ABU *v* Comptroller of Income Tax
[2015] SGCA 4

Case Number	: Civil Appeal No 150 of 2013
Decision Date	: 22 January 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Sundareswara Sharma (ATMD Bird & Bird LLP) for the Appellant; Vikna Rajah, Patrick Nai and Michelle Chee (Inland Revenue Authority of Singapore) for the Respondent.
Parties	: ABU — Comptroller of Income Tax

Revenue Law – international taxation – double taxation agreement

Statutory Interpretation – construction of statute – presumption against retrospective operation

22 January 2015

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

Introduction

1 This appeal arises in the context of an exchange of information request made by the National Tax Agency of Japan ("the JNTA") to the Comptroller of Income Tax ("the Comptroller"). The request was made pursuant to Art 26(1) of the Agreement between the Government of the Republic of Singapore and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income as amended by the Protocol ("the Treaty").

2 The JNTA sent a letter to the Comptroller requesting, among other things, the production of bank statements for certain accounts held by the Appellant, his son and their related entities with [BLM] Bank ("the Bank") pursuant to Art 26(1) of the Treaty ("the Letter of Request"). Having concluded that the bank statements were protected against unauthorised disclosure by s 47 of the Banking Act (Cap 19, 2008 Rev Ed), the Comptroller filed Originating Summons 331 of 2013 ("OS 331") against the Bank for an order directing the production of the bank statements under s 105J(2) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the ITA"). The Appellant applied for and was granted leave to intervene in OS 331.

3 On 31 May 2013, an order in terms of OS 331 was made by a High Court judge ("the Judge"). The Appellant filed Summons No 3310 of 2013 ("Summons 3310") for the order of court dated 31 May 2013 to be discharged and Summons No 5041 of 2013 ("Summons 5041") for execution of the order of court to be stayed pending the determination of legal proceedings commenced against the JNTA in Japan challenging the validity of the Letter of Request. Both summonses were dismissed by the Judge on 17 October 2013.

4 On 13 November 2013 the Appellant filed his appeal in Civil Appeal No 150 of 2013 ("CA 150") against the Judge's decision to dismiss Summonses 3310 and 5041. We heard the appeal on 15 October 2014. At the close of the hearing we dismissed the appeal save to the extent that the scope of the order made below on 31 May 2013 was to be varied to reflect the terms of the original request

made by the JNTA and no more. As we indicated we would, we now set out the grounds of our decision in full.

Facts

5 The Appellant is a Japanese national residing in Japan. On 22 November 2012, the JNTA sent the Letter of Request to the Comptroller making a request for information pursuant to Art 26(1) of the Treaty. Article 26 bears setting out in full:

> **ARTICLE 26**
>
> 1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement 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 local authorities, insofar as the taxation thereunder is not contrary to this Agreement. 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 Contracting 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:
>
> (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.
>
> 4. If information is requested by a Contracting State in accordance with the provisions of this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though the other Contracting 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 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. However, a Contracting State may decline to supply information

relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the other communications are protected from disclosure under the domestic laws of that Contracting State.

6 The ostensible purpose of the JNTA's request, insofar as it is relevant to these proceedings, was to determine whether the Appellant had failed to report distributions he had received from foreign securities investment funds which he and his family had invested in. In this regard the JNTA had found documents during the Appellant's tax examination in Japan suggesting that he had not done so. This was material because the Appellant was subject to income tax on his worldwide income under Japanese law.

7 Arising from its suspicions, the JNTA requested, among other things, the production of bank statements for the following accounts held with the Bank for the period 2006 through to 2011 and furnished the following reasons why these bank statements were required:

S/N	Account No	Account Holder	Reasons
1	[xxx]	The Appellant	The Appellant may have failed to report his financial income including interest arising from the bank accounts in Singapore and other financial income arising from overseas assets paid into bank accounts in Singapore.
2	[xxx]	[B]	[B] is the child of the Appellant and the Appellant may have used the bank account held in [B]'s name to hide his own income.
3	[xxx]	[C Company]	[C Company] was an asset management company located in the Netherlands. Its main source of income was dividends from the Dutch Shares. The Appellant was the representative of [C Company]. Income that was attributable to the Appellant may have been deposited into this account.
4	[xxx]	[D Company]	[D Company] was the investment management company for all foreign security investment trusts which the Appellant's family invested in. The JNTA had to examine [D Company's] bank accounts to determine whether there was any hidden income attributable to the Appellant's family (and therefore the Appellant) which had not been declared.

5	[xxx]	[E Company]	[E Company] was an asset management company located in the Netherlands. It was formed in October 2007 and dissolved in November 2009. The Appellant was the representative of [E Company]. [E Company] derived its revenue mainly from dividend income from foreign security investment funds. It was possible that the Appellant's Family continued to use the bank account of [E Company] to collect investment income and dividends attributable to them.
6	[xxx]	[F Trust]	These were bank accounts of the foreign securities investment trusts managed by [D Company]. Examining these accounts was necessary to clarify issues relating to the financial income attributable to the Appellant's Family.
7	[xxx]	[G Trust]	
8	[xxx]	[H Trust]	

The Proceedings Below

8 Having formed the opinion that the said bank statements were protected from unauthorised disclosure by s 47 of the Banking Act, the Comptroller sent a notice under s 105E of the ITA to the Bank and each of the account holders on 15 April 2013 informing them of his intention to make an application to the High Court for the production of the bank statements under s 105J(1) of the ITA. Section 105J of the ITA is central in these proceedings and the material parts of it read as follows:

> **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.

(4) Both or either of the following persons may, within 7 days from the date the order is served on the person against whom it is made, apply to the High Court to have the order discharged or varied:

(*a*) the person against whom the order is made;

(*b*) the person in relation to whom information is sought,

and the Court, on hearing such an application, may discharge the order or make such variation to it as it thinks fit.

…

(6) Proceedings under this section other than subsection (4) may, at the discretion of the High Court, be conducted in the presence or absence of —

(*a*) the person alleged to have possession or control of that information or against whom the order under subsection (2) is made, as the case may be; or

(*b*) the person in relation to whom information is sought.

…

9 Thereafter on 19 April 2013 the Comptroller filed OS 331 against the Bank. The main prayer in the originating summons was for an order under s 105J(2) of the ITA compelling the Bank to produce all bank statements for the period 1 January 2006 through to 31 December 2011 in relation to *all the accounts* held by the eight account holders identified in the Letter of Request (see [7] above). It may be noted here that the prayer sought by the Comptroller was wider than the JNTA's original request which related to the eight identified accounts only. We address this point later in these grounds (see [88] below).

