

CAYMAN ISLANDS COURT OF APPEAL

Cayman Islands Tax Information Authority - v- MH Investments and another CICA 31 of 2013 G391/2012 (31 July 2015)

CAYMAN ISLANDS TAX INFORMATION AUTHORITY - REQUESTS FOR INFORMATION - AUSTRALIAN TAX INFORMATION EXCHANGE AGREEMENT

In February 2011, the Australian Tax Office (the “ATO”) made a request of the Cayman Islands Tax Information Authority (the “Authority”) for information pursuant to Article 5 of the Australian Tax Information Exchange Agreement. The request was in connection with an active investigation into the Australian taxation affairs of Mr. Vanda Russell Gould (“Mr. Gould”) and Mr. John Scott Leaver (“Mr. Leaver”). The ATO had identified that Mr. Gould and Mr. Leaver and their respective associated entities had made multiple transactions with offshore entities registered in the Cayman Islands. The Cayman Islands entities that were identified were J.A. Investments Limited (“JA”) and M.H. Investments Limited (“MH”). The ATO was concerned that the transactions represented attempts by the Australian residents to evade tax properly payable in Australia by establishing offshore arrangements. The ATO believed that Mr. Gould and/or Mr. Leaver were the ultimate beneficial owners and controllers of JA and MH and had omitted income and/or claimed deductions in their Australian tax returns.

In April 2011, following the request from the ATO, the Authority issued and served on FCM Limited (the registered agent of JA and MH) a notice to produce the information required by the ATO. In order to take this step, the Authority was taken to have determined: (i) that the request was in compliance with the Australian Tax Information Exchange Agreement and (ii) that the information was not required for proceedings in Australia or for related investigations. FCM Limited provided the information requested on 4 May 2011 and the Authority forwarded this information to the ATO. The ATO sent a further request for information on 27 May 2011 and the Authority sent to FCM Limited two further notices to provide information. On 20 September 2011 the Authority sent the information produced by

FCM Limited to the ATO. Further requests followed and on 19 October 2011, the ATO sent a request seeking the Authority’s consent to disclose documents obtained from FCM Limited relating to the Cayman Island entities to HMRC in the United Kingdom. The ATO also requested consent to use the documents obtained from FCM Limited in proceedings before the Australian Federal Court, which were subsequently provided by the Authority.

On 18 September 2012, JA and MH applied to the Grand Court for judicial review of the decisions of the Authority. The relief sought was: (i) a declaration that the decisions were *ultra vires* of the powers granted to the Authority by the Law; (ii) an order of *certiorari*, quashing of the decisions and (iii) an order that the Authority provide JA and MH with copies of all documents which it held relating to the requests.

Quin J made orders including, amongst others, an order of *certiorari* quashing the decisions of the Authority and a declaration that the decisions to comply with the requests from the ATO were unlawful because the Authority had failed to apply to the Grand Court under the relevant sections of the Tax Information Authority Law (the “Law”).

The Authority appealed challenging the Judges finding that the Respondents should have been served with notices of the requests under Section 17(c) of the Law.

The Court of Appeal held that JA and MH were the subjects of the requests and on that basis it was bound to find that decisions to execute the requests without having served the Section 17(1)

notices on JA and MH were necessarily *ultra vires* and dismissed the Appeal.

It followed that the decisions to serve notices under Section 8(4)(b) of the Law, requiring FCM Limited to provide information, were made without taking into account material which the Law required that the Authority should take into account; and that the Judge of first instance was correct to conclude that those decisions should be set aside.

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