IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 23

Civil Appeal No 161 of 2016

Between

(1) AXY
(2) AXZ
(3) AYA
(4) AYB

… *Appellants*

And

COMPTROLLER OF INCOME TAX

… *Respondent*

In the matter of Originating Summons No 106 of 2014

Between

(1) AXY
(2) AXZ
(3) AYA
(4) AYB

… *Applicants*

And

COMPTROLLER OF INCOME TAX

… *Respondent*

Version No 1: 27 Oct 2020 (22:40 hrs)

GROUNDS OF DECISION

[Revenue Law] — [International taxation] — [Exchange of information]

[Administrative Law] — [Judicial review] — [Threshold for leave for judicial review]

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AXY and others
v
Comptroller of Income Tax

[2018] SGCA 23

Court of Appeal — Civil Appeal No 161 of 2016
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
5 September 2017

4 May 2018

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This appeal arose in the context of an exchange of information ("EOI") request ("the Request") made by the National Tax Service of the Republic of Korea ("the NTS") to the Comptroller of Income Tax ("the Comptroller"). The NTS had been investigating possible tax evasion involving the four appellants in this appeal ("the Appellants"), and had sent the Request to the Comptroller pursuant to Art 25(1) of the Convention between the Republic of Singapore and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income as amended by the Protocol signed on 24 May 2010 ("the Convention"). Further communications ensued between the NTS and the Comptroller over several months, in the course of which various clarifications were sought and obtained by the Comptroller, who then exercised his power to issue production notices to three banks in Singapore

on 21 and 27 January 2014 for the disclosure of banking activities relating to three of the Appellants and 51 companies ("the Production Notices"). The entire EOI process, including the issuance of the Production Notices, was conducted covertly without notice to the Appellants and the companies concerned.

2 The Appellants filed Originating Summons No 106 of 2014 ("OS 106") on 11 February 2014 seeking, among other things, leave to apply for a prohibiting order prohibiting the Comptroller from disclosing to the NTS the information which the latter sought and a quashing order in respect of the Production Notices. Having been served with the papers for OS 106 pursuant to O 53 r 1(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), the Attorney-General ("the AG") participated in the proceedings to make submissions on the applicable legal principles governing the operation of Singapore's EOI regime. The judicial commissioner who heard OS 106 ("the Judge") dismissed the action on 15 September 2016, and furnished his written grounds of decision in *AXY and others v Comptroller of Income Tax (Attorney-General, intervener)* [2017] SGHC 42 ("the GD") on 2 March 2017.

3 On 24 November 2016, the Appellants filed this appeal against the Judge's decision. We heard the appeal on 5 September 2017 in camera. At the conclusion of the oral arguments, we dismissed the appeal and gave our brief reasons. As we indicated we would do, we now set out the detailed grounds for our decision.

4 This appeal raised the novel issue of whether subsequent objections and issues that were put forward to the Comptroller *after* he had made his decision on an EOI request would be relevant and admissible in judicial review proceedings directed at that decision, particularly in circumstances such as the present, where the EOI process was conducted covertly without notice to the

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persons and/or entities in respect of whom information was sought (referred to hereafter as the "persons of interest" where appropriate to the context). In these grounds, we also examine the scope of the Comptroller's role and duties when assessing EOI requests from foreign tax authorities.

The factual background

5 The Appellants were, at the material time, a family of Korean nationals living in Indonesia. The first appellant ("the 1st Appellant") is the father, the fourth appellant ("the 4th Appellant") is the mother, while the second and third appellants ("the 2nd Appellant" and "the 3rd Appellant" respectively) are their sons. The 3rd Appellant is not a person in respect of whom information was sought by the NTS in the Request. The 1st Appellant owns a group of companies known as the "K Group", which has ten subsidiaries in Korea and 30 subsidiaries in Indonesia. The 1st Appellant acquired Indonesian citizenship in April 2014 and is no longer a Korean citizen.

6 At the material time, the NTS was conducting criminal tax investigations into the affairs of five individuals ("the five Korean taxpayers"): the 1st, 2nd and 4th Appellants, and two other persons who were officials of the K Group. Specifically, the NTS suspected that the 1st Appellant was the beneficial owner of a number of Singapore-incorporated companies ("the Singapore Entities") as well as related entities in the British Virgin Islands ("BVI"), the Netherlands, Hong Kong and Panama ("the Related Foreign Entities"). A total of 51 companies were implicated. The NTS suspected that the 1st Appellant had incorporated these 51 nominee companies ("the 51 implicated companies") using the names of his family members (specifically, the 2nd, 3rd and 4th Appellants) as well as the names of various employees of the K Group as the directors and shareholders of these companies, and, through this scheme, had

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evaded tax on the investment income of these 51 companies even though he was their beneficial owner. From its investigations, the NTS had reason to believe that the five Korean taxpayers as well as these 51 companies had bank accounts in Singapore that were being used to conceal unreported income and evade taxes.

The Request from the NTS

7 On 23 September 2013, the NTS submitted the Request to the Comptroller to obtain information relating to the five Korean taxpayers and the 51 implicated companies. The Request was made pursuant to Art 25(1) of the Convention. Article 25 of the Convention, which is incorporated into our domestic legislation via s 105D of the Income Tax Act (Cap 134, 2014 Rev Ed) ("the ITA"), reads as follows:

> 1. The competent authorities of the Contracting States shall exchange such information as is ***foreseeably relevant*** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
>
> 2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
>
> 3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

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> (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
>
> (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
>
> (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).
>
> 4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
>
> 5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.
>
> [emphasis added in bold italics]

8 Section 105D of the ITA also bears setting out in full:

> **Request for information**
>
> **105D.**—(1) The competent authority under a prescribed arrangement may make a request to the Comptroller for information concerning the tax position of any person in accordance with —
>
> (*a*) if it is an avoidance of double taxation arrangement, the EOI provision of that arrangement; or
>
> (*b*) if it is an EOI arrangement, the provisions of that arrangement.
>
> (2) *Unless the Comptroller otherwise permits, the request must set out the information prescribed in the Eighth Schedule.*
>
> (3) Every request shall be subject to and dealt with in accordance with the terms of the prescribed arrangement.

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> (4) For the purposes of subsection (3), the terms of the prescribed arrangement shall not be construed in such a way as to prevent the Comptroller from complying with, or to permit him to decline to comply with, a request for information merely because —
>
> > (*a*) Singapore does not need the information for its own tax purposes; or
> >
> > (*b*) the information is held by a bank or other financial institution, a nominee or a person acting in an agency or a fiduciary capacity, or it relates to the ownership interests in an entity.
>
> [emphasis added]

9 It was not disputed by the parties that the NTS was a "competent authority" and the Convention, a "prescribed arrangement", for the purposes of s 105D of the ITA.

10 In the Request, the NTS sought, in relation to the five Korean taxpayers and the 51 implicated companies, Singapore bank account information and documents, including bank statements, account opening contracts, personal information of agents and consignees, cancelled cheques, deposit slips and transactional documents, for the period from 1 January 2003 onwards. The cover letter accompanying the Request included the following confirmation by the NTS:

> We [*ie*, the NTS] confirm that the request herein is in conformity with the law and administrative practices of the Republic of Korea, and the competent authority undersigned is authorized to obtain the information in the normal course of administrative practice. We have pursued all means available in our own territory to obtain the information except those that would give rise to disproportionate difficulties.

The Comptroller sought clarification on 7 November 2013

11 In response to the Request, the Comptroller wrote to the NTS on 7 November 2013 to clarify certain matters. The Comptroller sought to

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understand "the legality and tax implications" under Korean law of Korean taxpayers owning offshore companies. The Comptroller also pointed to Singapore's EOI requirements in the Eighth Schedule of the ITA ("the Eighth Schedule"), and asked for the following specific clarifications to "understand the relevance of the requested information to [the NTS's] tax investigation":

> a) Please explain the tax evasion scheme that [the five Korean taxpayers] are said to have employed to hide their dividend income, interest income and shipping income from the NTS by using the offshore companies. Any evidence, that the NTS possesses, which shows that the offshore companies have been used to receive unreported income would be appreciated.
>
> b) To the extent available, please provide any documents or information that support [the] NTS's allegation that [the 1st Appellant] is the beneficial owner of [the Singapore Entities] and [the Related Foreign Entities].
>
> c) What is [the] NTS's basis of suspicion on each of the Singapore Entities? Does the NTS have any information on specific transactions between the [five] Korean taxpayers and each of the Singapore Entities that suggest[s] that such transactions were not declared by the [five] Korean taxpayers to evade taxes in Korea? …
>
> d) What is [the] NTS's basis of suspicion on the Related Foreign Entities? Please explain [the] NTS's allegation[s] and surface [the] NTS's findings (if any) to show that the Related Foreign Entities are established to evade offshore earnings of [the 1st Appellant].
>
> …

12 In addition, the Comptroller asked, among other things, that the NTS share, "[f]or each of the identified country group of the Related Foreign Entities and the related Korean taxpayer(s) involved, … [its] basis of suspicion and the findings thus far that led to the [Request]".

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The NTS's reply to the Comptroller on 16 December 2013

13 The NTS replied to the Comptroller on 16 December 2013 duly responding to each of the points of clarification sought by the Comptroller. In the cover letter accompanying its reply, the NTS included the same confirmation as that mentioned above at [10].

14 To explain the five Korean taxpayers' suspected tax evasion scheme, the NTS drew a diagram illustrating what it believed to be the structure of the scheme across the various jurisdictions involved. According to the NTS, the 1st Appellant was a Korean tax resident and was hence obliged to report his worldwide income to the NTS. The NTS suspected that the 1st Appellant had made investments through several offshore companies located in various jurisdictions (including the 51 implicated companies) and believed him to be the beneficial owner of these companies. The 1st Appellant had allegedly failed to report the income earned through these companies, and the NTS believed that he had concealed the unreported income in Singapore bank accounts.

15 The NTS also referred the Comptroller to information that it had recovered from a USB drive found in the 1st Appellant's Korean office ("the USB Drive"), "many substantial documents" and emails that it had obtained through its investigations and tax audit, as well as statements of officials in the K Group who had allowed their names to be used to incorporate the Related Foreign Entities, all as evidence forming the basis of its suspicion that the 1st Appellant was the beneficial owner of the aforementioned companies and had used them to invest and conceal unreported income.