10 OS 331 was first heard by the Judge on 9 May 2013. The defendant Bank did not attend. At that hearing, counsel for the Appellant made an oral application for leave to intervene in OS 331 which was granted by the Judge. The Judge exercised his discretion under s 105J(6) of the ITA to

allow the proceedings to continue *inter partes*.

11 Subsequently, there were several hearings before the Judge and several affidavits were filed by the Appellant and the Comptroller in support of their respective cases. In short, the Appellant objected to the production of the bank statements on the following broad grounds:

(a) The Comptroller's notice to the Appellant under s 105E of the ITA was ineffective as it was sent to the wrong residential address.

(b) The statutory regime implementing the Treaty did not permit the disclosure of information relating to periods before 14 July 2010, this being the date on which the Treaty took effect in Singapore. This was because it was presumed that legislation did not have retrospective effect. There was nothing in the relevant statutory regime to displace the presumption.

(c) The JNTA was precluded from obtaining the bank statements under the Treaty as it could not have obtained the information under Japanese law. The issuance of the Letter of Request was at variance with the laws and administrative practices of Japan. This was because:

(i) the Appellant was subject to a voluntary tax examination in Japan and not a criminal investigation. In a tax examination the disclosure of information was purely voluntary and the JNTA did not have the power to compulsorily obtain books and information; and

(ii) the JNTA was precluded from requesting information for 2009 and earlier years by the tax limitation period under Japanese law.

(d) The JNTA had not pursued all available means to obtain the information in Japan. In this regard the Appellant had disclosed statements for an account which he held with [I Bank] in Singapore upon JNTA's request. The JNTA could have similarly requested that the Appellant produce the bank statements for his account with the Bank but had not done so.

(e) By reason of (c) and (d) above, the Letter of Request did not comply with the requirements set out in the Eighth Schedule of the ITA.

(f) The Appellant had filed the distributions he received from the investment funds with the JNTA.

(g) The JNTA's request did not satisfy the requirement of foreseeable relevance under Art 26(1) of the Treaty because:

(i) The JNTA's request amounted to fishing. The language of the request as stated in the Comptroller's supporting affidavit was tentative and based on assumptions and suspicions.

(ii) The JNTA had already concluded its examination of the Appellant for the years 2009, 2010 and 2011 and had issued a Notice of Non-Requirement of Reassessment for those years. The enquiry for the years 2006 to 2008 had also been concluded. Hence, the Letter of Request had ceased to reflect the needs of the JNTA.

(iii) The bank accounts belonging to the other account holders were not sufficiently linked to the Appellant's tax examination.

12 Against this, the Comptroller took the position that:

(a) The s 105E notice was properly served on the Appellant's last known address. In any event, the Appellant was not prejudiced as he was aware of the notice and was represented at the hearing.

(b) Under the Treaty, and therefore the ITA, information could be exchanged in relation to any taxable period. This would not involve giving the statutory regime retrospective effect as no order for production could be made until after the Treaty came into effect.

(c) The JNTA was not precluded from requesting information for 2009 and earlier years. The JNTA had confirmed that Japanese law permitted a re-assessment to be conducted up to seven years before the tax return date where there had been tax evasion.

(d) The JNTA had also confirmed that the examinee's consent was not required where the information was sought under a tax convention.

(e) The requirements set out in the Eighth Schedule of the ITA did not require the Court to go behind what the JNTA had stated in the Letter of Request.

(f) The JNTA had confirmed that it still required the requested information. Although the Appellant's tax examination had been closed based on the information in the JNTA's possession, the information requested would determine whether the Appellant needed to be re-examined.

13 On 31 May 2013, the Judge made an order in terms of the Comptroller's application in OS 331.

14 On 19 June 2013 the Appellant filed Summons 3110 to discharge the order of court made on 31 May 2013 and to obtain discovery of the Letter of Request which had not been disclosed to the Appellant at that time as required under O 98 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The other account holders filed Summonses Nos 3108, 3109, 3111, 3112 and 3113 of 2013. The orders sought therein were identical to those sought by the Appellant in Summons 3110. In addition the other account holders prayed for leave to intervene in OS 331.

15 The Appellant's application in Summons 3110 was premised on a change in circumstances between the end of May 2013 and June 2013 given alleged further developments arising from communications between his representatives and the JNTA in Japan. It was alleged that the JNTA had confirmed that they would not re-examine the Appellant and, therefore, the Letter of Request had ceased to represent the needs of the JNTA. Moreover the JNTA had confirmed that the Appellant's case was not one of tax-evasion. This meant that a limitation period of three years applied and no re-assessment could be made for years up to and including 2010. As the requested information could not be obtained under Japanese law, it fell outside the scope of the Treaty. The other account holders primarily relied on the same grounds in their respective applications. The only difference was that it was additionally asserted by them that the bank statements for their respective accounts were not relevant to the tax-examination in Japan which related to the Appellant only.

16 On 17 July 2013, the Comptroller filed an affidavit exhibiting a letter from the JNTA dated 16 July 2013. In that letter, the JNTA confirmed that it still required the information requested in the Letter of Request. The JNTA also confirmed that the request had been made in accordance with Japanese law and administrative practices.

17 The Comptroller resisted Summons 3110 and the summonses filed by the other account holders on the principal basis that because OS 331 had been heard *inter partes*, there was no basis to

discharge or vary the order of court made by the Judge. Further, the other account holders were aware that OS 331 was being contested and should have applied to intervene before the order was made. In fact, [B], who filed affidavits on behalf of each of the other account holders, had filed an affidavit on the Appellant's behalf in the course of the *inter partes* hearing. The Comptroller argued that the applications made by the other account holders were dilatory in nature. In any event, the Comptroller submitted that the order for production of the bank statement was correctly made in the circumstances of the case.

18 On 20 September 2013, [B] and [D Company] filed a complaint against the JNTA in the Tokyo District Court challenging the validity of the Letter of Request ("the Japan Proceedings"). In the Japan Proceedings, it was alleged that the Letter of Request did not meet the requirements stipulated under Japanese law for its issuance and that the JNTA had lost its right to continue with the request on 17 April 2013 when it notified the Appellant that his tax examination had been concluded. Shortly after the Japan Proceedings were commenced, on 25 September 2013, the Appellant filed Summons 5041 for the execution of the order of court made on 31 May 2013 to be stayed pending the determination of the Japan proceedings. The Appellant contended that irreparable harm would be done to him if the bank statements were disclosed to the JNTA before the Japanese courts had the opportunity to determine the matters before it.

