

## BERMUDA SUPREME COURT

### ***IN THE MATTER OF A REQUEST FOR EXCHANGE OF INFORMATION UNDER THE INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) ACT 2005: MINISTER OF FINANCE -v- MNO***

***[2018] SC (Bda) 7 Civ (27 December 2017)***

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

This was a judgment on the defendant's application for review of a Production Order made by the Court in January 2017 under Section 5(2) of the *International Cooperation (Tax Information Exchange Agreements) Act 2005* ("the 2005 Act"). The application for the Production Order was made by the plaintiff (the Minister of Finance) on the request of a state Tax Authority under Bermuda's Tax Information Exchange Agreement ("the Agreement") with the Requesting State. The right of review was granted in July 2017.

#### **Background**

The Request concerns the affairs of a group of commercial entities ("the Group") which, through a smartphone app, facilitates on-demand transportation services by connecting passengers with drivers of vehicles for hire as well as ridesharing services.

The Tax Authority was 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.

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. 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 (e.g. knowhow, design, technology, website, marketing intangibles) to the defendant, and the defendant has allegedly sub-licensed them to the Dutch Group member.

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 was 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 failed to satisfy this requirement. In order to establish whether this was in fact the case, the Tax Authority sought to obtain information about the pricing structure and distribution of profits between the other Group entities. The Group member in the Requesting State explained to the Tax Authority that it was not in a position to provide the information which the Tax Authority requires - hence the Request.

#### **Defendant's grounds of objection**

The defendant advanced eight grounds of objection to the Request:

1. The plaintiff failed to make 'full and frank disclosure of all material matters' by giving inaccurate details of the defendant's corporate structure. The Court concluded that this was a material non-disclosure, but not one that was sufficiently serious to justify discharging the Production Order.
2. The Request failed to state '*to the fullest extent possible*' why the information sought was relevant to the determination of the Group member's tax liability. Hellman J pointed out that Article 5 of the Agreement simply provides that the information "*shall include the tax purposes for which the information is sought*". He concluded that the information provided in the Request satisfied this requirement.
3. The Request pertained to information in the possession or control of a person other than the defendant which did not relate '*specifically*' to the tax affairs of the Group member in the Requesting State. Hellman J pointed out that the requirement is not '*specific*' relevance but '*foreseeable*' relevance, and the information sought was 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.
4. The information sought did not relate to the taxable period in which the audit of the Group member in the Requesting State was being carried out (financial years 2012-2014), because the Request was for information from 2013, 2014 and 2015. However, the defendant exhibited a letter from the Tax Authority which confirmed that the audit included VAT returns from 1 January 2015 to 30 June 2015. The Court rejected this ground of complaint, but limited the information sought for 2015 to the period of the VAT audit.
5. The information requested was '*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*'. The Court determined that it was relevant.
6. The information requested represented 'excluded material' (i.e. a trade, business, industrial, commercial or professional secret or trade process under Article 7(2) of the Agreement. Hellman J said that in his judgment most of the information requested did not fall into this category, and any information that was 'excluded material' could be redacted.
7. The defendant was not satisfied that the Tax Authority would keep the information confidential or restrict its use to purposes permitted by the Agreement. Hellman J stated that the Court proceeds on the assumption that the Requesting State will honour its treaty obligations. Article 1 read in conjunction with Article 8(2) of the Agreement 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. Additionally, under the 2005 Act, a Production Order is made to obtain information for the purpose stated in the Request and not for any wider purpose.

8. The Production Order was lacking in clarity and makes statements as to the obligations of the recipient that are contrary to law. The Court found that the Production Order was not lacking in clarity and if the defendant did not understand any of the requests it could have sought clarification from the plaintiff or the Court. If the defendant could not produce the information sought then the appropriate response was a statement that the defendant did not have the requested information, with a brief explanation as to why it did not.

The defendant also complained that the Production order contained a penal notice warning. Hellman J referred to his decision in *Minister of Finance -v- AAA Group Ltd*, which concluded that a Production Order may properly be endorsed with a penal notice.

#### The decision

The defendant's application to discharge the Production Order was dismissed. However the Court varied the Production Order so that the requirement to produce information for 2015 was limited to the period 1st January 2015 to 30th June 2015.

For the avoidance of doubt, Hellman J added that 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, and the Requesting State may not, without leave of the Court, use the information for any purpose other than that stated in the request.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.