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The Comptroller sought further clarification on 17 January 2014

16 On 17 January 2014, the Comptroller sought further clarification. Based on the information that had by then been provided by the NTS, the Comptroller had grouped the 51 implicated companies into three groups. In this second letter, the Comptroller sought "further background" on one group of nine foreign companies whose links to the 1st Appellant did not seem apparent and whose shareholders were not any of the five Korean taxpayers. The Comptroller also sought clarification as to whether two specific companies were actually BVI or Indonesian entities.

17 In addition, the Comptroller sought the NTS's confirmation as to whether it was seeking confidentiality in respect of the Request such that the five Korean taxpayers and the 51 implicated companies would not be notified that their Singapore bank records were being sought pursuant to an EOI request.

The meeting between the Comptroller and the NTS on 21 January 2014

18 Subsequently, representatives of the Comptroller and the NTS met in Korea on 21 January 2014 to discuss the Request. In the course of the meeting, the NTS confirmed, based on what it had uncovered in the course of its investigations, its belief that the 51 implicated companies were companies which were wholly controlled by the 1st Appellant. The NTS informed the Comptroller that these companies had been used to receive unreported income, with a sum of at least US$250m kept in Singapore bank accounts that were held in their names. As the 1st Appellant had failed to report his overseas income and assets, the NTS required information on what it believed to be hidden foreign income and assets in order to assess the suspected evaded taxes. The minutes of

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the meeting also recorded that certain documents providing details relating to the 51 implicated companies were furnished to the Comptroller on his request.

19 The NTS further informed the Comptroller that it was seeking confidentiality in relation to the Request because its investigations into the five Korean taxpayers were serious criminal investigations and the latter had not been notified of the Request by the NTS.

The issuance of the Production Notices by the Comptroller on 21 and 27 January 2014

20 After due consideration of the Request, and following the various rounds of clarifications that had taken place, with information and documents provided by the NTS over the course of several months from September 2013 onwards, the Comptroller was satisfied that the Request satisfied the requirements stipulated in the Convention and the ITA. The Comptroller accordingly exercised his power under s 105F read with s 65B of the ITA to issue the Production Notices to three Singapore banks: one to the Singapore branch of Woori Bank on 21 January 2014, and the other two to UBS AG and Oversea-Chinese Banking Corporation Limited respectively on 27 January 2014.

21 The Production Notices were issued on a confidential basis, and the five Korean taxpayers as well as the 51 implicated companies were not notified of the Request prior to the issuance of these notices. However, on or around 27 January 2014, employees of the Appellants' companies were informed of the Request by the NTS's investigators. The Appellants also learnt from the NTS's investigators that the Comptroller had, in response to the Request, issued the Production Notices. On 11 February 2014, the Appellants filed OS 106 seeking leave to apply for a prohibiting order and a quashing order against the Comptroller and the Production Notices respectively (see [2] above).

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The tax residency challenges in Korea

22 On 8 May 2014, almost four months after the issuance of the Production Notices and some three months after the filing of OS 106, the 1st Appellant commenced adjudication proceedings in Korea with the National Tax Tribunal ("the NTT") to dispute his tax residency in Korea for the years 2003 to 2012. He did so by bringing an appeal against the tax assessment issued against him by the NTS on 7 March 2013, which was predicated on his being tax resident in Korea at the material time. The rest of the Appellants similarly requested adjudication by the NTT to determine their tax residency, but the NTT decided that that would be done only after the 1st Appellant's tax residency had been reviewed.

23 On 2 May 2016, the NTT determined that the NTS should re-investigate the issue of the 1st Appellant's tax residency in Korea. This was premised on a particular provision in the Korea-Indonesia tax treaty which was engaged when a person of interest was a dual resident of both Contracting States. In such circumstances, it was necessary to ascertain with which of the two States that person's economic relations was closer. This was the specific issue that the NTS was to revisit. The NTT, however, did opine that it was reasonable to consider the 1st Appellant a Korean resident for the purposes of Korean tax law, and that the 1st Appellant's personal relations appeared to be closer to Korea than Indonesia.

24 On 21 June 2016, the NTS issued the result of its re-investigation and maintained that its original tax assessment against the 1st Appellant was lawful. On 13 July 2016, the 1st Appellant filed a complaint with the Seoul Administrative Court seeking to overturn the NTS's tax assessment.

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25 In relation to the NTS's tax assessments against the 2nd to 4th Appellants, the NTT issued its decision on these tax assessments on 5 July 2016. The NTT cancelled a portion of the gift tax assessments against the 2nd and 3rd Appellants, but concluded that the rest of the tax assessments against the 2nd to 4th Appellants were lawful. At the time the Appellants' case in this appeal was filed, the 2nd to 4th Appellants were preparing to challenge the NTT's decision in the Seoul Administrative Court.

The Appellants' application in OS 106 for leave for judicial review

26 In OS 106, the Appellants relied on the grounds of illegality and irrationality to challenge the Comptroller's decision to issue the Production Notices, contending as follows:

(a) First, the Comptroller had failed to make sufficient prior inquiry into whether the Request complied with the requirements set out in the Eighth Schedule and/or the requirement under Art 25(1) of the Convention that the requested information must be "foreseeably relevant" to the administration of the Convention or the Requesting State's domestic tax laws. In particular, the Appellants alleged that the Comptroller had issued the Production Notices without properly evaluating whether the following requirements under the Eighth Schedule were satisfied:

(i) The requirement in para 8 of the Eighth Schedule that the NTS must have pursued "all means available" within its own jurisdictional territory to obtain the requested information before issuing the Request. The Appellants contended that the NTS could not have satisfied this requirement since it obtained a search and seizure warrant in respect of the 1st Appellant's

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Korean offices *four days after* the Request was made. This indicated that there remained other measures open to the NTS at the time it made the Request.

(ii) The requirement in para 7 of the Eighth Schedule that the Request must be "in conformity with the law and administrative practices" of Korea. The Appellants contended that this requirement had not been satisfied because:

(A) the 1st Appellant disputed his Korean tax residency and the rest of the Appellants had likewise asked the NTT to determine their tax residency. This meant that the NTS had no jurisdiction to assess taxes against all the Appellants.

(B) The Request sought information relating to certain periods covered by time bars applicable under Korean law, which prevented the NTS from raising at least some of the further tax assessments.

(b) Second, the Comptroller had breached his duty to ensure that the Request was "clear, specific and legitimate". The Request was no more than a fishing expedition and the scope of the information sought was sweeping, spanning a period of more than a decade.

(c) Third, the Comptroller had improperly delegated his decision-making power to the NTS given that he had acceded to the Request without sufficient inquiry and had issued the Production Notices indiscriminately.

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The decision below

27 The Judge made a number of key observations on the applicable legal principles in relation to Singapore's EOI regime:

(a) The requirement that the information requested must be foreseeably relevant to the administration or enforcement of the Convention or the Requesting State's domestic tax laws was the touchstone of the EOI regime (see the GD at [35] and [37]). This was a sufficiently clear requirement, represented a low threshold, and did not include any other sub-requirements such as requiring clear and specific evidence of a connection between the information requested and the administration of the Convention or the Requesting State's domestic tax laws (see the GD at [38]–[39]).

(b) The amendments made to the EOI regime by the Income Tax (Amendment) Act 2013 (Act 19 of 2013) ("the 2013 Amendments") did not change the standard for determining foreseeable relevance, but merely altered the identity of the authority that was to make this determination (from the court to the Comptroller). Case law before the 2013 Amendments which provided guidance on the issue of foreseeable relevance remained pertinent (see the GD at [23]–[25]), save that the court was now only entitled to evaluate the Comptroller's decision on an EOI request by way of judicial review and could not substantively assess the basis of the request itself.

(c) The Comptroller's assessment of foreseeable relevance should generally be made at the time of the EOI request concerned, and subsequent occurrences were immaterial unless they were exceptional. The Comptroller's assessment should also be based on the face of the

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statements and information provided by the foreign tax authority (see the GD at [40]–[42]).

(d) Apart from the requirement of foreseeable relevance, there was no additional requirement that an EOI request had to be clear, specific and legitimate (see the GD at [55]–[57]).

28 In so far as the Appellants' application in OS 106 was for leave for judicial review, the Judge dismissed the action as he found that there was no arguable or *prima facie* case of reasonable suspicion that the Comptroller had come to his decision to issue the Production Notices illegally or irrationally. This was because:

(a) The Comptroller had properly directed his mind to the issue of foreseeable relevance, and had appropriately analysed and clarified matters with the NTS. Evidential basis for the Request was not lacking, and the Comptroller had not improperly delegated his decision-making power to the NTS (see the GD at [47]–[49], [54] and [64]).

(b) The considerations of time bar and the disputed tax residency of the Appellants were not relevant to the Comptroller's decision as these were matters of foreign law (see the GD at [50]–[51] and [67]).

The arguments on appeal

29 On appeal, the Appellants submitted that the Judge had taken an unduly restrictive view of the court's role in determining whether leave should be granted for judicial review. They further argued that the Judge had erred in his assessment of the applicable standard for determining the foreseeable relevance of the information sought in an EOI request, and contended that the Comptroller should be required to *go behind* the Eighth Schedule statements and

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certifications provided by the foreign tax authority instead of simply taking them at face value. In this case, the Comptroller (so the Appellants argued) had been put on notice of doubts affecting the validity of the statements made by the NTS in relation to the Eighth Schedule requirements, and it was thus incumbent on the Comptroller to reconsider the position and resolve these doubts. The Appellants also criticised the Comptroller's reliance on what they maintained was insufficient evidence presented by the NTS. In particular, the Appellants submitted that the Comptroller had relied on incomplete and outdated information contained in the USB Drive mentioned at [15] above, which information was limited to only 27 of the 51 implicated companies.

30 The Comptroller, on the other hand, maintained that the Judge had applied the correct legal tests in relation to the court's role in judicial review proceedings and the Comptroller's role in assessing EOI requests, and had reached the right conclusion on the facts of this case. The Comptroller pointed out that the Appellants had relied on information and events that materialised after the Request was made and even after the Comptroller had issued the Production Notices. Such information and events, the Comptroller submitted, were irrelevant to the question of whether he had exercised his discretion illegally and/or irrationally at the time he decided to issue the Production Notices. The AG similarly submitted that the Request was to be assessed on its face by the Comptroller at the time of the Request, and that the reliability of the NTS's certifications should not be investigated further.

