts was not opened until 2004 and all three were closed in 2007, and suggests that this should define the outer time-limits of any investigation or Production Order. As I have found that the activity of the 13 Attorneys is foreseeably relevant, and the timeframe within which any such activity took place is not known, I reject this submission.

62. As the Request relates to criminal tax matters, the fact that it seeks documents which predate the coming into force of the Agreement on 3rd November 2010 is not material. See Ministry of Finance v E,F,H and O [2014] SC Bda Civ 43 in relation to an analogous provision of another TIEA at paras 36 – 45. It is true that the Request also relates to the determination, assessment and collection of taxes. But the amount of tax owing is likely to

be relevant to the question of the taxpayer's criminal liability. Moreover, under Article 9 of the Agreement, the requesting State may use information disclosed for one purpose under the Agreement for any other purpose for which information can be requested under the Agreement. Further, material generated prior to a particular tax year may be relevant to the assessment of taxes falling due in that tax year. In short, the date on which the Agreement came into force would not have been a reason for not ordering the production of material produced prior to that date.

63. Had I not discharged the Production Order, I should have been minded to vary the start date for the period with which it is concerned to the date of the incorporation of the Defendant. I would not have varied the end date.

Fourth ground: privilege

64. Legal professional privilege is a fundamental right long recognised by the common law. A legislative intention to override such rights must be expressly stated or appear by necessary implication. See the speech of Lord Hoffmann in R(Morgan Grenfell & Co Ltd) v Special Comr for Income Tax [2003] 1 AC 563 HL at paras 7 – 8 and the judgment of Clough JA in Braswell at para 47. This right is expressly recognised in Article 7(2)(ii) of the Agreement and section 4(2)(d) of the 2005 Act. The request for production of material covered by attorney-client privilege, which is nestled unobtrusively in the midst of a compendious list of requested documents in Part II of Annexure B to the Request, should never have been included as a requirement of the Production Order. Had I not discharged the Production Order I should have varied it to delete that requirement.

Summary

65. The Production Order is discharged on account of material non-disclosure by the Plaintiff. The Plaintiff's cross-summons is dismissed.

66. I shall hear the parties as to costs.

DATED this 23rd day of March 2016

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Hellman J