19 The Comptroller objected to such a stay being ordered. The Comptroller pointed out that the Eighth Schedule of the ITA only required the request to contain a statement that it was made in conformity with the laws of the requesting state. It said that the Singapore court should not be concerned with whether this statement was right or wrong.

20 The Judge delivered his judgment on 17 October 2013. The written grounds for his decision are reported as *Comptroller of Income Tax v BLM* [2014] 1 SLR 123 ("Judgment"). By his decision, the Judge dismissed each of the summonses filed by the Appellant and the other account holders. On 13 November 2014, the Appellant filed his appeal to this Court in CA 150. No appeal was filed by the other account holders.

Issues before this Court

21 The arguments before this Court were essentially a rehash of those made below. We should note however that between the time the appeal was filed and the time it was heard, the Appellant independently obtained a copy of the Letter of Request from the JNTA for use in these proceedings. Armed with the Letter of Request, the Appellant filed Summons No 1373 of 2014 to amend his written case in the appeal, in particular, to buttress his contention that the court could substantively review the Letter of Request under s 105J of the ITA. We granted leave to amend on 6 May 2014.

22 Based on the parties' written cases and the oral submissions made before us, there were four broad areas of contention:

(a) The High Court's role under s 105J of the ITA, in particular, whether s 105J contemplated substantive review of the Letter of Request by the High Court.

(b) Whether the statutory regime under the ITA permitted the exchange of information for periods before the Treaty was given effect in Singapore.

(c) Whether the making of an order under s 105J of the ITA was justified in the circumstances of the case.

(d) The position of the other account holders in the appeal.

The High Court's Role under s 105J of the ITA

Background to the statutory regime applicable to exchange of information requests

23 Before turning to the issues directly before us, we should first explain the statutory regime applicable to exchange of information requests made by foreign tax authorities. This was enacted in 2009 as the Income Tax (Amendment) (Exchange of Information) Act 2009 (Act 24 of 2009) ("the 2009 Amendments").

24 At the second reading of the amending bill (see Singapore Parliamentary Debates, Official Report (19 October 2009) vol 86 at columns 1601–1623 ("the Second Reading Speech")), the Minister for Finance, Mr Tharman Shanmugaratnam ("the Minister") explained the broad rationale for the amendments in the following terms (at column 1601):

> The Income Tax (Amendment) (Exchange of Information) Bill proposes amendments to the Income Tax Act that will allow Singapore to implement the internationally agreed Standard for the exchange of information for tax purposes upon request.

25 The "Standard" alluded to by the Minister is contained in Art 26 of the Organisation of Economic Cooperation and Development 2008 Model Tax Convention on Income and on Capital ("the EOI Standard"). It is in *pari materia* with Art 26 of the Treaty (see [5] above).

26 Four pertinent features of the EOI Standard should be mentioned here:

(a) First, the touchstone for the exchange of information under the EOI Standard is whether the requested information is "foreseeably relevant" for carrying out the provisions of the relevant tax treaty or the enforcement of the domestic tax laws of the requesting state. This is unlike the earlier incarnation of the EOI Standard, which Singapore previously implemented in its tax treaties, which required the information to be "necessary" for those purposes instead.

(b) Second, the EOI Standard does not permit a contracting state to decline a request merely because it lacks a "domestic interest" in the information.

(c) Third, it does not permit a contracting state to decline a request for information only because the information is held by a bank, a financial institution or a person acting in a fiduciary capacity.

(d) Fourth, the EOI Standard allows the sharing of information relating to all forms of taxes and not just income tax.

27 Parliament deemed the 2009 Amendments necessary to enable Singapore to comply with its obligations under its tax treaties which incorporated the EOI Standard. In this regard, the statutory regime that existed before the 2009 Amendments did not contain provisions which were specifically geared towards processing requests for information from foreign tax authorities; Singapore's ability to exchange information was instead premised upon the Comptroller's general powers to obtain information for the enforcement of Singapore's domestic income tax laws. Moreover, the Comptroller did not have the power to compel the disclosure of information protected by secrecy laws under s 47 of the Banking Act and s 49 of the Trust Companies Act (Cap 336, 2006 Rev Ed) unless the information was sought for the purpose of investigating or prosecuting domestic tax offences.

28 Yet, while Parliament sought to broaden the scope of the information which could be exchanged between Singapore and its treaty partners, it also sought to implement safeguards to protect taxpayer rights. As the Minister explained in the Second Reading Speech (at columns 1603–1604):

> *An integral aspect of the [EOI Standard] is its respect for taxpayers' rights*. The Bill contains important safeguards in this respect. *Spurious or frivolous requests for information will not be acceded to. Further, it does not allow for what is called "fishing expeditions" – it requires requests for information to be specific, detailed and relevant to the tax affairs of the taxpayer in question*. Consistent with the [EOI Standard], we will only provide assistance where there is a genuine case at hand, and the requested information is specific and relevant to the case.
>
> Additionally, the [EOI Standard] also does not allow jurisdictions to take advantage of the information system of another jurisdiction if it is wider than their own system. Hence, *we will only exchange information that a requesting jurisdiction would have ordinarily been able to obtain under its own laws or administrative practices, had the information resided in that jurisdiction in the first place. Jurisdictions must also have pursued all domestic means to access the requested information before putting forth a request to us*.
>
> Such safeguards do not impede the effective exchange of information. They are provided for by the [EOI Standard] to uphold the principle of respecting taxpayers' rights. With the amendments proposed in the Bill, Singapore is committed to respecting these rights, while fully meeting our obligations under the Standard and playing our full role as a trusted and responsible jurisdiction.
>
> The [EOI Standard] also sets out clear limits on the types of information that jurisdictions are obliged to exchange. Jurisdictions are not obliged to exchange trade or business secrets, or information that is subject to legal privilege. They may also decline to exchange certain information if doing so would be contrary to public policy. Some examples of such information include state secrets or information sought for the purposes of political, religious or racial persecution. However, these are serious grounds of refusal, and we do not expect to invoke them under normal circumstances.
>
> [emphasis added]

Features of relevant statutory regime

29 It was in this context that the 2009 Amendments were passed to implement a comprehensive statutory regime for dealing with exchange of information requests made by foreign tax authorities. Section 105D is the principal enabling provision and it reads as follows:

> 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 the EOI provision 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.

