

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. AA195a

BETWEEN:

MINISTRY OF FINANCE

Appellant

-and-

GER

Respondent

Before:

Hon. Chief Justice Hargun

Appearances:

**Mrs Shakira Dill-Francois, Deputy Solicitor General of
The Attorney General's Chambers, for the Appellant
Mr Jordan Knight, Appleby (Bermuda) Limited, for the
Respondent**

Date of Hearing:

19 August 2019

Date of Ruling:

21 August 2019

RULING

Introduction

1. This is the hearing of the application by the Respondent in relation to these two actions seeking an order that the Respondent be granted a right of review pursuant to section 5(6B) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (the "2005 Act"); and that the Minister of Finance (the "Minister") be ordered to disclose to the Respondent all documents filed with the

Court on the application pursuant to section 5(2) of the 2005 Act that resulted in the granting of the Production Orders in proceedings 2019 number AA 195 and AA 195A.

2. These two requests for exchange of information under the 2005 Act are made by the Government of the Federal Republic of Germany pursuant to an Agreement between the Government of Bermuda and Government of Germany. The information requested by the Government of Germany relates to taxpayers who are each subject of investigations by the tax authorities in Germany (paragraph 6 of Mr Knight's First Affidavit).
3. The original Orders required production of eight categories of information and/or documents. For purposes of this application, the original request has been reduced by the Minister to just one category numbered 8 and in the original Production Orders that category was described as follows:

“Was or is [the tax payer] invested in other companies or trusts based in the Bermudas or [were they] a beneficiary of such companies or trusts.”

4. The First Affidavit of Mr Wayne Brown, the Assistant Financial Secretary, Treaties, now makes it clear that the Minister has agreed to vary both Production Orders such that only the information in relation to category 8 on both Orders is required to the extent that it concerns trusts (paragraph 6). Accordingly, the only information required under both Production Orders is answer to the question whether the taxpayer in question *“was or is a beneficiary of trusts based in Bermuda”*.
5. In argument, counsel for the Minister made it clear that the Production Orders merely sought information which was in the possession of the Respondent and did not require the Respondent to carry out any investigation to find out the true position. Counsel for the Minister agreed that for purposes of answering this question, the relevant information would be in the possession of the Respondent if it was information known to the directors and officers of the Respondent. This

would include information which was known to the Assistant Secretary [of the Respondent], who has sworn three affidavits in these proceedings on behalf of the Respondent. Accordingly, the answer to the remaining question in the Production Orders can simply be answered by reference to the current knowledge of each of the directors and officers of the Respondent.

6. I agree with Mr Knight's submission that at this stage all he has to show is that he has an arguable case for seeking a review. In support of this application, Mr Knight relied upon section 4(2)(b) which provides that the Minister may also decline a request for assistance if the information relates to a period that is more than six years prior to the tax period in respect of which the request is made. Mr Knight argues that as the Production Orders do not specify any time periods and as a consequence, this request potentially may be seeking information which is more than six years prior to the tax period in respect of which the request is made. Counsel for the Minister accepted this contention and agreed to limit the period, for purposes of answering this question, to within the six year period calculated from the tax period in relation to which the information is sought. Counsel for the Minister advised that the relevant tax year for which the information is required is 2013 and accordingly that the Court should amend the order so that the answer to the question posed by question 8 is limited to the period 2007 to present.
7. I agree that having regard to the terms of section 4(2)(b), the Production Orders should be amended so that question 8 seeks information from the Respondent *"during the period 2007 to the present was or is [the taxpayer] a beneficiary of trusts based in Bermuda"*. In my view this amendment avoids any potential breach of section 4(2)(b) of the 2005 Act.
8. Mr Knight also complains that this request for information from the Government of Germany is a fishing exercise and he says that such fishing exercises are not allowed under the 2005 Act. He relies upon Hellman J's decision in *Minister of Finance v AAA Group Ltd* [2016] SC Bda 75 Civ, where Hellman J described fishing expeditions as *"speculative requests that have no apparent nexus to an open enquiry investigation"*. I disagree that the information sought in category 8 can

properly be described as “*fishing expeditions*”. The factual position is that [the] taxpayers are subject of investigations by the tax authorities in Germany. In relation to those investigations, the Respondent has already confirmed to the tax authorities in Germany, by letter dated 23 July, 2018 that neither of these *taxpayers* “(i) are currently or have ever been members of the [Respondent]; (ii) would be, upon a partial or complete dissolution of the [Respondent], entitled to income or capital distributions from the [Respondent]; and (iii) has currently or have ever had in the past a direct or indirect interest (shares, voting rights of the assets) in the [Respondent]”. Having regard to the information provided so far by the Respondent, it is understandable that the tax authorities in Germany may ask whether the Respondent is aware that the taxpayers may be beneficiaries of other trusts based in Bermuda. In the context of an open and existing tax investigation such a request cannot properly be characterised as a fishing expedition.

9. Finally, Mr Knight complains that the Production Orders may be reviewable on the basis that there has been a failure to provide full and frank disclosure. In paragraph 24 of his written submissions, Mr Knight argues that the Respondent has already provided information which answers questions 3 to 6 of the Production Orders and that the German authorities should have acknowledged that. In paragraph 25 Mr Knight submits that it is arguable that had full and frank disclosure occurred, including the fact that German authorities already know the answers to questions 3 to 6, the Court may have taken the information into account when determining whether to grant the request.
10. I do not consider that there is a properly arguable case of material nondisclosure in this case. First, as counsel for the Minister points out, information may be required under the 2005 Act so as to comply with the evidential requirements of the requesting State. In other words, the requesting State may be aware of the information sought but requires that information under the 2005 Act so that the information received is properly admissible in the relevant courts and/or tribunals. Second, in any event, the information already provided to the tax authorities in Germany related to questions 3 - 6 and not to question 8. It is not suggested by the

Respondent that the Respondent has provided any in relation to question 8 or that the Government of Germany is otherwise in possession of that information.

11. In all the circumstances, I conclude that the only arguable point to potential breach of section 4(2)(b) and in relation to that potential breach is the Court has agreed to limit the scope of that information in terms of time. Accordingly, that potential breach is no longer material and the Respondent is ordered to provide information within 21 days of the formal amended order being signed by the Court.
12. Given that the Respondent is unaware and unable to verify the tax year in question, which is the subject of the requests made under the 2005 Act, I consider it appropriate that I should exercise my discretion to allow the Respondent to obtain a copy of the Affidavit of Dennis R. Simons together with the exhibits (which contain the relevant requests from the Government of Germany) in both actions. I order that a copy of those affidavits be provided by the Applicant to the Respondent within the next seven days.
13. I will hear the parties in relation to the issue of costs, if necessary.

Dated 21 August 2019

NARINDER K HARGUN
CHIEF JUSTICE