IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 42

Originating Summons No 106 of 2014

Between

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

… *Applicants*

And

Comptroller of Income Tax

… *Respondent*

GROUNDS OF DECISION

[Revenue Law] — [International Taxation] — [Exchange of Information]
[Administrative Law] — [Judicial Review]
[Administrative Law] — [Discretionary Powers]

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AXY and others
v
Comptroller of Income Tax (Attorney-General, intervener)

[2017] SGHC 42

High Court — Originating Summons No 106 of 2014
Aedit Abdullah JC
14, 15 September 2016

2 March 2017

Aedit Abdullah JC:

1 This case concerned the nature and extent of the obligations of the Comptroller of Income Tax ("the Comptroller") in dealing with requests by foreign tax authorities for information under Singapore's exchange of information ("EOI") regime. The applicants ("the Applicants") sought leave to commence judicial review of the Comptroller's decision to issue notices for information to various banks in Singapore in fulfilment of requests made by the National Tax Service of the Republic of Korea ("NTS") under a bilateral convention. I concluded, having considered the submissions of the parties, including that of the Attorney-General ("AG") who had intervened, that the Applicants failed to establish an arguable or *prima facie* case of reasonable suspicion that the Comptroller's decision to issue the notices was either illegal or irrational. The Applicants, being dissatisfied with my decision, have appealed.

Background

2 These proceedings arose out of tax investigations conducted by NTS, the national tax administration agency of the Republic of Korea, in respect of the Applicants and related companies. On 23 September 2013, as part of its investigation process, NTS submitted a letter of request for information ("the Request") to the Comptroller pursuant to Article 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, which was concluded on 6 November 1969, as amended by the Protocol Amending the Convention which was signed on 24 May 2010 and took effect on 28 June 2013 ("the Convention"). Article 25 of the Convention, which is central to this dispute, reads in full:

> 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:

> (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.

3 Article 25 of the Convention is incorporated into domestic legislation through s 105D of the Income Tax Act (Cap 134, 2014 Rev Ed) ("ITA"), which states:

> 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.
>
> (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.

4 It was common ground between the parties that the Convention is a "prescribed arrangement" and that NTS is a "competent authority" as defined in s 105A(1) of the ITA.

5 The information sought by NTS in the Request can broadly be categorised into two groups. First, NTS sought information regarding stipulated bank accounts of 5 individuals, including the 1st, 2nd and 4th Applicants, and 11 companies. For these accounts, NTS provided the specific bank name, account number, and account holder details. Second, NTS also sought information relating to unidentified bank accounts of the 5 individuals and 51 companies in the Singapore branches of Woori Bank ("Woori") and the Union Bank of Switzerland Aktiengesellschaft ("UBS AG"). The scope of information sought for both categories included the following documents for the period between 1 January 2003 and the present:

(a) Periodic bank statements;

(b) Copies of the opening account contracts, signature cards, and personal information of agents or consignees;

(c) Copies of cancelled cheques, deposit slips, wire transfers of other deposits or withdrawal documents for all transactions; and

(d) Copies of certificates of deposits, safe deposit box contracts, loan documents or any other documents evidencing transactions which are reflected in the accounts' records.

6 On 7 November 2013, the Comptroller wrote to NTS seeking clarifications regarding the Request. Amongst other things, the Comptroller sought information concerning the legality and tax implications of Korean taxpayers owning offshore companies, explanations of the alleged tax evasion scheme by the Korean taxpayers listed in the Request, and evidence to show that the companies stated in the Request had been used to receive unreported income. NTS replied on 16 December 2013. Based on the information provided by NTS, the Comptroller grouped the 51 companies (of which bank account details were sought in the Request) into three groups and, on 17 January 2014, sent a second letter to NTS requesting further evidence chiefly in respect of the connections between the 1st Applicant and the companies in one of the groups ("the Second Letter").

7 Thereafter, a meeting between staff members of the Comptroller and NTS was held in Korea on 21 and 22 January 2014. The agenda of the meeting was to discuss various issues concerning the EOI regime, including the Request. On the first day of the meeting (*ie* 21 January 2014), two material exchanges between the authorities occurred. First, NTS made a specific request for information relating to a bank account of one of the companies identified in the Request with Oversea-Chinese Banking Corporation Limited

("OCBC"). Second, NTS provided documents seeking to address the Comptroller's further queries raised in its Second Letter.

8 Subsequent to the exchanges, the Comptroller issued notices for the disclosure of banking activity relating to the Applicants in the exercise of its powers under ss 65B and 105F of the ITA. These notices were issued on 21 January 2014 to Woori ("21 January Notice"), and on 27 January 2014 to UBS AG and OCBC ("27 January Notice") (collectively, "the Notices").

9 On 11 February 2014, the Applicants filed the present application in Originating Summons No 106 of 2014 ("OS") seeking, amongst others, a prohibitory order and a quashing order against the Comptroller and the Notices. The Applicants also sought stay of proceedings pending determination of the Applicants' tax residency and/or tax liability in Korea by the National Tax Tribunal of the Republic of Korea ("NTT").

The Applicant's Case

10 The Applicants submitted that the Comptroller acted illegally and/or irrationally in issuing the Notices as it failed to make sufficient prior inquiry into the compliance of the Request with the Eighth Schedule of the ITA, and/or the requirement under Article 25 of the Convention that the requested information be "foreseeably relevant" to the administration of the Convention or the requesting state's domestic tax laws. Specifically, the Comptroller took into account irrelevant factors and failed to consider relevant ones such as the developments in Korea subsequent to the Request which rendered the basis of the Request questionable. The Applicants also argued that the Comptroller breached its duty to ensure that the Request was "clear, specific, and legitimate" before issuing the Notices, and did not appropriately balance the

Applicants' rights to privacy and confidentiality against the Comptroller's desire to enhance international tax cooperation through an efficient EOI regime. These inadequacies were particularly egregious because of the sweeping scope of the information sought by NTS under the Request. Lastly, the Applicants argued that the Comptroller improperly delegated its decision-making powers as it reproduced the Request in its entirety, and acceded to the Request without sufficient inquiry.