The Treaty was declared to be a "prescribed arrangement" by the Income Tax (Singapore — Japan) (Avoidance of Double Taxation Agreement) Order 2010 (Cap 134, S 397/2010) with effect from 14

July 2010 ("the 2010 Order").

30 Notably, under s 105D(2) of the ITA, a request must provide the information prescribed by the Eighth Schedule unless the Comptroller otherwise permits. At the time of the JNTA's request, the Eighth Schedule then in force provided:

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, the relevance of the information to the purpose of the request, 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. The name and address of any person believed to have possession or control of the information requested for.

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 including getting the information directly from the person in relation to whom the information is requested.

9. The details of the period within which that country wishes the request to be met.

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.

31 Once the Comptroller is satisfied that a request is justified, he has wide powers in most cases to obtain the information under Part XVI of the ITA. There is an exception to this general position however if the Comptroller is of the opinion that the information is protected from unauthorised disclosure by s 47 of the Banking Act or s 49 of the Trust Companies Act. In that event the Comptroller must serve a notice under s 105E of the ITA on the person in relation to whom the information is sought and the person who is believed to have possession and control of the information, unless one of the prescribed exceptions under s 105E(4) exists. Next, the Comptroller must apply to the High Court for an order under s 105J(2) of the ITA granting him access to the protected information (see at [8] above). To this end, the High Court's power to make an order for the production of protected information under s 105J(2) is premised upon whether the conditions in s 105J(3) are satisfied. These conditions are as follows:

(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.

32 We note (purely in passing because it has no relevance to the issues before us) that the ITA was amended in 2013 by the Income Tax (Amendment) Act 2013 (Act 19 of 2013) and s 105J was repealed. The High Court is therefore no longer a party to the exchange of information process. In its place, the Comptroller is empowered to issue a statutory notice to compel the production of information protected from unauthorised disclosure by the Banking Act and the Trust Companies Act.

The High Court's role in assessing the justification of a request

33 Before us, the Appellant did not contend that the making of an order for production of the bank statements would be contrary to the public interest. Therefore the sole issue was whether the making of the order for production was justified in the circumstances of the case. This brings into focus the High Court's role under s 105J(3)(a) of the ITA.

34 In *Comptroller of Income Tax v BJY and others* [2013] 4 SLR 801 ("*BJY*"), Andrew Ang J considered the meaning of the phrase "justified in the circumstances of the case" under s 105J(3)(a) of the ITA. Having referred to that part of the Minister's speech which is set out at [28] above, Ang J observed (at [24]) that the Minister's concerns were reflected in the Eighth Schedule requirements and also in Singapore's tax treaties which incorporated the EOI Standard. In Ang J's view, these considerations (*viz*, the Eighth Schedule Requirements and the EOI Standard), which included the foreseeable relevance of the information, had to be taken into account in determining whether the making of an order for the production of the protected information was justified in the circumstances of the case.

35 The approach in *BJY* can be contrasted with that adopted by Choo Han Teck J in the earlier case of *Comptroller of Income v AZP* [2012] 3 SLR 690 ("*AZP*"). In *AZP*, it was held (at [6]) that three conditions had to be satisfied before the High Court would make an order under s 105J(2) of the ITA:

(a) first, the requested information must be foreseeably relevant to the carrying out of the tax treaty or the enforcement of the requesting state's domestic tax laws;

(b) second, the making of the order must be justified in the circumstances of the case; and

(c) third, the making of the order must not be contrary to the public interest.

In the court below, the Judge followed the approach adopted in *AZP*.

36 It will be apparent that the difference between these approaches is that in *AZP*, the issue of foreseeable relevance was treated as a separate requirement, while in *BJY*, this, as well as the other limitations on the exchange of information under the EOI Standard, were subsumed under the single broad enquiry of whether the making of an order for production was justified in the circumstances of the case. Although there is little difference in substance between them, in our judgment, the approach set out in *BJY* is to be preferred as it coheres with both the plain language of s 105J(3)(a)

which prescribes a single requirement of justification; as well as the legislative intention underlying the statutory regime, which was for the justification of a request to be assessed in the light of the EOI Standard encapsulated in the relevant tax treaty.

37 In our judgment, however, there is an anterior question as to the material which this Court is both required and permitted to consider in satisfying itself of the justification for a request. This was a pivotal issue in the proceedings before us. As he did in the court below, counsel for the Appellant, Mr Sundareswara Sharma ("Mr Sharma"), made three principal arguments as to why an order for the production of the bank statements would not be justified in the circumstances of the present case. First, Mr Sharma contended that the requested information could not have been obtained under Japanese law. Second, Mr Sharma contended that the JNTA had failed to pursue all available means to obtain the bank statements in Japan before making the request. Third, Mr Sharma contended that the request had ceased to be foreseeably relevant to the enforcement of Japan's income tax laws as the JNTA had concluded its tax examination of the Appellant.

38 There was no real dispute that, on its face, the JNTA's request met the requirements of the Eighth Schedule. Each of Mr Sharma's arguments would instead have required the court to go behind the JNTA's statements in the Letter of Request as well as the subsequent confirmations it provided. The Judge below rejected Mr Sharma's arguments in this regard. The Judge held that the justification for a request was to be determined on the face of the request and whether it evidently complied with the Eighth Schedule requirements. The Judge thought that in many respects, the High Court's role under the relevant statutory regime was an "administrative one" and there was little room for the High Court to examine the substantive merits of the Letter of Request (see Judgment at [8]).

39 Before this Court, Mr Sharma was critical of the Judge's interpretation of the High Court's role in this regard. Mr Sharma contended that Parliament's intention in enacting s 105J of the ITA was to ensure that unjustified requests could be denied at two levels in the case of protected information; the Comptroller would be the first level of protection, while the High Court would be the second. Mr Sharma sought to persuade us that the High Court's role under s 105J both permitted and required that it substantively review the Letter of Request and go behind the statements made in it to satisfy itself that those statements were in fact true. To make good these contentions, Mr Sharma relied on the Second Reading Speech where the Minister said (at column 1621):

> *Fishing expeditions can therefore be stopped at two levels – first by [the Comptroller], then by the High Court if it relates to information protected under the Banking Act and Trust Companies Act*. This arrangement offers robust safeguards without compromising on the efficiency and responsiveness of our information exchange regime. It is in essence similar to the processes in other major jurisdictions such as the US and the UK, and is not aimed at stifling the effective exchange of information.
>
> [emphasis added]

40 While we agree that s 105J requires the High Court to be independently satisfied as to the justification of a request, we do not think it follows from the Minister's statements that Parliament had intended for the High Court to substantively review a request to the extent of inquiring into the truth of the factual assertions contained in it. Taking a purposive as well as a contextual interpretation of the statutory scheme, it seems clear to us that Parliament had intended for the validity of a request to be determined on its face. There are four broad reasons for this.

