Comptroller of Income Tax *v* AZP
[2012] SGHC 112

Case Number : Originating Summons No 320 of 2012

Decision Date : 23 May 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Patrick Nai Thiam Siew, Foo Hui Min, Vikna Rajah and Jimmy Goh (Inland Revenue Authority of Singapore) for the plaintiff; K Gopalan (Straits Law Practice LLC) for Company Y.

Parties : Comptroller of Income Tax — AZP

Revenue Law – International Taxation – Double Taxation Agreement

23 May 2012

Choo Han Teck J:

1 This is an application made by the Comptroller of Income Tax ("the Comptroller") for the production of records and information relating to Account 1 and Account 2 (collectively, "the Accounts") held with the Defendant, a bank in Singapore. Account 1 is held in the name of Company X and Account 2 is held in the name of Company Y. The Comptroller made this application following a request for such information by the tax authority in India pursuant to Article 28(1) of the Agreement ("the Agreement") between the Government of the Republic of Singapore and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, as amended by the Second Protocol ("the Second Protocol") signed on 24 June 2011 which came into force on 1 September 2011. Article 28(1) of the Agreement as amended by the Second Protocol provides for the exchange of information between Singapore and India for the purposes of enforcing tax laws in both states, and in particular, to prevent tax evasion or fraud, and applies only to taxable periods on or after 1 January 2008.

2 The tax authority in India seized documents from an Indian national ("the Indian national") and three other persons allegedly associated with him. The tax authority in India believed that the documents indicated the existence of undeclared incomes and of bank accounts ("the Accounts") in overseas jurisdictions. This was in violation of India's tax laws. The tax authority in India suspected that monies constituting the Indian national's undeclared income were remitted to the Accounts. It therefore sent a request for information ("the Request") to the Comptroller on 12 September 2011. The Comptroller sought clarifications in a letter dated 30 September 2011, and the tax authority in India eventually responded in a letter dated 13 February 2012.

3 The Comptroller then applied under s 105J of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the ITA") and O 98 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") for an order requiring the Defendant to, *inter alia*, produce bank records and information on the Accounts from 1 January 2008 to date including:

a. documents pertaining to the opening of the Accounts (including details of the application form for the opening of the Accounts, the authorised signatories of the Accounts, names of the current, previous account holder(s) and beneficial owner(s) of the Accounts, if any);

b. documents executed by the account holder(s) and the beneficial owner(s) such as those relating to changes in their names or addresses;

c. bank statements for the Accounts, paying-in and disbursement slips, written remittance orders, remittance request forms, records of deposits, withdrawals, and the credit and debit entries of the Accounts;

d. correspondence exchanged and instructions given by the account holder(s) and beneficial owner(s) to the Defendant for the operation of the Accounts;

e. documents containing the name and address of the persons or entities who have paid or withdrawn monies from the Accounts, or to whom major amounts have been credited to from monies in the Accounts; and

f. transaction details of the Accounts if either Account 1 or Account 2 is a wealth management account.

4 I dismissed the application (without prejudice to the Comptroller making a fresh application) because I was not satisfied that the information requested was demonstrated to be "foreseeably relevant for carrying out the provisions of the Agreement" due to the inadequacy of the supporting documentation provided by the tax authority in India. The relevant and crucial issues I had to determine were:

(a) Whether the information requested was "foreseeably relevant" for carrying out the provisions of the Agreement or the administration or enforcement of India's tax laws, under Article 28(1) of the Agreement as amended by the Second Protocol?

(b) Even if the information was "foreseeably relevant", whether granting the application was justified in the circumstances of the case and was not contrary to the public interest to grant access or to order that copies of the documents sought be produced, under s 105J(3) of the ITA?