The Respondent's Case

11 The Comptroller accepted that an exercise of its statutory power to issue notices for information under ss 65B and 105F of the ITA is susceptible to judicial review. However, the Comptroller maintained that the Applicants failed to show a *prima facie* case of reasonable suspicion that its issuance of the Notices was illegal, irrational, and/or an improper delegation of decision-making powers. This was because, based on the Comptroller's enquiries and independent assessment, the information sought by NTS in its Request satisfied the requirements of the Eighth Schedule of the ITA and the threshold of foreseeable relevance in Article 25(1) of the Convention, both of which should be assessed exclusively as at the date of the Request. Accordingly, the Respondent was justified in issuing the Notices under ss 65B and 105F of the ITA. There is no distinct or additional legal requirement that requests for information must be "clear, specific, and legitimate". Nor is there a discrete legal duty on the Comptroller to balance the rights of individuals against the desire to enhance international tax cooperation in respect of every particular request for information.

12 In relation to the Applicants' prayer for stay of proceedings pending tax litigation in Korea, the Comptroller argued that this prayer should be

rejected as a matter of authority and policy, and in any event there was no legal basis for such an order.

The AG's Intervention

13 By letter dated 4 August 2016, the AG applied to intervene in this application citing the public interest in the construction of Article 25 of the Convention and the newly-introduced ss 65B and 105D of the ITA.

14 The AG's submissions focused on the issues of law and construction under the ITA and Article 25 of the Convention, and were largely aligned with those of the Comptroller's. In particular, the AG submitted that, on proper construction of the Convention and the ITA, a request for information would be valid as a matter of law if it complied with the requirements under the Eighth Schedule of the ITA and if the Comptroller was satisfied that the requested information was "foreseeably relevant" to the administration of the Convention or domestic tax laws. This standard of foreseeable relevance is to be assessed as at the time of receipt of the request and is intended to be broad and readily satisfied, in order to facilitate EOI to the widest possible extent. Further, in light of legislative intent to streamline and expedite the EOI process, the Comptroller does not have a duty to go behind the face of a request for information and examine the veracity of statements provided by a requesting State. Neither the "clear, specific and legitimate" request test, nor the balancing exercise between the rights of individuals and the need for an effective EOI regime, is an additional or distinct requirement for the Comptroller to assess in respect of each request for information. Lastly, the AG submitted that the mechanism of judicial review should not be so burdensome and time-consuming as to impede the EOI process and frustrate foreign tax investigations.

The Decision

Exchange of Information Regime

15 The EOI regime has been described as "a key aspect of the global cooperation in the fight against tax evasion and the protection of the integrity of tax systems" (per Edmund Leow JC in *AXY v Comptroller of Income Tax* [2016] 1 SLR 616 ("*AXY v CIT*") at [1]). The regime empowers the Comptroller to exercise its statutory powers under the ITA, on request by a foreign tax authority, to obtain and deliver information for the purpose of assisting that foreign tax authority in the administration of its tax treaty with Singapore, or its domestic tax laws. The increasing acceptance of this regime in jurisdictions across the world is an exception to the "age-old and universally recognised principle that one sovereign does not assist another in the collection of their taxes", and is a response to the heightened impetus for tax authorities to clamp down on evasive tax practices that exploit the incongruities between tax laws and practices across jurisdictions (*AXY v CIT* at [6]-[7]). Against this backdrop, our courts have recognised that an efficient EOI regime is "crucial in allowing countries to obtain the necessary information on the offshore assets of their taxpayers to enable them to investigate possible allegations of tax evasion properly" (*AXY v CIT* at [7]).

16 The history of the legislative framework for the EOI regime in Singapore has been set out by the Court of Appeal in *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 ("*ABU v CIT*") at [23]-[32] and by Leow JC in *AXY v CIT* at [1]-[15]. In brief, in 2009, Singapore endorsed Article 26 of the OECD Model Convention with respect to Taxes on Income and on Capital ("Model Convention") following its adoption as an internationally agreed standard for EOI in 2008. Tax treaties between Singapore and her partners were amended to incorporate Article 26 of the Model Convention.

Accordingly, in order to implement the new EOI regime and give effect to Singapore's obligations under the amended tax treaties, the Income Tax (Amendment) (Exchange of Information) Act 2009 (Act 24 of 2009) was enacted ("the 2009 Amendments").

17 Under the 2009 Amendments, the most significant change was the removal of the "domestic interest" condition, under which the Comptroller could only gather and exchange with treaty partners information that was protected by banking and trust confidentiality laws, if such information was concurrently relevant to the enforcement of Singapore's domestic tax laws. In its place, a new requirement was imposed – if the Comptroller was of the opinion that the requested information 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), the Comptroller would be obliged to apply to the High Court for an order under the then-existing s 105J(2) of the Income Tax Act (Cap 134, 2008 Rev Ed). Disclosure would only be permitted if the court was satisfied that the stipulated legislative requirements in the ITA were met.

18 In 2013, following a comprehensive review, significant changes were again made to the ITA to broaden the powers of the Comptroller and streamline the EOI regime. By the Income Tax (Amendment) Act 2013 (Act 19 of 2013), which repealed Part XXB of the ITA, the requirement that the Comptroller obtain an order of Court prior to accessing protected information from financial institutions was removed ("the 2013 Amendments"). The rationale for this amendment is apparent. As the Senior Minister of State for Finance explained at the Second Reading of the Income Tax (Amendment) Bill 2013: "we will allow IRAS to obtain information protected under the Banking Act and Trust Companies Act for EOI purposes without having to seek a Court Order. This is aimed at streamlining EOI administration".