41 First, it is clear from the relevant parliamentary material that Parliament had intended for the justification of a request to be assessed in light of the documentary requirements prescribed by the

Eighth Schedule. In this vein the Minister explained in the Second Reading Speech that (at column 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 Standard*. They will help screen out "fishing expeditions".
>
> [emphasis added]

42 In written submissions, Mr Sharma appeared to suggest that the Eighth Schedule requirements inherently contemplated that the court would examine the veracity of statements contained in a request. In our judgment, Mr Sharma's contention is not borne out. It is manifestly clear from a plain reading of the Eighth Schedule that it only requires a request to include a *statement* to the effect of paragraphs 4, 7 and 8 of the Eight Schedule (see [30] above). In short, once a "statement" to the requisite effect has been made by the requesting authority, then it will have complied with those requirements of the Eighth Schedule. In keeping with the Minister's explanation as to the rationale of the Eighth Schedule requirements (see [41] above), it seems to us that once the Eighth Schedule is complied with, the justification of a request in terms of its consistency with the EOI Standard will be determined without the court going behind the statements made in it.

43 Second, the interpretation advanced by the Appellant produces anomalous results from a practical perspective. If s 105J requires or permits the court to go behind the Letter of Request, there is a real risk of applications made under s 105J of the ITA resulting in full trials calling for the examination of witnesses and the determination of potentially difficult questions of foreign law. This is a pertinent point even if, in essence, a practical one, because although the Minister alluded to the protection of taxpayer rights as being one of the aims of the statutory regime, he also emphasised that this had to be balanced against the need to ensure that the efficacy of the exchange of information machinery was not compromised (see [39] above).

44 Third, international comity would be compromised if the Singapore court was required to make pronouncements that could question the underlying *bona fides* of requests made by foreign tax authorities. Would the foreign tax authority have to appear in our court to prove the basis of its request? If not, how would its right to be heard be secured before potentially adverse findings are made?

45 Fourth, in assessing the justification of a request, the court must be cognisant of its function, which is to apply the relevant provisions of the ITA. It must not step into the shoes of the executive, which is the branch of government charged with the responsibility for entering into and enforcing international agreements, including tax treaties.

46 We recently held in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [188] that international law and domestic law are regarded in Singapore as separate systems of law. We take a dualist view of the relationship between international law and domestic law.

47 Under the dualist view, international law does not form part of Singapore's domestic law "until and unless it is applied or definitively declared to be part of the domestic law by a domestic court" in the case of customary international law (see *Lim Meng Suang* at [118]); or until it has been infused into domestic law by legislation in the case of treaty obligations. In our judgment, it is also a corollary of the dualist view that where legislation has been passed to give effect to Singapore's treaty

obligations, the Singapore court's primary focus must be on applying the relevant provisions of the domestic legislation and not specifically on enforcing the treaty.

48 This is not to say that the treaty will never inform the interpretation of the domestic legislation giving effect to it; as we explained at [36] above, the EOI Standard encapsulated in the relevant tax treaty is relevant to the issue of justification that is raised by s 105J(3)(a) of the ITA. But it is not for us, in effect, to adjudicate the validity, as a matter of international law (in this case the relevant treaty), of a request made by a foreign tax authority of our tax authority. Indeed, the 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. But where the matter comes to the court, its role is to assess the justification for the request on the face of the request. To the extent that Mr Sharma's submissions suggested the contrary, we find them untenable.

The Temporal Scope of the Exchange of Information Regime

49 The Appellant's next principal contention on appeal was that the statutory regime implementing the Treaty did not permit the disclosure of information relating to periods before:

(a) 14 July 2010, this being the date on which the Treaty was given effect as a "prescribed arrangement" under s 105D(1) of the ITA by the 2010 Order ; or alternatively

(b) 9 February 2010, this being the date on which the 2009 Amendments to the ITA came into operation.

50 Mr Sharma's contentions on this issue were as follows. First Mr Sharma relied on the rule of statutory interpretation that statutes are presumed not to have retrospective effect. Mr Sharma pointed out that the exchange of information regime that existed prior to the 2009 Amendments vis-à-vis Japan restricted the sharing of information to what was *necessary*, as opposed to what was *foreseeably relevant*, for the enforcement of Japanese income tax laws. Mr Sharma submitted that reading the exchange of information regime as applying to information relating to periods before these dates would be tantamount to giving it retrospective effect. In the absence of clear words to indicate that this was what Parliament had intended, Mr Sharma submitted that we should not adopt such a construction.

51 Second Mr Sharma submitted that even if the 2010 Order was intended to operate retrospectively, it could not be made to do so before 9 February 2010, this being the date the on which the 2009 Amendments came into operation. In this regard, Mr Sharma cited s 23(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) which reads as follows:

Commencement of subsidiary legislation

23.—(1) Subsidiary legislation made under any Act or other lawful authority shall —

(*a*) unless it is otherwise expressly provided in any Act, be published in the Gazette; and

(*b*) unless it is otherwise provided in the subsidiary legislation, take effect and come into operation on the date of its publication.

(2) *Any such subsidiary legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the Act or the establishment of the authority*

by or under which the subsidiary legislation is made.

[emphasis added]

The law on the retrospective effect of legislation

52 We turn first to consider the law relating to the retrospective effect of legislation.

53 The temporal ambit or reach of any particular piece of legislation is defined by two pertinent concepts: see Ruth Sullivan, *Driedger on the Construction of Statutes* (Butterworths, 3rd Ed, 1994) ("*Driedger*") at p 486. The first is the temporal *operation* of legislation. This refers to the period during which the legislation forms part of the law, from its commencement to its repeal. In Singapore the temporal operation of legislation is to be determined by reference to s 10(1) of the Interpretation Act which provides as follows:

Time of commencement of written law

10.—(1) A written law or a provision of a written law shall come into operation —

(*a*) where a particular day for its coming into operation is specified by the written law or by a notification made under the written law, on the expiration of the previous day; or

(*b*) where the day of its coming into operation is the date of its publication in the Gazette, on the expiration of the previous day.