5 Article 28(1) of the Agreement as amended by the Second Protocol facilitates the exchange of information for tax purposes between Singapore and India without the "domestic interest requirement" (*ie* the requirement that the Comptroller can only obtain and release the information requested where it is relevant to the enforcement of Singapore's tax laws) (*Singapore Parliamentary Debates, Official Report* (19 October 2009) Vol 86 at col 1603). Information cannot be withheld on the grounds that it is protected by confidentiality provisions applicable to information held by banks. Given that the exchange of information could impinge on interests such as taxpayer privacy and confidentiality of banking information, it is important that the right balance is struck and that procedural safeguards are put in place to ensure that only specific and relevant requests are entertained. I now turn to the framework that Singapore has adopted to strike a balance between fulfilling our treaty obligations and safeguarding competing interests of taxpayers. In the present case, the information requested under s 105D(1)(a) of the ITA (*ie* pursuant to an avoidance of double taxation arrangement) is information protected from unauthorised disclosure under s 47 of the Banking Act (Cap 19, 2008 Rev Ed) ("the Banking Act"). Section 47(1) of the Banking Act provides that "[c]ustomer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in [the Banking] Act". In cases where such information is requested, s 105J(1) of the ITA requires the Comptroller to apply to the High Court for an order under s 105J(2) of the ITA to gain access to this information.

6 In relation to the conditions that must be satisfied before a court order will be granted, Article 28(1) of the Agreement as amended by the Second Protocol provides that "the Contracting States shall exchange such information as is *forseeeably relevant* for carrying out the provisions of [the Agreement] or to the administration or enforcement of the domestic laws concerning taxes... imposed on behalf of the Contracting States ..." [emphasis added]. Section 105J(3) of the ITA imposes two other conditions:

> The conditions referred to in [s 105J(2) of the ITA] are as follows:
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> (*a*) the making of the order is justified in the circumstances of the case; and
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> (*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.

Those three conditions must be satisfied before the High Court will grant an order under s 105J(2) of the ITA for access to the information requested or for a copy of the document containing the information requested to be given.

7 At this point, I should mention that one issue which arose during the proceedings was whether a person against whom the order is made or in relation to whom information is sought ("relevant persons") should only be allowed to depose affidavits to contest the application after the order is made, or whether they could do so at the hearing of the application even before the order is made. In this case, Mr Gopalan, counsel for Company Y, attended the hearing and informed me that Company Y intended to oppose the making of the order. The Defendant, Company X and Company Y had been notified of the Request as required under s 105E(1) read with s 105E(2) of the ITA. Mr Gopalan also requested for a copy of the affidavit for the Comptroller's application, excluding the Request. Mr Nai for the Comptroller was concerned that the affidavit contained details of the Request and should not be released to Company Y. Mr Nai was also concerned that allowing Company Y to be heard at this stage (*ie* before the order is made) would prevent the Comptroller from complying with the Request within 90 days, which is the ideal period of response set down by the Organisation of Economic Corporation and Development (see: OECD Committee on Fiscal Affairs, *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes: Module 1 on Exchange of Information on Request* (23 January 2006) at para 21).

8 It is clear that s 105J of the ITA read with O 98 of the Rules of Court envisions a two-stage test. The court will first consider whether the Comptroller's application under s 105J(1) of the ITA fulfils the three conditions set out in [6]. At this stage, the court's focus is on the sufficiency of the evidence supporting the Comptroller's application. Relevant persons will also be allowed to contest the application by, for example, arguing that the conditions for an order to be made are not fulfilled. While proceedings are to be heard *in camera* in general (s 105J(8) of the ITA) and the Comptroller's application may be made *ex parte* (O 98 r 2(1) of the Rules of Court), Section 105J(6) of the ITA provides that:

> Proceedings under [s 105J of the ITA] other than subsection (4) [*ie* proceedings pursuant to an application to set aside a s 105J(2) order] may, at the discretion of the High Court, be conducted in the presence or absence of —
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> (*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
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> (*b*) the person in relation to whom information is sought.

9 Order 98 r 2(3) read with O 98 r 2(4) of the Rules of Court further provide that:

> [i]f the Court decides under section 105J(6) [of the ITA] that the proceedings for the application should be conducted in the presence of a person referred to in section 105J(6)(*a*) or (*b*) [of the ITA], it must adjourn the proceedings for a period not exceeding 7 days and require the [Comptroller] to serve the summons and supporting affidavit on that person" but the supporting affidavit "shall exclude [the Request].