The issues which arose for determination

31 While the overarching issue in this appeal, which arose from an application for leave for judicial review, was whether the Judge erred in finding that the Appellants had failed to establish an arguable or *prima facie* case of

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reasonable suspicion in favour of granting the remedies that they sought, in our judgment, there were three specific issues for our determination in the appeal, namely:

(a) whether subsequent facts and issues raised after the time of the Comptroller's decision on an EOI request should be considered in determining a challenge that is brought against the Comptroller's decision on that request;

(b) whether the requirements in the Eighth Schedule had been complied with in the present case; and

(c) whether the Comptroller had complied with the internal procedures of the Inland Revenue Authority of Singapore ("the IRAS") in assessing the evidence and information presented to him as well as properly satisfied himself that the requirements in the ITA and the Convention had been satisfied before acceding to the Request.

32 Before we address these issues, we think it would be helpful to set out the relevant legal principles concerning the threshold for granting leave to commence judicial review proceedings and, more importantly, the Comptroller's role in assessing EOI requests, especially when such requests are made covertly without notice to the persons of interest, who might *subsequently* raise issues after the Comptroller has already made his decision.

The relevant legal principles in this appeal

The threshold for granting leave for judicial review

33 Three requirements must be satisfied before an applicant may be granted leave to commence judicial review proceedings: (a) the subject matter of the

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complaint has to be susceptible to judicial review; (b) the applicant has to have sufficient interest in the matter; and (c) the materials before the court have to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant: see *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [32]. The burden of proof lies squarely on the applicant to satisfy the court that these requirements are met.

34 The present appeal concerns the third of these requirements. The threshold for granting leave for judicial review is a low one: it suffices if there appears to be a point which might, on further consideration, turn out to be an arguable case in favour of granting the applicant the remedies sought. The requirement to obtain leave for judicial review is intended to filter out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful expenditure of judicial time as well as protect public bodies from harassment (whether intentional or otherwise) when the legality of their decisions is challenged: see *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [23]. Notwithstanding the modest threshold for granting leave, the courts have not hesitated to strike out unmeritorious judicial review cases even at the leave stage (see, for example, *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14; *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR(R) 648; and more recently, *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2017] SGHC 206). This is unsurprising since that is precisely what a case filter is for.

The Comptroller's role in assessing EOI requests

35 We turn now to the relevant legal principles concerning the Comptroller's assessment of an EOI request from a foreign tax authority, beginning with a brief background of Singapore's EOI regime.

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The developments in Singapore's EOI regime

36 Our EOI regime was first statutorily enacted in 2009 by the Income Tax (Amendment) (Exchange of Information) Act 2009 (Act 24 of 2009) ("the 2009 Amendments") so as to enable Singapore to implement an internationally agreed EOI standard for the exchange of information for tax purposes upon the request of a foreign tax authority. The regime essentially allows the Comptroller to exercise statutory powers under the ITA to obtain and deliver information for the purpose of assisting a foreign tax authority upon its request in certain circumstances. An efficient EOI regime is crucial to facilitate effective reciprocal information-sharing arrangements between tax administrations and, in this way, address, through cross-border collaboration, the widespread global problem of tax evasion. International tax cooperation practices and standards have continued to evolve and strengthen since the enactment of the 2009 Amendments.

37 At [15]–[19] of the GD, the Judge carefully traced the adoption of and the developments in the legislative framework of our EOI regime. We only highlight the developments in 2013, when the requirement for the Comptroller to obtain an order of court before accessing restricted information from financial institutions was removed pursuant to the 2013 Amendments. Prior to those amendments, where the requested information was information which was protected under s 47 of the Banking Act (Cap 19, 2008 Rev Ed) or s 49 of the Trust Companies Act (Cap 336, 2006 Rev Ed) ("protected information"), disclosure would only be permitted if the court was satisfied that stipulated legislative requirements under the now-repealed s 105J of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the now-repealed s 105J") had been met. That section read as follows:

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Orders relating to certain information

105J.—(1) Where —

(*a*) the Comptroller requires any information —

(i) for the administration of this Act, other than for an investigation or a prosecution of an offence alleged or suspected to have been committed under this Act; or

(ii) in order to comply with a request made under section 105D; and

(*b*) the Comptroller is of the opinion that the information is protected from unauthorised disclosure under —

(i) section 47 of the Banking Act (Cap. 19) including any regulations made under subsection (10) of that section; or

(ii) section 49 of the Trust Companies Act (Cap. 336),

then the Comptroller or an authorised officer may apply to the High Court for an order under subsection (2).

(2) If, on such an application, the High Court is satisfied that the conditions referred to in subsection (3) are fulfilled, it may make an order that the person who appears to it to have possession or control of the information to which the application relates shall —

(*a*) make a copy of any document containing the information and provide the copy to an authorised officer for him to take away; or

(*b*) give an authorised officer access to the information,

within 21 days from the date of the order or such other period as the Court considers appropriate.

(3) The conditions referred to in subsection (2) are as follows:

(*a*) the making of the order is justified in the circumstances of the case; and

(*b*) it is not contrary to the public interest for a copy of the document to be produced or that access to the information be given.

…

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Since the 2013 Amendments came into force, our EOI regime has been administered by the Comptroller rather than by the court.

38 The rationale underlying the 2013 Amendments was to further streamline the administration of our EOI regime. During the second reading of the Bill introducing the 2013 Amendments (*ie*, the Income Tax (Amendment) Bill 2013 (Bill 14 of 2013) ("the 2013 Amendment Bill")), it was noted in Parliament that the basic safeguards which protected the confidentiality of taxpayers' information would not be undermined by the proposed amendments, in that the Comptroller would continue to assess the validity of EOI requests in line with internationally agreed standards, and taxpayers would be able to make representations to the Comptroller as well as seek judicial review in appropriate cases. The then Senior Minister of State for Finance, Mrs Josephine Teo ("Senior Minister of State Teo"), stated (see *Singapore Parliamentary Debates, Official Report* (21 October 2013) vol 90 at pp 38–39):

> … [W]e will allow [the Comptroller] to obtain information protected under the Banking Act and [the] Trust Companies Act for EOI purposes without having to seek a [c]ourt [o]rder. This is *aimed at streamlining EOI administration*.
>
> Members may be concerned that the removal of the need for [the Comptroller] to seek a court order compromises safeguards that protect the confidentiality of taxpayers' information. Let me assure the House that *each request for EOI assistance is carefully considered and not acceded to indiscriminately*. Even though a court order is not required, [the Comptroller] will render EOI assistance only for *clear, specific and legitimate requests*.
>
> In the last four years, [the Comptroller] has, in fact, gained valuable experience in EOI administration, and is now well placed to evaluate and assist on requests in line with the internationally-agreed Standard. Taxpayers can make representations to [the Comptroller] to highlight issues with specific requests, which [the Comptroller] will take into account when evaluating them. *[The Comptroller's] decision can also be subject to judicial review*.
>
> [emphasis added]

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39 The "internationally-agreed Standard" referred to by Senior Minister of State Teo in the last paragraph of the passage just quoted is set out in Art 26 of the Organisation for Economic Co-operation and Development ("the OECD") Model Tax Convention on Income and on Capital ("the Model Tax Convention"), which Art 25 of the Convention is modelled after. As explained in para 5 of the OECD's "Update to Article 26 of the OECD Model Tax Convention and its Commentary" dated 17 July 2012 ("the OECD Commentary"), Art 26, which is titled "Exchange of information", is "intended to provide for exchange of information in tax matters to the widest possible extent". To this end, Art 26 lays down "[t]he standard of 'foreseeable relevance'" (also referred to hereafter as "the EOI Standard" where appropriate to the context) in respect of EOI requests. This standard entails that:

> … [A]t 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. … [original emphasis omitted]

The "foreseeable relevance" standard continues to underpin the EOI regime after the 2013 Amendments

(1) Relevance of judicial pronouncements before the 2013 Amendments

40 We next consider whether judicial pronouncements before the 2013 Amendments concerning the EOI regime then in place ("the pre-2013 Amendments EOI regime") and the relevant legal principles concerning the assessment of EOI requests under that regime remain valid under our current EOI regime.

41 In *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 ("*ABU*"), an appeal against a High Court decision granting the Comptroller access to protected information (as defined at [37] above) pursuant to an EOI request

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made prior to the 2013 Amendments, we discussed the role of the *High Court* in assessing the justification of an EOI request under the now-repealed s 105J. That case involved an EOI request made by the National Tax Agency of Japan pursuant to the Singapore-Japan double taxation agreement. We held that while the now-repealed s 105J required the High Court to be independently satisfied as to the justification of an EOI request, it only had to determine the validity of the request *on its face*. It was not for the court to substantively review an EOI request to the extent of inquiring into the truth of the factual assertions contained therein and, in that context, go behind the facts stated by the foreign tax authority. As for the pertinent features of the pre-2013 Amendments EOI regime, the following principles were articulated (at [26] of *ABU*):

> (a) First, the touchstone for the exchange of information was whether the requested information was "foreseeably relevant" for carrying out the provisions of the tax treaty concerned or enforcing the domestic tax laws of the Requesting State.
>
> (b) Second, the regime did not permit a Contracting State to decline an EOI request merely because it lacked a "domestic interest" in the information sought.
>
> (c) Third, the regime did not permit a Contracting State to decline an EOI request merely because the information sought was held by a bank, a financial institution or a person acting in a fiduciary capacity.
>
> (d) Fourth, the regime allowed the sharing of information relating to all forms of taxes and not just income tax.

42 More importantly, we also held (at [42] of *ABU*) that once the requirements in the Eighth Schedule (which the tax authority of the Requesting

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State must satisfy) were complied with, the justification of the EOI request in terms of its meeting the EOI Standard would be determined without the court going behind the statements made in the request.

43 This approach of determining the validity of an EOI request on its face was articulated in *ABU* in the context of the *court's* role in assessing the justification of a request, and four broad reasons were given for it (at [41]–[45]):

> (a) From the relevant parliamentary material, it was clear that Parliament intended the justification of an EOI request to be assessed *in the light of the documentary requirements prescribed by the Eighth Schedule*. In other words, the Eighth Schedule requirements were stipulated to ensure that EOI requests were justified and to help screen out unjustified fishing expeditions. A plain reading of the Eighth Schedule bore out the conclusion that in relation to paras 4, 7 and 8 thereof, what was required was only a *statement* to the requisite effect by the foreign tax authority; once such a statement was made, the foreign tax authority would have complied with the Eighth Schedule.
>
> (b) From a practical perspective, if a court were required to go behind the statements made by a foreign tax authority, there was a real risk of applications for production orders under the now-repealed s 105J resulting in full trials calling for the examination of witnesses and the determination of potentially difficult issues of foreign law. The efficacy of the EOI regime would be severely compromised were this to be the case.

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(c) International comity would be compromised if a Singapore court were required to make pronouncements that questioned the underlying *bona fides* of EOI requests made by foreign tax authorities.