…

In the case of subsidiary legislation its temporal operation is governed by s 23(1) of the Interpretation Act (see [51] above).

54 The second is the temporal *application* of legislation which refers to the period in which events occur that are governed by the legislation during the time of its operation. It is apposite for us to observe that the temporal application of legislation will not always coincide with its temporal operation. For example, legislation may apply to facts or events which have occurred before its commencement, or more rarely, after its repeal.

55 In relation to the temporal application of legislation, it is an established common law principle of statutory interpretation that courts will lean against interpreting statutes as having retrospective application unless clear words are stated to this effect. In *Maxwell v Murphy* (1957) 96 CLR 261 ("*Murphy*"), Dixon CJ famously stated the principle as follows (at 267):

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood *as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events*.

[emphasis added]

56 It will be evident from Dixon CJ's *dicta* that the principle does not entail legislation being read in a manner where facts and events occurring before its enactment will never fall within the scope of its temporal application. Instead, the presumption against the retrospective application will only arise if the application of the legislation to events occurring before its enactment would lead to the legal

consequences attaching to those events being altered.

57 Where a statute is repealed, the principle is also statutorily enshrined in s 16(1) of the Interpretation Act which reads as follows:

> **16.**—(1) Where a written law repeals in whole or in part any other written law, then, *unless the contrary intention appears*, the repeal shall not —
>
> (*a*) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (*b*) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;
>
> (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
>
> (*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

58 The principle is said to rest upon the broader maxim or presumption that parliament does not intend what is unjust or unfair: see *Maxwell on the Interpretation of Statutes* (P St J Langan gen ed) (Sweet & Maxwell, 12th Ed, 1969) at p 215. Likewise, *Driedger* (at p 513) identifies the rule of law as the basic tenet upon which the principle is based:

> Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.
>
> …
>
> In short, retroactive legislation is undesirable because it is arbitrary and tends to be unfair. It upsets plans and undermines expectations and it may impose penalties or other disadvantages without fair warning. It is helpful to have these reasons for disliking retroactivity in mind when considering whether a particular application of legislation would be condemned as retroactive.
>
> [emphasis added]

While we agree with the thrust of the author's observations, we would add that what we are ultimately concerned with here is nothing more than a presumptive rule of statutory interpretation extant under the common law, which may be rebutted by statements of legislative intent to the contrary. It is not an immutable rule which fetters Parliament's power to pass retrospective legislation.

59 Although the basic presumption against the retrospective application of legislation is easily stated in theory, its practical application is fraught with difficulty. The case law on the presumption has precipitated a highly technical and formulaic body of rules which are not always readily reconcilable. Broadly speaking there are three rules of note.

60 The first rule states that there is a distinction between, on the one hand, statutes which have a prior effect on past events, and, on the other, statutes which have future operation based on past events. The presumption against the retrospective application of legislation is said to arise in relation to the former but not the latter class of statutes.

61 A frequently cited case on point is *In re A Solicitor's Clerk* [1957] 1 WLR 1219. There a solicitor's clerk was convicted of charges of larceny in 1953. As the law stood at the time of his conviction, an order prohibiting him from being employed as a solicitor's clerk could not be made because his conviction for larceny did not involve stealing from his employer or his employer's client. The law was later amended to permit such an order to be made for *any* conviction of larceny. The solicitor's clerk argued that to apply the amendment to him would be to give it retrospective effect. This argument was rejected by the English Court of Appeal. The court held (at 1222–1223) that the statute did not involve any retrospective application; rather it had future operation only, even if its operation depended on conduct which had happened in the past.

62 The principle relied on in *In re A Solicitor's Clerk* has received endorsement in cases and academic commentary: in relation to case law where the principle was applied see the decision of the Full Federal Court of Australia in *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; in relation to academic commentary see Dennis C Pearce & Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th Ed, 2011) ("*Statutory Interpretation in Australia*") at pp 324–325; see also Francis A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) at p 317.

63 In our judgment, while the basic premise for the principle in *In re A Solicitor's Clerk* is apparent, which is that the presumption does not arise unless the application of the statute to past events would alter the legal consequences which those events have (see our discussion at [56] above), its application in the case may be questionable. After all, at the time of his conviction, the person concerned could be employed as a clerk. He lost that right after the legislation came into force on account of what he had done prior to the legislation coming into force. In this respect, *In re A Solicitor's Clerk* may be contrasted with the Victorian case of *Bakker v Stewart* [1980] VR 17 ("*Bakker*"). In *Bakker*, the law was amended to remove the power of the court to grant bail to persons convicted of drink-driving offences. The court held that the amendment did not apply to persons who had committed an offence before the amendment. The court reasoned that to hold otherwise would be tantamount to retrospectively increasing the penalty for such offences. To this extent, *In re A Solicitor's Clerk* is not readily distinguishable. It seems probable that the court took the view that it did because it recognised that the purpose of the legislation in that case, which was the protection of the public, required that the legislation be read as applying to the solicitor clerk's previous convictions. While this is entirely sensible, it does not seem principled if one were to insist on a strict application of these rules.

64 The second rule states that there is a distinction between statutes affecting substantive rights and those regulating matters of procedure only. Unlike the former, procedural enactments are *presumed* to apply to both pending and future actions: *Wright v Hale* (1860) 6 H & N 227 at 232.

65 At a general level, this distinction between substance and procedure is readily understandable. Procedural statutes regulate the pursuit of remedies while substantive statutes are those which define the rights and liabilities of parties that give rise to those remedies. However, the distinction is

not always easily drawn in practice. Legislation relating to limitation periods and the right of appeal are apt illustrations of the point. Furthermore, the application of a procedural statute to proceedings pending at the time of its enactment can conceivably result in unfairness, thereby requiring the presumption to be modified: see *Statutory Interpretation in Australia* at p 337.

66 The third rule states that there is a distinction between legislation which has retrospective effect and legislation which prospectively interferes with vested rights (sometimes referred to as "existing rights").

67 In *West v Gwynne* [1911] 2 Ch 1 ("*West v Gwynne*"), Buckley LJ explained the distinction in the following terms (at 11–12):

> Retrospective operation is one matter. Interference with existing rights is another. If any Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here…is as to the ambit and the scope of the Act, and not to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.

68 In the Canadian case of *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271 ("*Gustavson Drilling*"), the issue was whether a taxpayer could make deductions against its liability to pay income tax for certain expenses incurred before 1960 when the Act was amended in 1962 to repeal the availability of such deductions for tax years after 1962. A majority of the Canadian Supreme Court rejected that argument that the repealing legislation was retrospective. In this regard, Dickson J observed that (at 282–283):

> It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. … No one has a vested right to the continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

This observation was, however, prefaced by another observation (at 282):

> The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. … The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms.