19 Taking the above together, the two significant amendments to the EOI regime codified in the ITA are (1) the 2009 Amendments which removed the "domestic interest" condition; and (2) the 2013 Amendments which removed the requirement that the Comptroller obtain a court order before accessing protected information from financial institutions pursuant to a request for information. These amendments had the overall effect of vesting significant control over the enhanced EOI regime in the Comptroller. Notwithstanding these amendments, it was expressly clarified in Parliament in 2013 that, as a safeguard against any arbitrary exercise of powers by the Comptroller, in addition to the right to make representations to the Comptroller, "[t]axpayers still have access to the judicial process through a judicial review" (*Singapore Parliamentary Debates, Official Report* (21 October 2013) vol 90 (Josephine Teo, Senior Minister of State for Finance) ("*Debates 2013*")).

Judicial Review

Standard of Review in Leave Applications

20 Leave may be granted for judicial review if and only if, amongst others, the material before the court discloses an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant (*Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [5]; *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [32]).

21 This standard for leave has been described as "a very low threshold" (*Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [22]). 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 to the applicant the relief claimed" (*Public Service Commission v Lai Swee Lin*

Linda [2001] 1 SLR(R) 133 ("*Linda Lai*") at [22]). However, the fact that this standard is easily satisfied does not mean that it is only a *pro forma* requirement. The underlying purpose of the leave application is "to be a means of filtering out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful use of judicial time and to protect public bodies from harassment (whether intentional or otherwise) that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged" (*Linda Lai* at [23]). Local courts have thus not hesitated to strike out unmeritorious cases, even at the leave stage, if it transpires that the applicant has no reasonable prospect of success (see *eg*, *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14; *Pang Chen Suan v Commissioner for Labour* [2007] 4 SLR(R) 557).

The Interface between Judicial Review and the EOI Regime

22 In framing their arguments before me, there was some disagreement between the parties about the effect of the 2013 Amendments on the court's and the Comptroller's respective roles in the EOI regime. The Applicants argued that the requisite legal tests in the ITA and the Convention for the disclosure of their protected information should bear a similar, if not stricter, interpretation after the 2013 Amendments as the Comptroller has now become the taxpayer's only safeguard against wrongful disclosure of protected information. The Comptroller and the AG both submitted that the same obligations and considerations that were previously applicable to the court should now be applicable to the Comptroller.

23 In my view, while the 2013 Amendments changed the identity of the authority assessing the EOI requests, the requirements have not been substantively altered. As earlier noted, the legislative purpose of the 2013

Amendments is to streamline the EOI process by removing the need for court orders, which has been described as "a somewhat cumbersome process" (*AXY v CIT* at [11]). The Comptroller was intended to extend the same safeguards over taxpayers' interest in confidentiality by subjecting requests for information to the same substantive standards as had been the case prior to the 2013 Amendments. This was in recognition of the fact that the Comptroller had "[i]n the last four years … 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 for EOI contained in the Convention]" (*Debates 2013*). Therefore, it is not correct to argue that a stricter (or looser) standard is applicable to the Comptroller.

24 What has changed is the role of the court. While the Comptroller's approach to assessing requests for information may be guided by the court's position vis-à-vis its own role prior to the 2013 Amendments (see *eg*, *ABU v CIT*), the court now has to examine the Comptroller's decisions through the lens of judicial review, rather than substantively assess the basis for the request of information itself. This change in perspective is critical. A court exercising judicial review generally examines the decision-making and not the substantive decision itself, and refrains from substituting the decision actually taken with its own view of how best to exercise a discretion or power. As Andrew Ang J stated in *ACC v CIT* [2010] 1 SLR 273 (at [21]):

> It is well established that in judicial review, the court is concerned not with the merits of the decision but the process by which the decision has been made... This is because judicial review is not an appeal from a decision and the court cannot substitute its discretion for that of the public body nor can it quash a decision on the basis that the court would not have arrived at that decision or that some other decision would have been a better one.

25 Accordingly, the central issue in this application was whether the Applicants succeeded in showing an arguable or *prima facie* case of reasonable suspicion that the Comptroller's issuance of the Notices pursuant to the Request satisfied any ground for judicial review. The determination as to whether such grounds were satisfied was in turn measured against the duties and obligations placed on the Comptroller, which was codified in the ITA and the Convention as incorporated into domestic law by s 105D of the ITA. Case law prior to the 2013 Amendments on the courts' role in reviewing requests for information remained relevant in informing the Comptroller's role under the present EOI regime, and therefore with necessary modification, to the courts' analysis in judicial review. Bearing these in mind, it was clear that the Comptroller had not acted, as the Applicants claimed, in breach of the terms of the statutory powers conferred upon it, without proper consideration of the facts, or in improper delegation of its statutory discretion.

Illegality

26 Illegality in judicial review is concerned with whether the Comptroller "has been guilty of an error of law" in issuing the Notices (per Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 414F). The Applicants argued that the Comptroller failed to properly evaluate and/or make sufficient inquiry into whether the Request complied with (a) the Eighth Schedule of the ITA as required by s 105D(2) of the ITA, (b) the test of foreseeable relevance contained in Article 25 of the Convention read with s 105D(3) of the ITA, and (c) the condition that the Request be "clear, specific and legitimate" grounded in a Parliamentary debate. The Applicants also argued that the Comptroller ought to have balanced their interests against its own desire for an efficient EOI regime. They further

alleged that the Comptroller improperly delegated its decision-making powers to NTS. These arguments will be considered in turn.

Requirements Prescribed by the Eighth Schedule of the ITA

27 Under s 105D(2) of the ITA, the Comptroller is obliged to ensure that a request for information by a foreign tax authority complies with the Eight Schedule of the ITA unless the Comptroller otherwise permits. The Eighth Schedule, which sets out the necessary information that is to be included in a request for information, states:

> EIGHTH SCHEDULE
>
> 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.
>
> 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.