(d) The court should be cognisant of its function, and not step into the shoes of the Executive.

44 In our judgment, the Judge rightly held that the 2013 Amendments merely "changed the identity of the authority assessing … EOI requests" in respect of protected information, and did not substantively alter the requirements in this regard (see the GD at [23]). The four features stated at [41] above remain the key aspects of the current EOI regime. It is also important to note that the touchstone for the exchange of information – namely, the EOI Standard of whether the requested information is "foreseeably relevant" for carrying out the provisions of the tax treaty concerned or enforcing the domestic tax laws of the Requesting State – has not changed. In addition, the principal enabling provision, s 105D of the ITA, remains the same, with the only amendment being the insertion of a new subsection (4) after subsection (3) pursuant to the 2013 Amendments:

> (4) For the purposes of subsection (3), the terms of the prescribed arrangement shall not be construed in such a way as to prevent the Comptroller from complying with, or to permit him to decline to comply with, a request for information merely because —
>
> (*a*) Singapore does not need the information for its own tax purposes; or
>
> (*b*) the information is held by a bank or other financial institution, a nominee or a person acting in an agency or a fiduciary capacity, or it relates to the ownership interests in an entity.

45 It follows that judicial pronouncements on the pre-2013 Amendments EOI regime concerning the foreseeable relevance of the requested information

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remain generally relevant in informing the Comptroller's role in assessing EOI requests under the present EOI regime, but with the necessary and important modification that the Comptroller's decision on an EOI request is now subject to judicial review in appropriate circumstances.

46 In judicial review of the Comptroller's decision on an EOI request, the court examines the Comptroller's decision-making process and powers rather than the substantive merits of the decision itself. Judicial review of the Comptroller's decision is not an appeal from that decision. There has thus been a shift in the court's perspective from making a substantive decision on an EOI request under the pre-2013 Amendments EOI regime to reviewing the Comptroller's decision-making process and powers in respect of such a request under the present regime. However, the fact that it is the Comptroller who now makes the substantive decision on EOI requests also carries with it some consequences. By way of illustration, in previous cases under the now-repealed s 105J, our courts were cognisant that our function in the EOI process was "to apply the relevant provisions of the ITA", and thus held that it might not be compatible with notions of comity for a court to question the *bona fides* of EOI requests made by the Executive authorities of foreign governments; in short, we were careful not to "step into the shoes of the Executive" (see *ABU* at [44]–[45]). Further, the Comptroller's duty under the current EOI regime to seek clarification from a foreign tax authority so as to satisfy himself of the validity of the latter's EOI request is a duty that was not and could not have been a feature of the court's role under the pre-2013 Amendments EOI regime. The substantive standards applicable to the court under that regime should thus not be unthinkingly treated in their entirety as being the same as the standards that now apply to the Comptroller. But this is essentially a gloss rather than a fundamental change of position.

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(2) The statutory scheme setting out the Comptroller's role affords him a wide discretion when assessing EOI requests

47 Having established that the principles articulated in *ABU* in respect of the pre-2013 Amendments EOI regime still remain broadly relevant to the Comptroller's role in assessing the validity of EOI requests, we turn now to examine the statutory scheme of the current EOI regime. The relevant provisions are found in Part XXA of the ITA, titled "Exchange of Information under Avoidance of Double Taxation Arrangements and Exchange of Information Arrangements". Section 105D(2) of the ITA states that "[u]nless the Comptroller otherwise permits", an EOI request "must" set out the information prescribed in the Eighth Schedule. For ease of reference, the Eighth Schedule is reproduced in full below:

EIGHTH SCHEDULE

Sections 105D(2) and 106(3)

INFORMATION TO BE INCLUDED IN A REQUEST FOR INFORMATION UNDER PART XXA

1. The purpose of the request.
2. The identity of the competent authority.
3. The identity of the person in relation to whom the information is requested.
4. A ***statement*** of the information requested for including its nature, and the form in which the competent authority wishes to receive the information from the Comptroller.
5. The grounds for believing that the information requested for is held by the Comptroller, the Comptroller of Goods and Services Tax, the Comptroller of Property Tax, the Chief Assessor or the Commissioner of Stamp Duties, or is in the possession or control of a person in Singapore.
6. To the extent known, the name and address of any person believed to have possession or control of the information requested for.

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> 7. A ***statement*** that the request is in conformity with the law and administrative practices of the country of the competent authority, and that the competent authority is authorised to obtain the information under the laws of that country or in the normal course of administrative practice.
>
> 8. A ***statement*** that the country has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties.
>
> 9. [Deleted by S 595/2012]
>
> 10. Any other information required to be included with the request under the prescribed arrangement.
>
> 11. Any other information that may assist in giving effect to the request.
>
> [original emphasis omitted; emphasis added in bold italics]

48 In assessing EOI requests, the Comptroller must be satisfied (unless he otherwise permits) that the information specified in the Eighth Schedule has in fact been provided as required by s 105D(2). In our judgment, an examination of the text of the legislative provisions setting out the statutory scheme of our EOI regime leads to the conclusion that Parliament intended to grant the Comptroller a *wide degree of discretion* in dealing with EOI requests. This can be seen from the following provisions. Section 105B states that the specific legislative purpose of Part XXA of the ITA is to "*facilitate* the disclosure of information" [emphasis added] to the tax authorities of foreign jurisdictions which Singapore has EOI arrangements (or double taxation arrangements) with; in respect of the Comptroller's assessment of EOI requests, s 105D(3) states only that every request shall be "subject to and dealt with in accordance with the terms of the prescribed arrangement"; and, as we have already mentioned, s 105D(2) refers to the requirements in the Eighth Schedule in *qualified* terms:

> (2) *Unless the Comptroller otherwise permits*, the request must set out the information prescribed in the Eighth Schedule. [emphasis added]

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49 Of course, for the purposes of the Comptroller's broad inquiry, the EOI Standard of foreseeable relevance as well as other limitations on the exchange of information pursuant to that standard remain relevant, and this is so by virtue of the reference to the Convention as a "prescribed arrangement" under s 105D(3). At the same time, it is clear that Parliament has legislatively given effect to the principle embodied in the EOI Standard that the EOI regime should allow for the exchange of information between tax administrations "to the widest possible extent" (see para 5 of the OECD Commentary, which was cited with approval in *Comptroller of Income Tax v BJX* [2013] SGHC 145 at [10]). And, as we reasoned in *ABU* (see above at [43(a)]), a plain reading of the Eighth Schedule bears out the conclusion that in relation to the requirements set out in paras 4, 7 and 8 thereof, what is needed is only a *statement* to the requisite effect by the foreign tax authority; once such a statement has been made, the foreign tax authority will ordinarily be regarded as having complied with those requirements. Hence, based on the text of Part XXA of the ITA, the Comptroller is generally not expected to go behind the Eighth Schedule statements and certifications provided by a foreign tax authority pursuant to an EOI request.

50 This interpretation of the text of Part XXA of the ITA is confirmed by the parliamentary material which we surveyed in *ABU* at [41]. At the second reading of the Bill which introduced the 2009 Amendments outlined at [36] above, the then Minister for Finance, Mr Tharman Shanmugaratnam, explained (see *Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1607):

> The new Eighth Schedule sets out the *documentary* requirements which a requesting jurisdiction must fulfil for all requests. These requirements ensure that requests are justified, that is, clear, specific, relevant, legitimate and consistent with the [EOI] Standard. They will help screen out "fishing expeditions". [emphasis added]

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51 Similarly, it can be seen from Senior Minister of State Teo's explanation, during the parliamentary debates on the 2013 Amendment Bill, of the nature of the confirmations to be provided by a foreign tax authority that Parliament did not envisage that the Comptroller would or could second-guess the veracity of such confirmations (see *Singapore Parliamentary Debates, Official Report* (21 October 2013) vol 90 at p 56):

> … There are robust safeguards in the international EOI Standard to ensure that only clear, specific and relevant requests are acceded to. … In particular, the requesting foreign jurisdiction will, firstly, have to explain why the request is being made, and has to put forward the case for why they are making the request. Secondly, they have to identify the taxpayer under investigation or assessment, and *declare* that it has pursued all available means in its own jurisdiction to obtain the information. So, firstly, explain why you want the information. Secondly, tell us who is being investigated. Thirdly, *declare* that you have indeed exhausted all other means. [emphasis added]

52 These observations indicate that Parliament intended the justification of an EOI request to be assessed *in the light of the documentary requirements prescribed by the Eighth Schedule*, and this accords with our own interpretation of the text of Part XXA of the ITA and its plain meaning.

53 The Appellants cited some precedents from the courts of Jersey to persuade us that the Comptroller is obliged, in certain circumstances, to question the correctness of the statements made by a foreign tax authority pursuant to an EOI request. However, on closer examination, these precedents likewise point to the conclusion that the Comptroller has no duty to hold an independent investigation or a mini-trial to test the correctness of statements made by a foreign tax authority. This can be seen from the decision in *Taylor Fladgate & Yeatman Limited v Comptroller for Taxes, acting as competent authority for Jersey* [2014] JRC 64 ("*Taylor Fladgate*"), where the applicant sought leave for judicial review of the decision by the Jersey Comptroller of Taxes ("the Jersey

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Comptroller") to issue a production notice pursuant to a Jersey-Portugal tax agreement. The Jersey Royal Court upheld (at [42]–[43]) the principles enunciated by the Jersey Court of Appeal at [32] of *Volaw Trust & Corporate Services Limited and Mr Berge Gerdt Larsen v The Office of the Comptroller of Taxes* [2013] JCA 239 ("*Volaw*"):

> … [I]t does not seem to us possible to read into the [Jersey] Comptroller's decision making process a need to hold a mini-trial. The [Jersey] Comptroller has neither the power nor the facility to provide one. As long as he has reasonable grounds for his belief or opinion on the material before him, he is empowered to act on that belief or opinion. …

54 The Jersey Royal Court refused to grant the applicant in *Taylor Fladgate* leave for judicial review after concluding (at [56]) that the latter had no real prospect of successfully arguing that the Jersey Comptroller had acted illegally in deciding to issue the production notice. It held that the Jersey Comptroller had demonstrably probed and evaluated Portugal's EOI request, and was not under a duty to hold "an independent investigation or mini-trial to test the correctness of the statements made to him" (at [57]).