6 9 *Gustavson Drilling* therefore established two presumptions. The first being the traditional presumption against legislation having retrospective effect; and the second (albeit weaker presumption) being that legislation is presumed not to prospectively interfere with *vested or accrued* rights. Put in simple terms, the legislature is thus presumed not to have intended to interfere with vested rights, whether prospectively or retrospectively. This aspect of *Gustavson Drilling* was endorsed by Lord Rodger of Earlsferry in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 ("*Wilson*") at [191]–[195]. Lord Rodger's observations in *Wilson* have also been endorsed by Lord Neuberger of Abbotsbury in *Odelola v Secretary for State for the Home Department* [2009] 1 WLR 1230 ("*Odelola*") at [48].

70 The utility of the approach adopted in the line of cases discussed above is not immediately apparent. For a start, it blurs the distinction between the temporal operation and application of legislation (see especially Buckley LJ's dicta in *West v Gywnne* at [67] above). Next, it entails the often tenuous enquiry of whether a particular right is a "vested right". As Lord Rodger observed in *Wilson* (at [196]):

> … The courts have tried, without conspicuous success, to define what is meant by "vested rights" for this purpose. … It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label "vested" to those rights which they conclude should be protected from the effect of the new legislation.

71 Finally, it entails the further and equally difficult enquiry as to whether a particular reading of the statute affects vested rights prospectively or retrospectively. This in turn affects the strength of the presumption to be applied. In our judgment, these considerations distract from what these cases are really concerned with, which is whether a particular statute has temporal *application* to past or future facts and events. The answer to this must depend largely on the interpretation of the statute and the presumption is merely one factor to be taken into account by the court in making this broader determination.

72 It is therefore unsurprising that courts have attempted to distance themselves from the technical rules which have come to plague the presumption. Instead there has been a discernible shift towards applying the presumption on the broad basis of fairness. The water-shed decision in this regard was that of Staughton LJ in *Secretary of State for Social Security and another v Tunnicliffe* [1991] 2 All ER 712 ("*Tunnicliffe*") where it was stated (at 724):

> [T]he true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is expected that Parliament will make it clear if that is intended.

73 In *L'Office Chefifien Des Phosphates and another v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 ("*Yamashita-Shinnihon Steamship Co Ltd*"), Lord Mustill cast similar doubts on the reliability of generalised presumptions and maxims in determining legislative intent. He observed (at 524–525) that such maxims had the propensity of confining the court to a perspective which treated all statutes and the situations to which they applied as the same. As Staughton LJ did in *Tunnicliffe*, Lord Mustill noted (at 525) that the basis for the presumption against retrospectivity was simple fairness. In this regard, Lord Mustill observed that the application of the presumption might be hindered by a formulaic approach which itself tended to become the subject of minute analysis when what ought to be analysed is the statute itself. On the issue of fairness, Lord Mustill made this pertinent observation (at 525–526):

> Precisely how the *single question of fairness will be answered* in respect of a particular statute *will depend on the interaction of several factors*, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All

these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.

My Lords, whilst the approach which I propose involves a single indivisible question, to be answered largely as a matter of impression, it is convenient…to look separately at the various factors…

[emphasis added]

Lord Mustill's observations were endorsed in *Wilson* by Lord Nicholls of Birkenhead (at [19]) and Lord Rodgers at [196]; and in *Odelola* by Lord Brown of Eaton-under-Heywood (at [31]–[32]) and Lord Neuberger (at [49]).

74 In Australia a formulaic application of the presumption was similarly rejected, in favour of Lord Mustill's broad-based enquiry, by Spigelman CJ in the New South Wales Court of Appeal decision in *Attorney-General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261. Spigelman CJ made the following observation (at [52]–[53]) as to how legislative purpose was to be determined:

52 The contemporary approach to the determination of parliamentary intention – in the objective sense of intention employed in the law of statutory interpretation – is no longer formulaic in the manner sometimes suggested by lists of "canons" or "principles" of statutory interpretation. …

53 The issue must be determined in accordance with the full range of relevant factors that are employed to determine the intention of parliament, in the same way as the High Court identified …:

> The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects … (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [91])

75 In our judgment these observations are particularly apposite in the Singapore context where s 9A(1) of the Interpretation Act requires that a purposive approach be taken in statutory interpretation. Moreover, as we reiterated in *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [18] and *BFC Development LLP v Comptroller of Property Tax* [2014] 2 SLR 462 at [14], the purposive approach which is mandated by s 9A(1) takes precedence over all common law rules of statutory interpretation. The latter may prove more relevant to *confirm* the court's understanding of the purpose of the statute in question, such as where the application of these rules and maxims of construction produces a conclusion that coincides with the evident purpose of the law in question; or if ambiguity in interpretation of the written law persists even after an attempt at purposive interpretation has been properly made: see also *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [41].

76 To put this in the context of the presumption against the retrospective application of legislation, we conclude that the purposive approach should be applied to determine questions pertaining to the temporal application of the legislation. This will entail a single overarching enquiry as to parliamentary intent and that will be found in the words of the law, its context and the relevant extrinsic aids to statutory interpretation. Only if ambiguity persists on a purposive interpretation may recourse be had to the various presumptions. In this regard we endorse Lord Mustill's formulation of

the presumption in *Yamashita-Shinnihon Steamship Co Ltd* (at [73] above), which in our view possesses both the simplicity and the flexibility needed to reach a sensible result in these cases.

Did the exchange of information regime apply to information relating to past periods?

77 Keeping with the approach we have identified above (at [75]–[76]), in our judgment, the relevant issue of statutory interpretation concerned whether the exchange of information regime applied to information relating to periods before the Treaty was given effect as a "prescribed arrangement" under the ITA.

78 In submitting that the regime did not limit the temporal scope of the information which could be exchanged under the Treaty, counsel for the Comptroller, Mr Vikna Rajah ("Mr Rajah") referred us to s 105D(1) of the ITA which provides that a competent authority under a prescribed arrangement could make a request for information concerning the "tax position" of any person. "Tax position" is defined in s 105A(1) of the ITA as follows:

> "tax position", in relation to a person, means the person's position —
>
> (*a*) as regards any tax —
>
> (i) of the country with whose government the avoidance of double taxation arrangement or EOI arrangement in question was made; and
>
> (ii) that is covered by the EOI provisions of the avoidance of double taxation arrangement or by the EOI arrangement;
>
> (*b*) as regards —
>
> (i) past, present and future liability to pay any tax referred to in paragraph (*a*);
>
> (ii) penalties, interest and other amounts that have been paid, or are or may be payable, by or to the person in connection with any such tax; and
>
> (iii) claims, elections, applications and notices that have been or may be made or given in connection with any such tax.