28 In determining whether the Eighth Schedule requirements have been satisfied, the parties' main dispute was the extent to which the Comptroller was obliged to examine the veracity and bases of the foreign tax authority's statements as prescribed by the Eighth Schedule. Unsurprisingly, the Applicants argued that the Comptroller bore the onus to "go behind" the Request and "resolve doubts concerning the veracity of the Request", whereas the Comptroller argued that it was rightfully entitled to take NTS's statements satisfying the Eighth Schedule at face value.

29 In my judgment, the Comptroller is entitled under the present EOI regime to take NTS's statements at face value in determining whether the Eighth Schedule requirements are satisfied, and is not obliged to go behind these statements and second-guess their veracity. This is consistent with the position vis-à-vis the courts prior to the 2013 Amendments, which ought to be the case as those amendments only changed the identity of the assessor but not the content of the assessment (see above at [23]-[24]). To this end, the Court of Appeal's statement in *ABU v CIT* on the prior position of the courts is apposite:

> [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…

> …
>
> [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… 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… 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.

30 Given Parliament's intention to streamline the EOI regime and entrust greater responsibility to the Comptroller in 2013, it would be incongruous if the court indirectly engaged in an even more searching enquiry into the justifications of requests by foreign tax authorities through the machinery of judicial review, than it did prior to the 2013 Amendments when foreign authorities' statements were taken at face value in direct assessment by the court.

31 The Applicants' position would also not place any limit on the Comptroller's duty to "resolve doubts" regarding the basis of every request for information. It is not difficult – and indeed, quite conceivable – for any taxpayer to raise some doubts about the justifications for such requests when the related foreign investigations are pending or incomplete, and are under regimes and laws that are not necessarily familiar to the Comptroller. Practical issues are also abound in teasing out the precise content of any duty to resolve doubts. The Comptroller cannot be obliged in each and every instance to call

foreign witnesses and to resolve complex issues of foreign law. In this regard, guidance was given by the Court of Appeal in *ABU v CIT* (at [43]):

> 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… 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…

32 For these reasons, the Applicants' argument that there existed a broad duty to "resolve doubts" in statements by foreign tax authorities which at face value satisfy the Eighth Schedule was not sustainable.

33 Aside from the law, I could not accept the Applicants' arguments that the Eighth Schedule was not satisfied because the Notices were issued (a) without NTS having pursued all means available in Korea to obtain the same information, (b) even though the Request was not in conformity with Korean law and practices, and (c) despite NTS's assessments against the Applicants being time barred under Korean law. All of these points compelled the Comptroller and, in turn, a court in judicial review, to engage in questions of domestic Korean law and potentially required the examination of foreign witnesses. This is impractical and contrary to Parliament's intent to "ensure that the efficacy of the exchange of information machinery [is] not compromised" (*ABU v CIT* at [43]). The proper application of a requesting state's tax law, and the exercise of powers of the requesting authority, are matters of domestic law to be dealt with by the domestic courts and authorities of the requesting state. It would be invidious to require local authorities and courts to delve into such matters, even if these matters are brought to their attention by the affected persons.

34 This is not to say that the law *requires* the Comptroller to rely solely on the statements provided by foreign authorities, or that the law *precludes* the Comptroller from making any further inquiry to satisfy itself of doubts as to the basis of a request.[1] In my view, although it is not for a court exercising judicial review jurisdiction to require this, it remains open to the Comptroller to engage with a foreign tax authority regarding any request for information (see *ABU v CIT* at [48]), in recognition of its "substantial experience in handling foreign requests and tax administration" (*Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1621 (Tharman Shanmugaratnam, Acting Minister for Finance) ("*Debates 2009*")).

Requirement of Foreseeable Relevance

35 Under s 105D(3) of the ITA, the Comptroller is obliged to deal with a request for information from a foreign tax authority "in accordance with the terms of the prescribed arrangement", *ie* in accordance with the Convention. Article 25 of the Convention permits only the exchange of information that is "foreseeably relevant" to the administration or enforcement of the Convention or the requesting state's tax laws. Accordingly, the test of foreseeable relevance has been described as the "touchstone" of the EOI regime (*ABU v CIT* at [26]).

36 The Applicants argued that the Comptroller, in assessing the foreseeable relevance of the information requested, failed to consider that (a) the scope of the Request was too sweeping, and (b) NTS provided less than "clear and specific" evidence to establish foreseeable relevance. The Comptroller wholly denied these allegations.

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1 Respondent's Submissions dated 7 September 2016 at para 39.

37 Foreseeable relevance was, prior to the 2013 Amendments, part of the "single broad enquiry of whether the making of an order for production was justified in the circumstances of the case" (*ABU v CIT* at [36], citing *Comptroller of Income Tax v BJY* [2013] 4 SLR 801 ("*CIT v BJY*")). Given the 2013 Amendments, however, which abolished this justifiability inquiry under s 105J of the ITA, the test of foreseeable relevance appears now to stand as an independent requirement for the Comptroller's consideration, incorporated through s 105D(3) of the ITA read with the relevant provisions of the tax treaty concerned.

38 Contrary to the Applicants' submission, the requisite standard of foreseeable relevance has not changed with the 2013 Amendments for the reasons I have stated above (at [23]-[24]). As regards the content of this test, the Applicants cited *Comptroller of Income Tax v AZP* [2012] 3 SLR 690 for the proposition that foreseeable relevance requires some "clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws" (at [10]). In turn, the Comptroller relied on *CIT v BJY* for the following passage (at [28]):

> Since the requested information need only be foreseeably relevant, the requesting State need not show that the requested information is demonstrably relevant for carrying out the provisions of the [Tax Treaty] or to the administration or enforcement of its domestic tax laws. However, it must at the very least explain why the particular information requested is thought to be possibly relevant. Naturally, speculative requests for information will not meet the standard of foreseeable relevance.