55 In addition, it bears emphasis in this context that it is not the case that *all* of the Eighth Schedule requirements *must* be fulfilled before the Comptroller may be satisfied that the EOI Standard of foreseeable relevance has been met and that the EOI request concerned should therefore be acceded to. Ultimately, the discretion is vested in the Comptroller in his assessment of the foreseeable relevance of the requested information and the validity of each EOI request. As we noted above at [48]–[49], the statutory scheme which sets out our EOI regime has been drafted to afford the Comptroller the discretion to facilitate the exchange of information "to the widest possible extent".

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56 We observed earlier (at [48] above) that s 105D(2) of the ITA empowers the Comptroller to waive any of the requirements in the Eighth Schedule. An example of this is where "[t]he identity of the person in relation to whom the information is requested" (see para 3 of the Eighth Schedule) is not specified in the EOI request. In respect of such a situation, the OECD Commentary states (at para 5.1):

> … [A] request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation. The same holds true where names are spelt differently or information on names and addresses is presented using a different format. However, in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer. …

57 Hence, it is clear that the legislative framework of our EOI regime does not require the Comptroller to, nor does it contemplate that he should, go behind the statements made by a foreign tax authority pursuant to an EOI request. Further, this framework vests considerable discretion in the Comptroller with the objective of facilitating the exchange of information as far as possible.

(3) The Comptroller's duty to seek clarification

58 This is not to say that the Comptroller can act uncritically or unthinkingly in processing an EOI request. In ensuring that the Eighth Schedule requirements are met, and in raising any necessary clarifications with a foreign tax authority so as to satisfy himself that the foreign tax authority's EOI request is valid and the information sought is foreseeably relevant, the Comptroller inherently strikes the balance between the competing interests of facilitating the exchange of tax information "to the widest possible extent" on the one hand and safeguarding the confidentiality of taxpayers' information on the other hand,

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and should carefully consider the EOI request within the applicable legislative framework.

59 The AG submitted that in assessing the foreseeable relevance of the information sought in an EOI request, what was material was the belief of the *Requesting* State's tax authority, and not the belief of the *Requested* State's tax authority. For this proposition, the AG relied on para 5 of the OECD Commentary, which states:

> … The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of [the] requested information are not clear to the requested State. However, *once the requesting State has provided an explanation as to the foreseeable relevance* of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. … [original emphasis omitted; emphasis in italics added by the AG]

60 We did not agree with the AG on this point. The AG's submission overlooked the remaining parts of the same paragraph of the OECD Commentary that directly follow the passage just quoted:

> … *Where the requested State becomes aware of facts that call into question* whether part of the information requested is foreseeably relevant, the competent authorities *should* consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 [of Art 26 of the Model Tax Convention] *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.* [original emphasis omitted; emphasis added in italics]

61 Clearly, the assessment by the *Requested* State's tax authority of the foreseeable relevance of the information sought remains relevant. If the Requested State's tax authority believes that a particular EOI request amounts

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to a fishing expedition, it is not obliged to provide the requested information. And where there are facts that call into question the foreseeable relevance of the requested information, the Requested State's tax authority should consult the Requesting State's tax authority, which may then provide clarification in response. We referred to this in *ABU*, where we noted (at [48]):

> … [T]he EOI Standard contemplates interaction and cooperation between the executive arms of the governments of the contracting states. If there are *doubts concerning the veracity of a request*, it would *fall to the Comptroller to resolve them through diplomatic channels*. … [emphasis added]

62 The Comptroller accepted that this much was correct, but submitted that his duty to seek clarification from a foreign tax authority arose only if he was of the view that there was "doubt or lack of clarity regarding whether the necessary requirements for the validity of a request are met". We agreed with the Comptroller's submission. Doubts may arise on the face of an EOI request itself, or from the representations made by the persons of interest in relation to specific information sought in the request. In line with the OECD Commentary, where the foreign tax authority provides an explanation to clarify any doubts which the Comptroller may have, the Comptroller is not obliged to embark on a full-scale substantive inquiry into the correctness of that explanation and/or the application of the foreign jurisdiction's tax laws. The Comptroller also submitted, and we agreed, that the explanation provided by the foreign tax authority in response to any request for clarification "must be an explanation that is satisfactory". The Comptroller's role in the EOI process is thus not superfluous, and he must not delegate his discretion and decision-making power to the foreign tax authority.

63 This is consistent with the following statement in Parliament by Senior Minister of State Teo during the second reading of the 2013 Amendment Bill.

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Touching on the fact that the Comptroller would seek the necessary clarifications from foreign tax authorities when necessary, Senior Minister of State Teo stated (see *Singapore Parliamentary Debates, Official Report* (21 October 2013) vol 90 at p 56):

> … [T]he removal of the Court process does not mean that [the Comptroller] will freely share information with our EOI partners. There are robust safeguards in the international EOI Standard to ensure *that only clear, specific and relevant requests* are acceded to. …
>
> Where requesting jurisdictions *do not explain clearly* how the requested information is relevant to [their] investigation or assessment, [the Comptroller] *has and will continue to seek the necessary clarifications* before agreeing to release the information.
>
> [emphasis added]

64 In the court below, the Comptroller himself led evidence on the IRAS's internal decision-making process when dealing with EOI requests, which reflected a recognition of the Comptroller's role in ensuring the validity of such requests and the need to resolve any doubts in this regard. Ms Wai Yean Tze ("Ms Wai"), a director in the IRAS's International Tax Affairs and Relations Branch, deposed in an affidavit dated 21 August 2014 ("Ms Wai's affidavit") that EOI requests were reviewed by an EOI review committee as follows:

(a) the request must set out the information required under s 105D of the ITA and must be *in accordance with the Eighth Schedule*;

(b) if the requested information was *vague or ambiguous*, *further clarification would be sought* from the foreign tax authority and a satisfactory response must be received;

(c) the requested information must be "*foreseeably relevant*" as required by the EOI (or double taxation) agreement concerned; and

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(d) if the foreign tax authority did not provide satisfactory answers to the Comptroller's queries under sub-para (b) above, the Comptroller would consider whether to exercise any of his powers under the ITA, including alternative measures such as restricting the information sought to only the information specified in those parts of the EOI request that were *clear and specific*.

65 In outlining his role in assessing the foreseeable relevance of the information sought in an EOI request, the Comptroller articulated the need to ensure that the request was "clear", "specific", "relevant" and "legitimate" (see [38], [50], [63] and [64(c)]–[64(d)] above). In a similar vein, the High Court observed in *Comptroller of Income v AZP* [2012] 3 SLR 690 at [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. … [emphasis added]

66 We agreed with the Judge's ruling (at [57] of the GD) that phrases such as "clear, specific and legitimate" do not amount to or operate as distinct or separate strict legal requirements that bind the Comptroller since they are not prescribed in either the ITA or the Convention. Rather, they serve as signposts to guide the Comptroller in assessing the foreseeable relevance of the requested information to the tax investigation carried out by the foreign tax authority concerned.

67 Hence, *in general*, the Comptroller is not expected to go behind the assertions made by a foreign tax authority pursuant to an EOI request. The Comptroller should consider the request and the assertions that are put forward,

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and make *reasonable inquiries* to satisfy himself that the requirements in the Eighth Schedule have been complied with. In doing so, the Comptroller should be aware that ultimately, the EOI Standard of foreseeable relevance is intended to provide for the exchange of information relating to tax matters "to the widest possible extent".

EOI requests which are made covertly without notice to the persons of interest

68 We turn now to consider how the approach set out above might be modified in situations such as the present, where an EOI request is processed and acceded to covertly without the person(s) of interest being notified of the request prior to the Comptroller's decision on it.

69 The Appellants did not seem to disagree with the established principle that the validity of an EOI request (and any review of the Comptroller's decision on the request) should normally be assessed at the time the request (or, as the case may be, the Comptroller's decision) is made. In this regard, para 5 of the OECD Commentary expressly states (see also [39] above):

> … In the context of information exchange upon request, the standard [*ie*, the EOI 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. … [original emphasis omitted; emphasis added in italics]

70 The EOI Standard thus contemplates that there need only be a reasonable possibility that the requested information will be relevant, and this is to be assessed at the time the EOI request is made. Subsequent matters which might show that the requested information is not in fact relevant would not be material to the validity of the Comptroller's initial decision on the request.

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71 In the course of his oral arguments, counsel for the Appellants, Mr Tan Chee Meng SC ("Mr Tan"), clarified that the Appellants were not disputing that where the Comptroller's decision on an EOI request was impugned, the decision was to be assessed by reference to the circumstances prevailing at the time it was made. He submitted, however, that this was the case only where the persons of interest had had the opportunity to raise their concerns to the Comptroller before the latter made his decision on the EOI request. In circumstances such as the present, where the EOI request was made and assessed on a confidential basis without notice to the persons of interest, then, Mr Tan argued, if *subsequent* facts and information demonstrated that the statements made by the foreign tax authority which allegedly satisfied the Eighth Schedule requirements were in fact false and the Comptroller had acted on that basis, it would not be right that either the Comptroller or the court could shut its eyes to this reality.

72 Mr Tan submitted that his proposition was in line with the assurance given in Parliament during the debates on the 2013 Amendment Bill that the safeguards to protect taxpayers' interests would remain after the enactment of the 2013 Amendments. It was highlighted then that taxpayers could make representations to raise any issues that the Comptroller could take into account, and that the Comptroller's decision would be subject to judicial review in appropriate cases (see [38] above). Mr Tan contended that if the first opportunity that a person of interest had to make representations on an EOI request was *after* the Comptroller had already decided to furnish the information sought, then if all the information and facts presented subsequently by the person of interest were treated as inadmissible or legally irrelevant, the person of interest would effectively be shut out of any remedies even if he were able to

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validly demonstrate the falsity of the facts that the Comptroller had based his decision on.

73 Counsel for the Comptroller, Mr Alvin Koh ("Mr Koh"), appeared to accept that if compliance with the Eighth Schedule was called into question subsequently by evidence raised by a person of interest, the Comptroller would have a duty to seek clarification from and consult the foreign tax authority if necessary, and then reassess his position in that light. Mr Koh also agreed that if assertions made by a foreign tax authority pursuant to an EOI request were subsequently demonstrated to be untrue, the Comptroller would no longer be able to act on the request. He submitted, however, that in the present case, based on the evidence before the court, subsequent clarification from the NTS had in fact been sought by the Comptroller in the course of processing the Request. The Comptroller had also stated that he was standing by his initial decision to accede to the Request.

74 The AG took a slightly different position. Deputy Chief Counsel Ms Aurill Kam ("Ms Kam") emphasised that after the Appellants learnt of the Request, they elected to apply (via OS 106) for leave for judicial review of the Comptroller's decision instead of making representations to the Comptroller. Ms Kam submitted that this was fatal since fresh facts would not be relevant in judicial review proceedings. She urged the court to draw a distinction between good practice and what was necessary as a matter of legality.