79 In this regard Mr Rajah also drew our attention to s 105A(3) which provides that "reference[s]… to the tax position of a person are to his position at *any period of time or in relation to any period*, *unless otherwise stated in the prescribed arrangement in question* [emphasis added]". Mr Rajah pointed out that unlike certain other tax treaties which Singapore had entered into, the Treaty did not contain provisions limiting the temporal scope of the information which could be exchanged under it.

80 Mr Rajah also referred to commentary on the EOI Standard by the OECD Council (see *Update to Article 26 of the OECD Model Tax Convention and its Commentary* (17 July 2012)) which states (at para [10.3]) that:

> *Nothing in this Convention prevents the application of the provisions of the Article to the exchange of information that existed prior to the entry into force of the Convention, as long as assistance with respect to this information is provided after the Convention has entered into force and the provisions of the Article have become effective*. Contracting states may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such

information, in particular when the provisions of that convention will have effect with respect to taxes arising or levied from a certain time.

[emphasis added]

81 In our judgment, both these points make it clear that Parliament had intended to permit the exchange of information relating to *any* period both before and after the date on which the Treaty was given effect as a "prescribed arrangement" under s 105D(1) of the ITA (*ie* 14 July 2010) as well as the date on which the 2009 amendments to the ITA came into force (*ie* 9 Feb 2010). The point really was that present request could only be made after the Treaty had been given effect as a prescribed arrangement, but once made, the request could relate to information pertaining to an earlier period. Put simply, the temporal scope of information which can be exchanged under the exchange of information regime under the ITA is unlimited save for where a contrary provision is made under the relevant tax treaty. It was noted that this has been done in some tax treaties but not in the present.

82 In the circumstances recourse to the presumption against the retrospective application of legislation was both unnecessary and inappropriate. Mr Sharma's submissions on this issue therefore did not leave any impression on us.

Was the Making of the Order Justified in the Circumstances of the Case?

83 Having considered the relevant legal principles, we come to the core issue arising in this case before us, that is, whether the making of an order for production of the bank statements in terms of the Comptroller's application was justified in the circumstances of the case.

84 As we alluded to earlier, the Appellant's contentions in this regard were effectively premised upon this Court being able to substantively review the Letter of Request and go behind the facts stated in it. To this end, we have already said that the Appellant's contentions were untenable. As we noted at [33]–[48] above the issue of the justification for a request is to be determined on the face of the request.

85 Keeping with those principles we were satisfied that the Letter of Request contained all the information prescribed by the Eighth Schedule. It clearly identified the Appellant as the taxpayer in issue. The purpose of the request was also clearly stated, this being to determine whether the Appellant had failed to declare income from foreign investment funds for the purpose of assessing his income tax. In relation to the bank statements, it was also clearly explained how each of the bank accounts for which statements had been sought were considered relevant to the purpose underlying the request.

86 In the circumstances, because the Eighth Schedule requirements had been met, we were also satisfied that the standard of foreseeable relevance under Art 26(1) of the Treaty had been met. Plainly, it could not be said that the JNTA's request constituted a fishing expedition on the face of it. Indeed Mr Sharma did not contend that, on the face of the request, there was no nexus between the purpose of the request and the bank statements sought. Rather his main contention was that the information had ceased to be relevant as the JNTA had concluded the Appellant's tax examination and no longer required the information. In view of the JNTA's confirmations on 20 May and 16 July 2013 that they still required the information, we found Mr Sharma's arguments in this respect untenable.

87 There were also no grounds for us to refuse to order the production of information flowing from Art 26(3) of the Treaty. In this regard it sufficed that the Letter of Request included a *statement*

confirming that the JNTA was authorised to obtain the information under Japanese law and a *statement* confirming that the JNTA had pursued all available means in Japan to obtain the requested information. This was precisely what was stipulated in paragraphs 7 and 8 of the Eighth Schedule.

88 It follows that an order for the production of the bank statements for the eight accounts identified in the Letter of Request was justified in the circumstances of the case. However, as we noted at [9] above, the Comptroller's application in OS 331, and the order of court made below pursuant to it, was in fact wider than this; it applied to bank statements for *all* accounts held with the Bank by the account holders in question. As stated in s 105J(1)(*a*)(ii) of the ITA, the Comptroller may only apply for an order from the court pursuant to s 105J(2) "in order to comply with a request [for information]". Any application therefore cannot go beyond the ambit of the request. When we raised the issue with Mr Rajah, he readily conceded that the terms of the order should be limited to the original request. In our judgment this concession was properly made. We therefore amended the order of court made below to reflect the original request made by the JNTA.

89 Finally, we note Mr Sharma's alternative submission that even if we were not minded to disturb the order of court made below we should grant a stay on its execution until the Japan Proceedings were determined. In our judgment, this submission was misconceived. To begin with, Mr Sharma did not identify any basis, whether statutory or common law, under which we had the power to make such an order which seems to us to be anomalous at first blush and contrary to the scheme for the exchange of information in this context. Moreover, and in line with our discussion at [45]–[48] above, the court's role under s 105J(3)(a) of the ITA is limited to being satisfied of the justification of the request. Once it is so satisfied, the decision as to whether to transmit the information to the foreign tax authorities lies with the Comptroller and not the court.

The Position of the Other Account Holders on Appeal

90 This leaves for us to consider the position of the other account holders on appeal. In this regard, Mr Sharma contended that the Judge had wrongly refused the other account holders leave to intervene. This was on the basis that each of their applications raised matters which were peculiar to them. According to Mr Sharma this was a further reason why we should set aside the order of court made below.

91 In our judgment, Mr Sharma was precluded from raising this issue on appeal. If the other account holders were aggrieved by the Judge's decision to dismiss their applications for leave to intervene, they ought to have appealed that decision. Given their failure to do so there was nothing before us on the point.

Conclusion

92 For all the reasons stated above, we dismissed the appeal with costs save to the extent that the order of court made below is to be varied to reflect the original request made by the JNTA. We also made the usual consequential orders.