39 To my mind, the phrase "foreseeable relevant" is sufficiently clear in itself. In the context of Article 25 of the Convention (which is modelled after Article 26 of the Model Convention), the test as fully stated is "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". This is a low threshold. In practice, it has been observed that "once the requesting State can point to an ongoing investigation into the affairs of a particular taxpayer, that would in most cases by itself dispel the notion of the request being random or speculative" (Update to Article 26 of the OECD Model Tax Convention and its Commentary (17 July 2012) ("*OECD Commentary*") at p 3, para 5).

40 I agree with the AG's submissions that the assessment on foreseeable relevance should generally be made as at the time of the request. Subsequent occurrences affecting the assessment of foreseeable relevance are immaterial, save perhaps in the most exceptional of situations where such evidence is uncontradicted or unanswerable. The Comptroller is also not obliged to slow down or suspend its internal processes in expectation of the taxpayer's intended challenge to the relevance of the requested information. To expect otherwise would contradict clear Parliamentary intention to streamline the EOI process. It would likely also impose on the Comptroller an onerous burden of predictive supervision over foreign proceedings and unduly fetter its ability to respond expeditiously to requests for information since, in the nature of things, there are bound to be challenges that could, and would, be made against an ongoing tax investigation.

41 As a corollary, the indeterminability of actual relevance of the requested information as at the time of request is no bar to the disclosure of such information by the Comptroller, since actual relevance may only become clear upon receipt and assessment of such information by the foreign authority, or even later after the proper disposition of the entire tax investigation in the foreign jurisdiction. Thus, as stated in the *OECD Commentary* at p 3, para 5:

> In the context of information exchange upon request, the standard [of foreseeable relevance] requires that at the time a request is made there is a reasonably possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information

42 Further, for the reasons I have indicated above (at [29]-[32]), the assessment of relevance may be made on the face of the statements and information provided by the foreign tax authorities. This is consistent with the *OECD Commentary*, which suggests that the requested State is obliged to accept a requesting State's explanation as to foreseeable relevance at face value (*OECD Commentary* at p 3, para 5):

> 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 requested information is 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 to withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination

43 This principle of restraint applies *a fortiori* in relation to matters involving the foreign jurisdiction's domestic laws. It is neither practical, nor appropriate, for the local court or authority to assume the role of the foreign court or authority in respect of the proper construction and application of their domestic law.

44 The Applicants cited the Jersey decision of *APEF Management Company Limited v The Comptroller of Taxes* [2013] JRC 262 ("*APEF Management*") for the proposition that a court should set aside a notice for information if the taxpayer could bring to its attention "evidence … which on

its face wholly undermined the very foundations upon which the requests had been made". In that case, the Royal Court of Jersey set aside the Jersey tax authority's notice for information on the basis that reliable and publicly available information in France regarding the transaction that was being investigated, which was brought to the court's attention by the taxpayer concerned, negated the whole basis of the French authority's request for information. This was so decided even though on the face of the information provided by the French tax authority, the Jersey tax authority's decision to issue the notice was properly taken.

45 I did not find the Jersey case persuasive or directly applicable to our facts. First, the Jersey decision was an appeal filed under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 ("TIEA") and not a case of judicial review. The decision of *Volaw Trust v Office of the Comptroller of Taxes* [2013] JCA 239 cited by the Applicants equated Jersey's appeal with Jersey's judicial review (at [46]), but that did not mean that Jersey's appeal regime could be equated to Singapore's approach to judicial review. The permissible intensity of the court's scrutiny may therefore be different there than in Singapore. Second, much of the analysis in *APEF Management* involved an examination of the legality of a transaction in interest in a French company, which transaction was supervised by the French Competition Authority. Singapore courts appear to adopt a more deferential attitude in matters of foreign law and policy than Jersey courts, taking into consideration our concern for comity and practicality. Third, the policy tensions and legal framework underlying the EOI regime are jurisdiction-specific. Thus, jurisprudence on this area of law is not readily transposable without a full understanding of the history and context of the EOI regime in each jurisdiction. In fact, the Jersey legislative provision governing such EOI

appeals appear to have been tightened by amendments in late 2013, which *APEF Management* did not have to consider. In any event, *APEF Management* was factually distinguishable as the taxpayer there brought sufficient evidence that allowed the court to conclude that the "very foundations" of the French request were "wholly undermined"; this was not the situation in our case.

46 In my view, a balance must be struck between the Comptroller's ability to respond to requests for information without undue haste and administrative burden, and the taxpayer's legitimate interest in contesting an allegedly unauthorised release of his personal information. The difficulty in this exercise is exacerbated by the inevitable uncertainty in investigative outcome at the time of the request and the need for comity between courts and authorities of different jurisdictions. The application of the above propositions would, therefore, depend heavily on the factual context, with a margin of deference accorded to the Comptroller in recognition of the fact that, in the final analysis, the concern is not with whether the Comptroller's decision was correct on its merits, but rather with whether that decision was illegally or irrational to the extent required by the law on judicial review.

47 In the present case, I found that the Comptroller had properly directed its mind to the issue of foreseeable relevance and clarified matters with NTS as was appropriate in the circumstances.

48 The Applicants also argued that the Comptroller erred in failing to consider that the information requested was extremely extensive and intrusive. I did not agree. The Comptroller had analysed the Request vis-à-vis the position of each of the objects in question, including both the individuals and companies, crafted relatively defined queries to NTS on 7 November 2013,

and subsequently, based on NTS's responses, classified the companies into three categories in preparation for further enquiry.