75 In our judgment, in the ordinary course of events, when the Comptroller's decision on an EOI request is challenged in judicial review proceedings, the Comptroller's decision is to be assessed based on the material that was before him at the time he made the decision. Ordinarily, the Comptroller is required to serve notice of an EOI request on the person(s) of

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interest pursuant to s 105E(1) of the ITA if the request relates to protected information. However, the Comptroller may act in a covert manner without notice to the person(s) of interest in the circumstances set out in s 105E(4):

> (4) Notice under subsection (1) or (1A) need not be served on any person –
>
> (*a*) if the Comptroller —
>
> (i) does not have any information of the person upon whom service may be effected in accordance with section 8;
>
> (ii) is of the opinion that this is likely to prevent or unduly delay the effective exchange of information under the prescribed arrangement; or
>
> (iii) is of the opinion that this is likely to prejudice any investigation into any alleged breach of any law relating to tax of the country of the competent authority making the request (whether the breach would result in the imposition of a criminal or civil penalty); or
>
> (*b*) on such other ground as may be prescribed under section 105H.

76 Where the exception under s 105E(4) is invoked, the first opportunity that a person of interest would have to raise any concerns with the Comptroller's decision would, as Mr Tan correctly pointed out, be *after* the issuance of the corresponding production notice. In our judgment, the person of interest should, in such circumstances, have the opportunity to raise to the Comptroller any concerns pertaining to the EOI request's compliance with the requirements in the Eighth Schedule, and the Comptroller should reconsider his decision in the light of these concerns if they appear to be legitimate. If necessary, the Comptroller should consult and seek the views of the foreign tax authority on the points raised by the person of interest.

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77 This is not just a matter of good practice, but also one of legality because any information which is raised after the Comptroller's decision on an EOI request and which calls into question the validity of that request would undermine the basis of the Comptroller's exercise of his discretion to accede to the request. In such a situation, what is needed is a fresh consideration by the Comptroller to determine whether the new material warrants a change in his initial decision. The Comptroller would be best placed to determine whether it would be necessary to seek any further clarification from the foreign tax authority on any points, whether the request was no longer valid or should be pared down, or whether the new material was inconsequential and did not affect his initial decision. This is also in line with what Senior Minister of State Teo noted in relation to the anti-tipping off provisions included in the 2013 Amendments in order to protect the confidentiality of EOI requests and production notices (see *Singapore Parliamentary Debates, Official Report* (21 October 2013) vol 90 at p 56):

> Ms Foo [*ie*, Ms Foo Mee Har, Member of Parliament for West Coast] had also asked about the anti-tipping off provision in the Bill [*ie*, the 2013 Amendment Bill]. Such provisions are necessary as there may be certain sensitive investigations whose success might be undermined by tip-offs. This provision is, in fact, already part of our existing EOI regime. The only difference being that the court makes such orders now whereas it is [the Comptroller] which will issue the order after the Bill is passed. *This change, however, does not take away the right for the taxpayer to make representation[s] to [the Comptroller] or lodge a request for a judicial review should he become aware of the request.* [emphasis added]

78 In judicial review proceedings, the court is ordinarily concerned with assessing the legality of the decision under challenge by reference to the material that was before the decision-maker at the time the decision was made. The danger of admitting fresh evidence in such proceedings is that the court

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may find itself in the position of being asked to decide the merits of the decision rather than confining itself to reviewing the legality of the decision.

79 Notably, in *Regina v Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839, the House of Lords (at 860H–861B) considered the changed circumstances and further developments since the time of the impugned decisions in that case as follows:

> The situation has changed since 1995 when the decisions were taken. So it is necessary first to mention the situation at that time and then to *examine the situation at the present stage*. Although we are concerned primarily with the reasonableness of the decisions at the time when they were taken *we cannot ignore these developments*. … If the expectations which the Secretary of State had when he took his decisions have not been borne out by events or are at risk of not being satisfied …, it would be your Lordships' duty to set aside the decisions so that the matter may be *reconsidered in the light of the changed circumstances*. [emphasis added]

80 In a similar vein, in *R v Inner London North Coroner, ex parte Touche* [2001] 2 All ER 752, where the coroner's decision refusing to hold an inquest into the death of the applicant's wife was under review, the English Court of Appeal observed (at [36]) that although the coroner's initial decision was *originally* correct, it seemed to the court that the coroner should have changed his mind based on the information which was *subsequently* brought to his attention, and should then have concluded that an inquest ought to be held after all.

81 In *Regina (British Broadcasting Corporation and another) v Secretary of State for Justice* [2013] 1 WLR 964 ("*BBC v Secretary of State for Justice*"), the English High Court took a practical approach given that the decision-maker (the UK Secretary of State for Justice) had had the opportunity to consider the new material which arose after he made his decision and had *stood by his*

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decision right up to the time of the hearing of the case. In the circumstances, the court considered all the material placed before it, including factual developments that occurred after the impugned decision was made or that were not brought to the decision-maker's attention before the decision was made:

> 27 Some of the above factual developments have occurred after the decision under challenge in the present case or were not specifically brought to the Secretary of State's attention before that decision was taken. Normally the court in a claim for judicial review would be concerned to assess the lawfulness of a decision under challenge by reference to the material that was before the decision-maker at the time it was taken: see *R v Secretary of State for the Environment, Ex p Powis* [1981] 1 WLR 584, 595–597 (Dunn LJ, giving the judgment of the Court of Appeal). However, that is not always the rule and, especially in human rights cases, the courts have been prepared to look at the up-to-date position: see eg *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 860–861 (Lord Hope of Craighead), a pre-HRA [*ie*, the Human Rights Act 1998 (c 42) (UK)] case; and *R (Limbuela) v Secretary of State for the Home Department* [2004] QB 1440, para 113 (Carnwath LJ), a post-HRA case (the case went to the House of Lords but not on this point [2006] 1 AC 396).
>
> 28 The Secretary of State did not submit at the hearing before us that we should ignore the up-to-date material. It seems to us that *it would be unrealistic and undesirable* in the present case to ignore some of the material that was placed before us. This is because the Secretary of State *has had the opportunity to consider such material, right up to the time of the hearing in this case, and has made it clear that he stands by his decision* of 22 September 2011. Furthermore, if the court were to dismiss the claim for judicial review on the basis of limited material, the claimants could be expected simply to place the additional material before the Secretary of State and invite reconsideration of his earlier decision and then, given the stance taken by the Secretary of State at the hearing before us, they would have to bring a further challenge in this court. Such a process would be time-consuming and would add to costs without serving any practical purpose. Accordingly, we have considered all the material that was placed before the court in reaching our decision in this case.
>
> [emphasis added]

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82 The situation in *BBC v Secretary of State for Justice* should probably not be regarded as a true exception to the default position that in judicial review of an impugned decision, the legality of that decision should be assessed based on the material before the decision-maker at the time the decision was made. This is because in that case, the court was essentially reviewing the decision-maker's subsequent decision to stand by his initial decision after he had had the opportunity to consider the additional material which emerged following that initial decision. Nonetheless, the case demonstrates the broader point that the default position in judicial review barring consideration of material which arises after the impugned decision is made is not an absolute one.

83 The common rationale justifying the court's departure from the default position is the emphasis on achieving justice and fairness. Admittedly, such a departure is justified only in circumstances that are unusual, if not exceptional. That said, in our judgment, the present case, which concerns the Comptroller's assessment of a *covert* EOI request, is one such unusual situation because the persons of interest in this case (namely, the five Korean taxpayers and the 51 implicated companies) were afforded the opportunity to raise issues to the Comptroller only *after* his decision on the Request had been made. As acknowledged by the Comptroller himself, if subsequent facts or evidence emerge calling into question an EOI request's compliance with the Eighth Schedule requirements, the Comptroller would no longer have a basis to act on and accede to that request (see [73] above). The Comptroller should not be shielded from judicial review if a person of interest is able to satisfy the court that the basis of the Comptroller's decision was in fact incorrect. This position is also not at cross-purposes with the *raison d'être* of the EOI regime, which serves to facilitate the exchange of *foreseeably relevant* information between tax administrations so as to address cross-border tax evasion. Within this

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context, if it can demonstrably be shown within a *reasonable time* of the Comptroller's initial decision that the EOI request in question has not in fact satisfied the Eighth Schedule requirements such that the touchstone of foreseeable relevance has not been established, there is no reason for the Comptroller not to reconsider his initial decision on that request.

Summary of the relevant legal principles on the Comptroller's role

84 In summary, the relevant principles in relation to the Comptroller's role in dealing with EOI requests may be expressed as follows:

(a) The standard for assessing EOI requests remains the EOI Standard of foreseeable relevance. The requirements in the Eighth Schedule help to ensure that the touchstone of foreseeable relevance is satisfied, while ensuring at the same time that relevant information is exchanged to the widest possible extent. The Comptroller must be satisfied that the information specified in the Eighth Schedule has been provided by the foreign tax authority unless he waives any of these requirements.

(b) The Comptroller's assessment of the foreseeable relevance of the requested information is important in determining whether an EOI request amounts to a fishing expedition, that is to say, a speculative request that has no apparent nexus to an ongoing tax inquiry or investigation by a foreign tax authority. If the Comptroller should so conclude, he should not provide the requested information.

(c) The Comptroller is afforded a wide discretion in dealing with EOI requests. In general, he is not expected to go behind the assertions made by a foreign tax authority in an EOI request. The Comptroller is

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not obliged to embark on an independent investigation or a mini-trial to establish the veracity of the foreign tax authority's statements, nor is he required to delve into questions concerning a foreign jurisdiction's domestic law.

(d) In assessing an EOI request, any doubts which the Comptroller may have as to whether the Eighth Schedule requirements have been satisfied and/or whether the EOI Standard of foreseeable relevance has been met should be clarified with the foreign tax authority. Such doubts may arise on the face of the EOI request itself or from the representations made by the person(s) of interest in response to the request. The Comptroller should make reasonable inquiries to satisfy himself that the requirements in the Eighth Schedule have been complied with and the "foreseeable relevance" standard met. Where the foreign tax authority provides an explanation to clarify any doubts that may arise, the Comptroller is not obliged to embark on a substantive inquiry into the correctness of that explanation.

(e) Each EOI request is generally assessed at the time it is made. At the material time, there need only be a reasonable possibility that the requested information will be relevant. Subsequent matters going towards the actual relevance of the requested information once it has been provided will generally be immaterial in a review of the Comptroller's initial decision on the request.