49 I also accepted that the Comptroller had, after classification of the companies, sought further information in relation to the companies in one of the categories on 17 January 2014, and obtained an adequate reply on 21 January 2014, which was the first day of a meeting with NTS, before it exercised its discretion to issue the Notices later on 21 and 27 January 2014. The Applicants invited me to infer that there were further discussions about the Request on 22 January 2014, the second day of the meeting, based on meeting minutes appended to the Comptroller's affidavit. This, they submitted, showed that the issuance of the 21 January Notice was premature or pre-determined. I noted that the Comptroller did not deny discussing the Request on 22 January 2014 in absolute terms; it only claimed that the discussion on 21 January 2014 took place only for a part of the day, that other matters not related to the Request were discussed during both days of the meeting, and that the 21 January Notice was issued after full consideration of its merits.[2] Nevertheless, even if the Request was indeed discussed again on 22 January (in addition to the exchanges on 21 January), there was to my mind sufficient consideration of the scope of the Request, and basis for acceding to the Request as framed, based on the Comptroller's efforts prior to the 21 January Notice. Further, the revised list of accounts provided by NTS on 22 January was only a revision of a document earlier exchanged between the authorities; the Comptroller had in his possession the unrevised document before issuing the Notices, and his decision to do so cannot be impugned by virtue of hindsight.

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2 3rd Affidavit of WYT dated 9 June 2016 at [16].

50 The Applicants further argued that the Comptroller, in assessing foreseeable relevance, failed to consider that NTS's tax assessments were by the time of the hearing before me time barred in Korea.[3] I did not agree that this was relevant to the Comptroller's decision, as NTS did not concede this and it was clearly a matter of foreign law to be determined by foreign courts and authorities. Further, as I have stated, the determination of foreseeable relevance should be assessed as at the time of the request. While aggrieved taxpayers may legitimately seek judicial review and other means to protect their interest in the confidentiality of the requested information, they should not be able to rely on the time taken for such mechanisms as itself a defence against disclosure. The distortive incentives in holding otherwise are apparent and should be avoided.

51 I also rejected the Applicants' argument that the Comptroller erred in law and/or acted irrationally as it relied on the mistaken fact that the Applicants were Korean tax residents, based merely on NTS's assertion of the same, when the tax courts and tribunals in Korea seised of the matter had not yet so concluded.[4] The premise of their argument was flawed. The Comptroller did not have to take into consideration matters going to the tax residency or liability of persons subject to a request for information, or other matters, which are questions of domestic Korean law. Further, the tax residency and liability of the Applicants had not yet been finally decided by the Korean courts either way. In the tentative state of things, the Comptroller was entitled to rely on NTS's statements as to the tax liability and/or residency of the Applicants at face value. The Comptroller was also not obliged to hold its hand pending the outcome of this issue in Korea. The actual relevance of

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3 Applicants' Submissions dated 7 September 2016 at para 101.

4 Applicants' Submissions dated 7 September 2016 at paras 103-115.

the information requested, whatever the answer may be when the proceedings in Korea come to a close, was also irrelevant (see above at [41]).

52 Finally, the Applicants raised several claims alleging that the evidential basis for the Request was lacking, such that the information requested was not "foreseeably relevant" and the Comptroller's failure to properly weigh such evidence (or lack thereof) rendered its decision to issue the Notices illegal. Specifically, the Applicants argued that a document on which the Request was based was outdated and known to be incomplete,[5] that a simple company search would have revealed the inadequacies of the Request, and that there was insufficient evidence of the requisite nexus between two of the three categories of companies listed in the Request and the Korean tax investigations.[6]

53 In my view, these arguments bordered on a conflation of judicial review with a merits review; this Court is not concerned with the issue of whether the requested information was actually "foreseeably relevant" to the Korean tax law as such. The assessment as to the quality and sufficiency of evidence, in particular, is a matter in which our courts are slow to intervene, even if a different conclusion may be reached on a *de novo* review of the matter.

54 In any case, the Applicants' arguments were factually misconceived. As regards the outdated document, that document stated that it was "correct as at 2004 and there could be more companies now", but that merely showed that more companies could be involved of which NTS was unaware, and did not negate the quality of the evidence to the extent that the Comptroller's reliance

5 Applicants' Submissions dated 7 September 2016 at paras 116-129.

6 Applicants' Submissions dated 7 September 2016 at paras 95-100.

thereon became illegal or irrational. The EOI regime is often resorted to precisely because more and better evidence of tax violations are needed for tax enforcement; to demand perfectly contemporaneous and comprehensive evidence to support every request for information is to ask for the impossible. As regards the company search, that was neither here nor there as it revealed new information not contained in the "outdated" document, but also surfaced new evidence of nexus between the Applicants and that company. As regards the sufficiency of shareholding as a nexus to sustain the Request, the Comptroller clearly directed its mind to this issue as it was the one who made the classification of companies and sought further information from NTS in respect of one of the classes whose links to the Applicants were weaker than the others. There was nothing improper in the Comptroller's weighing of the evidence, and a mere difference in opinion between the Applicants and the Comptroller as regards the final outcome of that evaluative process did not give rise to any viable claim in judicial review.

Requirement to Ensure Requests are "Clear, Specific and Legitimate"

55 The Applicants argued that, as a distinct and specific requirement of law from those expressed in the Eighth Schedule, the Comptroller must ensure that a request for information is "clear, specific and legitimate" before it can issue the attendant notices for information under the ITA. They cite as sole authority the Parliamentary debates during the Second Reading of the Income Tax (Amendment) Bill 2013, where the Senior Minister of State for Finance, in a bid to assuage concerns regarding the removal of the requirement for a court order prior to disclosures of confidential information, stated as follows (*Debates 2013*):

> … we will allow IRAS to obtain information protected under the Banking Act and Trust Companies Act for EOI purposes

> without having to seek a Court Order. This is aimed at streamlining EOI administration.
>
> Members may be concerned that the removal of the need for IRAS 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, IRAS will render EOI assistance only for clear, specific and legitimate requests.

56 By the Applicants' reasoning, the Comptroller acted illegally and/or irrationally by issuing the Notices which mirrored the Request that was too broad to qualify as "clear, specific, and legitimate". I noted that the phrase "clear, specific and legitimate" was also used by the Inland Revenue Authority of Singapore on its website to describe the administration of the EOI regime.

57 Nonetheless, I could not accept the Applicants' proposition of law. It was clear in the context of the Parliamentary debate cited that the phrase "clear, specific and legitimate" was not intended to operate as a distinct or specific requirement to bind the Comptroller as a matter of law; it was merely an illustration of the standards that would be achieved upon satisfaction of the requirements expressed in the Eighth Schedule of the ITA. I was buttressed in this view by the Parliamentary debate at the introduction of the Eighth Schedule, which explained that "[t]he 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" (*Debates 2009* at col 1607). Accordingly, the phrase "clear, specific and legitimate" merely expressed an outcome in line with the satisfaction of expressed requirements of the Eighth Schedule; it was not an addendum to the Schedule on its terms.

58 Further, there was no authority cited for the proposition that Parliamentary debates could in themselves ground requirements that bind the Comptroller as a matter of law, especially where there is no equivalent expression in the statute itself, *ie* in the ITA or the Convention (as incorporated domestically through statute). Indeed, I found it telling that Parliament could have, but did not, expressly incorporate the requirement that requests for information be "clear, specific and legitimate" in any part of the Eighth Schedule or the ITA, despite the comments made on this point during the Second Reading. There was also no guidance, whether in the ITA, the Convention, or the relevant Parliamentary debates, on the content of this "clear, specific and legitimate" test and how it differed from the expressed and established test of foreseeable relevance. In the context of the carefully calibrated EOI regime, it was simply untenable that Parliament intended to bind the Comptroller without making clear the existence and content of its legal duties. The ability to refer to materials, including Parliamentary Debates, to assist in the interpretation of statutory provisions cannot morph into a rewriting of the language of the enactment that was passed into law.

59 In any event, I found it clear on the facts that the Comptroller had sufficiently evaluated, and made appropriate enquiries of NTS, to ensure that the Request was "clear, specific and legitimate". Clarifications and evidence were sought, and there was nothing on the face of the Request as clarified that showed any impropriety.

Requirement to Balance Individual Rights against Policy of Efficient EOI Regime

60 The Applicants further argued that the Comptroller's issuance of the Notices would infringe the confidentiality and privacy rights of the Applicants and of any independent shareholders of the companies covered by the Request.

To the extent that they suggested a distinct and specific requirement that the Comptroller must, in assessing each request for information under the EOI regime, balance the affected parties' interests in confidentiality against the need for an efficient EOI regime, this was not founded on the proper interpretation of the law. The appropriate balance of interests was provided by the legislative structure of the ITA read with Article 25 of the Convention. For instance, Article 25(3) of the Convention listed the exceptions under which a requested State need not comply with a request for information. Article 25(2) of the Convention also imposed strict confidentiality obligations on the requesting State. As the court recognised in *Comptroller of Income Tax v BKW* [2014] 1 SLR 13 in respect of Article 28(2) of the Singapore-India Double Taxation Agreement ("SIDTA") which is *in pari materia* with Article 25(2) of the Convention, "the strict confidentiality obligations placed on the Indian tax authorities under Art 28(2) of the [SIDTA] would serve to allay any concerns regarding prejudice arising from the disclosure of information" (at [21]). This was the framework Singapore negotiated for, and which Parliament thought appropriate to balance the tension between efficiency and invasiveness. The Comptroller was therefore not obligated in law to conduct such balances again as a distinct legal requirement in respect of each particular request for information.

Improper delegation of discretion

61 The Applicants further argued that the Comptroller failed to independently exercise its discretion to issue the Notices and improperly delegated its decision-making power to NTS, as the Comptroller acceded to the Request prematurely, without sufficient independent inquiry, and reproduced the scope of the Request in its entirety in the Notices with minimal refinements.

62 I accept that as a general proposition, an authority must apply its own mind to the exercise of its statutory discretion and cannot delegate its decision-making authority to another person or body, failing which its policy of delegation, or the delegated decision itself, may be invalidated. The Court of Appeal has described this "general principle" as "unexceptional" because a "violation of this principle would amount to a failure by the [authority] to exercise the power vested in it" (*Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [31]).

63 In *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52 ("*Lines International*"), the High Court invalidated a general policy stating that the Port of Singapore Authority ("PSA") would refuse berth access to a vessel "if the Gambling Suppression Branch, CID and Singapore Tourist Promotion Board so (*sic*) determine that such action is necessary" (at [98]), on the ground that PSA had "the duty to exercise that discretion itself after considering various relevant factors [and] cannot abrogate this responsibility by taking orders from other statutory boards unless it is under a legal duty to do so" (at [99]). However, PSA's decision to deny berth to a particular vessel was upheld as the learned Judge found that PSA had made its own decision in respect of that vessel and had not simply relied on the impugned policy (*Lines International* at [118]).

64 In the present case, it was clear that the Comptroller had directed its mind independently to the satisfaction of Article 25 of the Convention and ss 105B and 105F of the ITA. The Comptroller independently analysed the Request, categorised the companies referred therein, and made genuine inquiries of NTS in relation to the Request by way of letters dated 7 November 2013 and 17 January 2014. The subsequent decision to issue the Notices was neither pre-determined nor premature (see above at [49]). The Applicants

cannot allege delegation of powers merely because the Comptroller took a different view from them of what was necessary to satisfy the legal requirements for the Notice to be issued and hence declined to narrow the scope of the Request. Accordingly, the fact that the Comptroller issued Notices matching the language of the Request did not take the Applicants very far: it is proper for the Comptroller to do so if it is so satisfied that this is appropriate; this is not necessarily evidence of any failing.

Irrationality

65 The Applicants also alleged that the Comptroller's decision to issue the Notices was irrational, relying chiefly on the same arguments as those for illegality, including that it was irrational to disregard ongoing Korean litigation about the Applicants' tax residency and to rely on an outdated document.