(f) However, where a person of interest has not been served with notice of the EOI request and becomes aware of the request only after the Comptroller has made his decision on it, the person of interest should have the opportunity to raise concerns as to the validity of the request

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> within a reasonable time, and the Comptroller should reconsider his initial decision in the light of these concerns if they appear to be legitimate. If necessary, the Comptroller should consult and seek the views of the foreign tax authority on any doubts which may arise from the representations made by the person of interest.

85 With these principles in mind, we turn to the three issues outlined at [31] above which arose in this appeal.

Our decision

Whether the issues and facts raised after the time of the Comptroller's decision on the Request should be considered

86 In respect of the issue set out at [31(a)] above, we proceeded on the basis that we would consider the issues and facts raised by the Appellants after the time of the Comptroller's decision to accede to the Request and issue the Production Notices on 21 and 27 January 2014. This was because the EOI process in this case had proceeded covertly, with the result that the Appellants first had the opportunity to raise issues to the Comptroller only after he had made his decision on the Request. Further, the Comptroller had expressly stated that it was, and *remained*, his position that the information sought in the Request was foreseeably relevant and met the gateway requirements listed in the Eighth Schedule. Hence, the Comptroller in fact had the opportunity to consider the subsequent material raised by the Appellants, and had continued to stand by his decision right up to the time of the hearing in the court below. This was similar to the situation in *BBC v Secretary of State for Justice* (see [81]–[82] above). In these circumstances, we thought it appropriate to consider the subsequent material presented by the Appellants.

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Whether the Eighth Schedule requirements had been complied with

87 With regard to the issue of whether the requirements in the Eighth Schedule had been complied with in this case (see [31(b)] above), we concluded that they had and that the confirmations given by the NTS had not been affected or undermined by the issues raised by the Appellants.

88 The Appellants highlighted to us four issues which they claimed raised an arguable or *prima facie* case of reasonable suspicion that the statements made by the NTS in the Request pursuant to paras 7 and 8 of the Eighth Schedule were incorrect. These issues, which were by and large the same as those outlined at [26] above, were as follows:

(a) In relation to para 8 of the Eighth Schedule, which required the NTS to declare that it had pursued "all means available" in Korea to obtain the requested information:

(i) First, no request had ever been made to the Appellants for the information sought.

(ii) Second, four days after the Request was made, the NTS obtained in Korea a search and seizure warrant in respect of the 1st Appellant's offices. This indicated that there remained other measures open to the NTS at the time it made the Request.

(b) In relation to para 7 of the Eighth Schedule, which required the NTS to declare that the Request was in conformity with Korean law and administrative practices:

(i) First, the tax residency of the 1st Appellant was being disputed, and the rest of the Appellants had likewise sought the

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NTT's adjudication on their tax residency. The NTS therefore had not established tax jurisdiction over the Appellants.

(ii) Second, any possible assertion of tax liability for the period from 2003 to 2007 was time-barred under Korean domestic law. This meant that the Request, which sought information for the period from 1 January 2003 onwards, was not in conformity with Korean law and administrative practices.

We deal with each of these objections in turn, beginning with those pertaining to para 7 of the Eighth Schedule.

Para 7: Conformity with the Requesting State's domestic law and administrative practices

89 Paragraph 7 of the Eighth Schedule reads as follows:

> 7. A statement that the request is in conformity with the law and administrative practices of the country of the competent authority, and that the competent authority is authorised to obtain the information under the laws of that country or in the normal course of administrative practice.

(1) The Appellants' tax residency

90 The Appellants contended that the NTS lacked the jurisdiction to impose taxes on them since the tax residency of the 1st Appellant remained in dispute. The Appellants further argued, in respect of *all four* of them, that "[a]t all times, including the time of the issuance of the [Production] Notices, it has not been established that the Appellants were Korean tax residents liable to pay taxes on worldwide income". It was submitted that there was a "clearly established" mistake of fact by the Comptroller as to the tax residency of all the Appellants, and this mistake gave rise to unfairness because it played a material part in the Comptroller's decision to issue the Production Notices.

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91 In our judgment, there was no merit in these arguments for several reasons. First, at the time the Production Notices were issued on 21 and 27 January 2014, the Appellants had yet to dispute their tax residency and it was thus not an issue before the Comptroller. The relevant Korean proceedings disputing the 1st Appellant's tax residency were brought only in May 2014, some three months after OS 106 was filed in Singapore on 11 February 2014 and almost four months after the Production Notices were issued (see [22] above).

92 Second, even though the 1st Appellant was disputing his tax residency in Korea at the time the present appeal was filed, the relevant proceedings had not been concluded and were still pending before the Seoul Administrative Court, with the 1st Appellant's earlier rounds of objections having been rejected (see [22]–[24] above). Thus, as far as the 1st Appellant was concerned, it could not be said that there was a "clearly established" mistake regarding his tax residency at the time of the Comptroller's decision on the Request. This alleged mistake was contentious and not objectively verifiable.

93 Third, in relation to the 2nd to 4th Appellants, the NTS had represented to the Comptroller that there was no live dispute in relation to their tax residency. In any event, their tax residency was immaterial because the NTS sought information concerning them not on the basis of their being tax resident in Korea, but on the basis of its suspicion that they were involved in tax evasion with the 1st Appellant. In this regard, the Comptroller cited the example in para 8(e) of the OECD Commentary of how the EOI Standard might work in practice, and stated that the scenario in that example was virtually identical to the scenario in the present case:

> e) The tax authorities of State A conduct a tax investigation into the affairs of Mr. X. Based on this investigation the tax

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> authorities have indications that Mr. X holds one or several undeclared bank accounts with Bank B in State B. However, State A has experienced that, in order to avoid detection, it is not unlikely that the bank accounts may be held in the name of *relatives of the beneficial owner*. State A therefore requests information on all accounts with Bank B of which Mr. X is the beneficial owner and *all accounts held in the names of his spouse E and his children K and L*. [original emphasis omitted; emphasis added in italics]

94 More importantly, the NTS had confirmed to the court that it *still* maintained that the Appellants were tax resident in Korea, and that the Request remained valid notwithstanding the tax residency challenge brought by the 1st Appellant. Thus, the NTS stood by its statement confirming that the Request was in conformity with Korea's domestic law and administrative practices. Given the statutory scheme, the Comptroller was entitled to accept, and, indeed, rightly accepted, the NTS's assertions at face value. As we discussed above at [48]–[57], the Comptroller is not required or expected to go behind the assertions and statements made by a foreign tax authority in its EOI request. For the EOI regime to run effectively, the Comptroller must be able to assume the correctness of the information laid before him by the foreign tax authority. It cannot be part of the Comptroller's function, when deciding whether to accede to an EOI request, to resolve contentious issues of foreign law or reach definitive conclusions as to whether the person of interest is or is not liable to tax in the Requesting State: see also *Volaw* at [197]. To hold otherwise would not only render the EOI regime inoperable and impractical, but also run counter to its purpose, which is to facilitate the exchange of information "to the widest possible extent" in order to combat international tax evasion.

(2) The Appellants' time bar objection

95 As for the time bar issue, the question of a possible time bar arose only *after* the Production Notices had been issued. It was not an issue at the time the

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NTS made the Request, and likewise at the time the Comptroller issued the Production Notices. It would defeat the EOI regime's whole purpose of facilitating investigations into suspected tax evasion if, following a decision on an EOI request which was valid when it was made, a person of interest were able to raise a time bar objection claiming that the request had subsequently become time-barred and therefore invalid.

96 In addition, we agreed with the AG's submission that the Appellants' time bar argument conflated *investigation* with *prosecution*. The mere fact that the NTS might now be time-barred from prosecuting tax evasion for certain years did not mean that the information relating to those years was no longer relevant to the NTS's tax investigations into suspected tax evasion for periods that were not caught by the alleged time bar. Critically, the NTS confirmed that it *still* required all the information sought in the Request for its investigations. The Appellants' time bar objection thus had no bearing on whether the Request was valid and whether it complied with para 7 of the Eighth Schedule.

Para 8: Pursuing "all means available" in the Requesting State

97 We turn next to para 8 of the Eighth Schedule, which states:

> 8. A statement that the country has pursued all means available *in its own territory* to obtain the information *except those that would give rise to disproportionate difficulties*. [emphasis added]

The Appellants raised two objections in relation to this requirement. They claimed that the NTS's statement that it had pursued "all means available" in Korea to obtain the requested information was incorrect *at the time of the Comptroller's decision* as: first, no request had ever been directly made to the Appellants for the information in question; and second, four days *after* the Request was made, the NTS obtained a search and seizure warrant in Korea

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against the offices of the 1st Appellant, which showed that there were other measures open to the NTS at the time it made the Request.

98 The rebuttal to the Appellants' first point can be found in *Taylor Fladgate*, where the Jersey Royal Court said (at [52]):

> … [A]ssuming it is correct that the Portuguese Competent Authority [has] not made direct inquiries of the Portuguese residents it suspects to be beneficial owners, those persons have (as I understand it) in effect allegedly failed to declare that beneficial ownership. It seems *somewhat naïve* to suggest that in such circumstances the Portuguese Competent Authority should inquire of those persons whether they are beneficial owners and accept their responses. The *only proportionate way* of ascertaining *as a matter of reliable fact* whether they are beneficial owners (as opposed to just relying on what they might care to volunteer) may well be by requesting that information from [the applicant] (and the Jersey Companies Registry) in Jersey where that information is actually held. … [emphasis added]

99 It seemed to us that the same could be said in this case. It is important to note that para 8 of the Eighth Schedule is not an absolute requirement. It does not require that *all* available means in the Requesting State must have been taken before an EOI request can be made; instead, it contains an important qualifier that excludes means which would give rise to "disproportionate difficulties".

100 In our judgment, Ms Kam was correct in her submission that the countervailing consideration of preserving evidence while investigating tax evasion cases was important, and that the NTS's decision not to approach the Appellants directly for the requested information did not mean that the NTS had therefore failed to comply with para 8 of the Eighth Schedule. Notably, the NTS had previously requested the Appellants on numerous occasions to assist and provide documents in relation to its tax investigations, but to no avail; the NTS had also expressed concerns that the Appellants might destroy relevant

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evidence. Further, anti-tipping off provisions have been statutorily enacted in the ITA to help keep the EOI process confidential in appropriate circumstances.

101 As to the Appellants' second point pertaining to the search and seizure warrant obtained by the NTS after the Request was made, there is no merit in it. In our judgment, para 8 of the Eighth Schedule should properly be construed to mean that the foreign tax authority must have taken all available steps *within its jurisdiction* (save for those that would give rise to disproportionate difficulties) to obtain the information sought in its EOI request. Whatever the search and seizure warrant in respect of the 1st Appellant's offices in *Korea* applied to, in our judgment, it would likely not have applied to documents pertaining to bank accounts in *Singapore*, which was what was sought in the Request. In any event, there was no evidence before us as to the scope of the search and seizure warrant, and in those circumstances, we did not think there was any basis for concluding that there was a reasonable suspicion that the requirements in the Eighth Schedule had not been met.

102 Our decision on this point was not affected by Mr Tan's reference to para 42 of Ms Wai's affidavit. In our view, this particular paragraph of Ms Wai's affidavit should be read in its entirety. There, Ms Wai traced the difficulties encountered by the NTS (which the NTS had apprised the Comptroller of) in seeking to obtain information for its investigations into the five Korean taxpayers:

> According to the Competent Authority of the Republic of Korea [*ie*, the NTS], and contrary to the [Appellants'] assertions …, the [Appellants] have not been cooperative in investigations undertaken in Korea by the Competent Authority of the Republic of Korea. In [its] preliminary investigations, the Competent Authority of the Republic of Korea analyzed the financial transactions and business activities of [the 1st

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> Appellant] and [the 2nd Appellant] in Korea and overseas, identifying areas which gave rise to suspicions of tax evasion. The Competent Authority of the Republic of Korea had requested numerous times for [the 1st Appellant] and [the 2nd Appellant] to assist and provide documents in relation to [its] tax investigations but they had without fail refused to do so. The Competent Authority of the Republic of Korea found that [the 1st Appellant], [the 2nd Appellant], [the 4th Appellant], among others, as well as companies related to them, h[e]ld bank accounts in Singapore and the Competent Authority of the Republic of Korea required more information about these bank accounts for [its] ongoing tax investigations. The Competent Authority of the Republic of Korea formed the view that it would not be able to obtain this required information without seeking the [Comptroller]'s assistance via the Request, and it was also concerned about the possibility of the [Appellants] destroying relevant evidence. …

103 We pause here to note that this assertion – namely, that the NTS had formed the view that it would not be able to obtain the requested information without seeking the Comptroller's assistance – *precedes* the portion of para 42 of Ms Wai's affidavit that Mr Tan relied on. And that portion, which comes immediately after the passage quoted at [102] above, states:

> … The Competent Authority of the Republic of Korea had even gone through the exceptional route of obtaining a search and seizure warrant from the Seoul Central District Court on 27 September 2013 in an attempt to obtain *the evidence [it] required*. … [emphasis added]

104 Relying on this passage, Mr Tan sought to show that the NTS had obtained the aforesaid search and seizure warrant to seek information identical to the information sought in the Request. We did not think such a finding was warranted. In our judgment, it was at least equally possible that the phrase "the evidence [the NTS] required" in the above extract from para 42 of Ms Wai's affidavit referred to the evidence that the NTS was *generally* seeking for the purposes of its investigations into the five Korean taxpayers, as opposed to the exact same information as that sought in the Request.

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105 Hence, we found the Appellants' contentions regarding the alleged instances of non-compliance with para 8 (as well as para 7) of the Eighth Schedule to be ultimately unsustainable.

Whether the Comptroller had complied with the IRAS's internal decision-making procedures in assessing the Request

106 Lastly, we deal with the Appellants' argument at [31(c)] above pertaining to the Comptroller's alleged non-compliance with the IRAS's internal procedures for processing EOI requests (as recounted at [64] above) and his alleged failure to properly satisfy himself that the Request complied with the ITA and the Convention.

107 First, the Appellants questioned whether the Request had even been reviewed by an EOI review committee. Their attempt to raise doubts in this regard was based on the close proximity in time between the clarification provided by the NTS to the Comptroller at the meeting in Korea on 21 January 2014 (see [18] above) and the Comptroller's issuance of the first of the Production Notices (namely, the notice to the Singapore branch of Woori Bank) on the same day. Mr Tan questioned how it could have been possible for an internal committee *in Singapore* to have reviewed the Request in the light of the clarifications provided by the NTS at the above meeting *in Korea* when the first of the Production Notices was issued on the very same day that the meeting took place. In our judgment, there was no basis to draw the inference that the appropriate flow of information did not in fact take place. The short point is that even if the persons reviewing the Request had not been present at the meeting in Korea, it cannot be doubted that ample means exist for people in different countries to work and communicate with one another virtually instantaneously.

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108 The Appellants' more pertinent objection was in relation to the evidence placed before the Comptroller by the NTS, upon which the Comptroller based his decision to accede to the Request. The Appellants submitted that based on that evidence, the Comptroller had made inquiries to and sought clarifications from the NTS, but had not received satisfactory responses from the latter, and hence, the Comptroller should have restricted the Production Notices to exclude information in respect of which satisfactory responses had not been given by the NTS. Pertinently, the Appellants relied on parts of the evidence which they said suggested that the Comptroller had relied *solely* on the information contained in the USB Drive mentioned at [15] above, which information pertained to only 27 of the 51 implicated companies. Based on this, the Appellants contended that the Comptroller's decision to issue the Production Notices targeting *all* 51 companies was not defensible.

109 In our judgment, it was apparent from the evidence filed on behalf of the Comptroller that his decision to accede to the Request was based on the totality of the information and evidence provided by the NTS over the course of the several months that intervened between the time the Request was made and the time the Production Notices were issued. This extended beyond the information contained in the USB Drive to the further information and documents that were presented to the Comptroller at the meeting in Korea on 21 January 2014. The Comptroller was satisfied on the basis of the *totality* of *all* of the aforesaid evidence and material provided by the NTS that the Request had been properly made and should be acceded to. We came to this conclusion based on Ms Wai's affidavit, where she deposed:

> 20. The Competent Authority of the Republic of Korea [*ie*, the NTS] has also informed the [Comptroller] that in the course of [its] investigations, [it] uncovered a document in [the 1st Appellant's] USB drive [*ie*, the USB Drive mentioned at [15] above], found in the Korean office of [the K] Group, which

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> indicated that [the 1st Appellant] is the "beneficial owner" of these 51 companies i.e. that he is either the shareholder or he has used the names of his family members or key employees as the directors and/or shareholders of these nominee companies.
> …

110 Ms Wai's affidavit then went on as follows:

> 20. … In reliance on this document [which was found in the USB Drive] *and further clarification and information* provided by the Competent Authority of the Republic of Korea, I have prepared a table setting out the list of the 51 foreign companies and their respective links to [the 1st Appellant], which is annexed hereto and marked as "WYT-4".
>
> …
>
> 32. At the meeting in Korea with the Competent Authority of the Republic of Korea on 21 January 2014, the Competent Authority of the Republic of Korea provided the [Comptroller] with *further document*s to show the links in the relationships [which] the 51 foreign companies had with each other and how all the 51 foreign companies were linked and/or related to [the 1st Appellant] and the other [Appellants]. These *further documents* were also taken into account by the [Comptroller] in assessing whether the information requested for was "foreseeably relevant".
>
> [emphasis added]

111 In our judgment, it was plain, when read in context, that Ms Wai's evidence was not to the effect that the totality of the evidence relied on by the Comptroller was limited to that which was contained in the USB Drive. On the contrary, the Comptroller had also relied on other information and "further documents" that he received from the NTS, and we have no reason to disbelieve his evidence on this point. This evidence was corroborated by and also clear from the minutes of the meeting in Korea on 21 January 2014, which demonstrated that the Comptroller had sight of further documents and information beyond what was found in the USB Drive. The minutes stated that copies of "some of the documents" obtained by the NTS containing details relating to the 51 implicated companies were provided to the Comptroller at the

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meeting. In addition, in its reply on 16 December 2013 to the Comptroller's first letter of 7 November 2013 seeking clarification, the NTS referred the Comptroller to information beyond what was contained in the USB Drive in order to substantiate the basis of its suspicion that the 1st Appellant had evaded taxes by not reporting investment income in the 51 implicated companies, which he beneficially owned. The NTS pointed out that it had "many substantial documents" and emails that it had obtained through its investigations, as well as statements of officials in the K Group who had lent their names for the incorporation of the Related Foreign Entities (see [15] above).

112 Hence, in our judgment, the Comptroller had made his decision to accede to the Request based on the totality of all the evidence presented to him from the time the Request was submitted on 23 September 2013 up to the time of the meeting in Korea on 21 January 2014, and this evidence was not confined to the information contained in the USB Drive. The Comptroller had sought clarification from the NTS on two separate instances (see [11]–[16] above), and thereafter, had also met the NTS's representatives in Korea to discuss the Request. Among other things, in his first letter to the NTS dated 7 November 2013 (see [11] above), the Comptroller had sought *specific* clarifications to understand "the relevance of the requested information to [the NTS's] tax investigation" as well as the structure and mechanics of the suspected tax evasion scheme (along with any supporting evidence that the NTS had). The Comptroller had evidently evaluated the Request carefully and had made appropriate inquiries of the NTS, which in turn had duly responded. It was apparent that the Request was not a fishing expedition, and that the requested information was foreseeably relevant to the NTS's ongoing tax investigations. The Request identified the entities involved in those investigations and sought specific information relating to those entities. We thus find that the Comptroller

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had applied his mind to ensure that the Request complied with the ITA and the Convention, and could not be said to have improperly delegated his decision-making power to the NTS.

113 In the circumstances, we held that the Appellants' case fell short of the threshold for granting leave to commence judicial review proceedings. It could not be said that the Appellants had established an arguable or *prima facie* case of reasonable suspicion that the Comptroller's decision was tainted by any illegality or irrationality so as to afford grounds for judicial review.

Conclusion

114 We therefore dismissed this appeal. We also fixed the costs of the appeal as follows, and made the usual order for payment out of the security for costs:

(a) costs to the Comptroller – $35,000 all in, inclusive of disbursements; and

(b) costs to the AG – $20,000 all in, inclusive of disbursements.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Tan Chee Meng SC, Ho Pei Shien Melanie, Lim Ying Min, Rachel Ong, New Xiao Yan Charmaine and Ngiam Heng Hui Jocelyn (WongPartnership LLP) for the appellants;
Koh Meng Sing Alvin, Li Yourui Charles, Nai Thiam Siew Patrick and Pang Mei Yu (Inland Revenue Authority of Singapore) for the respondent;

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Aurill Kam and Fu Qijing (Attorney-General's Chambers) for the Attorney-General.

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