66 Generally, irrationality as a ground for judicial review is satisfied if the authority came "to a conclusion so unreasonable that no reasonable authority could ever have come to it" (*Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 at 234; see also *Lines International* at [137]), or which is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [119]). It is "hornbook law that the standard if unreasonableness is … pragmatically fixed at a very high level" (*Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") at [125]). This is because "decision-makers can in good faith arrive at quite different decisions [such that]… there is an inherent measure of latitude" (*Chee Siok Chin* at [95]).

67 In the present case, I found the Applicants' arguments on irrationality to be wholly untenable. For reasons I have earlier explained, it was not illegal or improper for the Comptroller to disregard matters of foreign law (such as the Korean proceedings on tax residency status and whether NTS exhausted all means within Korea to obtain the information). The Comptroller was also entitled to come to a determination on the foreseeable relevance of information sought in the Request based on the face value of what NTS placed before it (including the "outdated" document). NTS had clearly explained, in compliance with the ITA and the Convention, how the Applicants and other companies in the Request were thought to be related to the tax investigations in Korea. The 21 January Notice also cannot be said to be premature given the inquiries made by the Comptroller prior to its issuance. Accordingly, there was nothing on the face of the Request that seriously undermined or cast doubts on its validity, and there was all the more no reason to hold that the Comptroller's decision to issue the Notices was irrational.

Miscellaneous issues

68 The above analysis makes clear that the Applicants' arguments in illegality and irrationality were non-starters. For completeness, a number of remaining issues are briefly addressed.

69 First, there may be concerns regarding the *locus standi* of the 3rd Applicant in bringing this application as he was not included in the Request as one of the Korean taxpayers under investigation by NTS. As this argument was not pursued during the leave hearing, and was in any event not necessary for the disposal of this application, I declined to make a finding on this issue.

70 Second, the Applicants sought in their originating summons a stay of proceedings pending the final determination in Korea of the Applicants' tax residency status and tax liability. I could not accept this as there was no basis for the court to make such an order. The information requested by NTS could also go towards the establishment or otherwise of the tax residence and/or liability of the Applicants; to hold them back pending determination of such residency and liability would be contrary to the purpose of the EOI regime. As the Court of Appeal stated in *ABU v CIT*:

> 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 …

71 Lastly, it was argued by the Comptroller and the AG that too lenient a judicial review mechanism could delay the entire EOI process and frustrate the purpose of the 2013 Amendments. Judicial review may indeed cause a delay in response to an EOI request; but if the grounds for judicial review are made out then that indicates the judicial review mechanism is working as intended, whatever the discomfort this may cause the agencies concerned. The EOI regime is not to be privileged with a special judicial review test as compared to other administrative actions or decisions. It was noted that Leow JC stated in *AXY v CIT* (at [16]):

> Judicial review in the context as outlined above plays an important role in operating as a safeguard of the taxpayer's interest in an exchange of information framework which is rapidly expanding in recent times, but should not be relied on to unnecessarily delay tax investigations commenced against the taxpayers, and must not result in the foreign state being hamstrung in its investigations as a result of the judicial review application in Singapore. It was clear from the

> legislative history of the Income Tax Act that the court, in determining the scope of discovery for a judicial review application, should consider the overriding principle that the gathering of information in a foreign state for tax investigation purposes must not be prejudiced by court proceedings in Singapore, a consideration which is not usually present in judicial review applications.

Leow JC was concerned with the impact of a discovery application and I did not read this statement as importing a different standard for judicial review.

72 There is a strong public interest in allowing taxpayers to have recourse to judicial review to ensure the lawful release of their confidential information. Indeed, this was Parliament's intent when it was assured during the passage of the 2013 Amendments that "[t]axpayers still have access to the judicial process through a judicial review" (*Debates 2013*) (see above at [19]). If delays are caused as a result of the pursuit of a claim in judicial review, that is an unfortunate but necessary consequence. After all, just as there is public interest identified by Parliament in enhancing international tax cooperation through a robust and efficient EOI regime, there is also public interest in ensuring that statutory powers are exercised lawfully: "This is the very object of judicial review" (*Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [60]). There are proper mechanisms to deal with the abuse of judicial review, and indeed where the threshold is not made out, the court will dismiss the application at the leave stage.

Conclusion

73 In the final analysis, having read and heard parties' submissions, I had no doubt that the Applicants did not meet the standard of an arguable and *prima facie* case of reasonable suspicion. The Applicants may disagree with the Comptroller's decision to issue the Notices, but mere disagreement does not provide sufficient basis to ground an action in judicial review, even at the

leave stage. Despite the plethora of arguments raised by the Applicants, when the dust settled, it was clear to me that there was no arguable basis in fact or in law on which they can succeed. For the foregoing reasons, I dismissed the application.

74 In respect of costs, I ordered as follows:

(a) to the Respondent from the Applicants:

(i) SUM 1700, 2201 of 2014: $9,000 plus reasonable disbursements

(ii) SUM 6214/2015: $4,000 plus reasonable disbursements

(iii) RA 236/2014: $3,000 plus reasonable disbursements

(iv) OS 106/2014: $12,000 plus reasonable disbursement

(v) Total: $28,000 plus reasonable disbursements

(b) to the Applicants from the Respondent:

(i) SUM 4732/2014, RA 42/2015 and SUM 1002/2015: $7,000 plus reasonable disbursements

(c) to AGC from the Applicants:

(i) OS 106/2014: $3,500 plus reasonable disbursements.

75 The cost awards being conveyed by letter to the parties on 10 November 2016, I also granted an extension of time for appeal to 2 weeks after the date of the said letter.

Aedit Abdullah
Judicial Commissioner

Tan Chee Meng SC, Ho Pei Shien Melanie, Ngiam Heng Hui Jocelyn, Samuel Lim Si Wei and Lim Ying Min (WongPartnership LLP) for the applicants;
Koh Meng Sing Alvin, Li Yourui Charles, Nai Thiam Siew Patrick and Pang Mei Yu (Inland Revenue Authority of Singapore) for the respondent;
Ruth Yeo and Jocelyn Teo (Attorney-General's Chambers) for the intervener.