It is thus clear that an entity such as Company Y may attend a hearing for an application by the Comptroller under s 105J of the ITA and can, with the court's leave, obtain the supporting affidavit for the application so as to be able to challenge the application properly. Should the order be made, the relevant persons can apply to vary or discharge the order within seven days of service of the order on them (s 105J(4) of the ITA). The relevant persons must file a summons supported by affidavit and serve this on the Comptroller and any other person entitled to apply to discharge or vary the order at least seven days before the date of the hearing of the application. It is at this stage that the court will then consider evidence from the relevant persons as to whether the order should be set aside.

10 The first requirement of foreseeable relevance requires the Comptroller (on behalf of the requesting state) to show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws. Clear and specific evidence is necessary to prevent unwarranted disclosure of information that could not otherwise be sought from any party including the requested state. This was emphasised during the Parliamentary debates on the Income Tax (Amendment) (Exchange of Information) Bill (*Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1603-1604 (Mr Tharman Shanmugaratnam, Minister for Finance)):

> An integral aspect of the internationally agreed 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 tax 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.
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> ...
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> 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".
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> …
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> I should emphasise that these procedures are not meant to frustrate or delay the information exchange process. Rather, they are intended to provide a fair and independent assessment of the validity of requests, and allow us to render effective assistance to valid requests. They are essentially similar to procedures used in the United Kingdom, which relies on a tribunal process, or the United States which relies on the courts.
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> [emphasis added]

11 In the present case, the tax authority in India alleged that the Indian national transferred monies to Account 1 and Account 2. It should be noted that Company X and Company Y are not the subjects of any investigations by the tax authority in India, nor entities incorporated in India. The court has a duty to ensure that there is sufficient evidence of the connection between the Indian national and the two companies and the foreseeable relevance of the information requested to the investigations on the Indian national.

12 In relation to Company X, the tax authority in India relied on an unsigned transfer instruction ("the first transfer instruction") allegedly issued by the Indian national as evidence that the Indian national remitted monies to Company X's bank accounts in Singapore. The tax authority in India also relied on the first transfer instruction as evidence of the connection between the Indian national and Company X. The Indian national has not admitted to any connection between him and Company X. The first transfer instruction was a letter dated 19 December 2005 instructing a bank in Switzerland ("Bank S") to transfer monies from an account held with a bank in New York to Account 1. The first transfer instruction was unsigned and it is unclear if the instructions were executed. Furthermore, even if the first transfer instruction was issued and executed, it was issued around 2005, which is outside the period for which Article 28(1) as amended by the Second Protocol applies (*ie* taxable periods beginning on or after 1 January 2008). The Comptroller had already stated in its letter dated 30 September 2011 that it could not provide the bank records and statements requested for the period before 1 January 2008, and this was accepted by the tax authority in India. The tax authority in India did not provide evidence of any transaction between Company X and the Indian national on or after 1 January 2008 in relation to Account 1. I therefore did not grant the information requested in relation to Account 1, given the lack of clear and specific evidence supporting the Request.

13 In relation to Company Y, the tax authority in India also relied on an unsigned transfer instruction ("the second transfer instruction") as evidence that the Indian national remitted monies to Account 2. Again, the tax authority in India claimed that the second transfer instruction was evidence of the connection between Company Y and the Indian national for the purposes of the investigations. The second transfer instruction was a letter dated 16 July 2000 to Bank S to transfer monies to an account purportedly held by Company Y with a bank in Dubai. There was no evidence that monies had been transferred to or from Account 2 at all. In addition, there was no evidence of any transaction between Company Y and the Indian national on or after 1 January 2008 in relation to Account 2. I therefore also declined to grant an order for the information requested on Account 2. The Request and the supporting evidence was not sufficiently clear and specific for me to say that the information requested would be foreseeably relevant to the enforcement of India's tax laws and the ongoing investigations on the Indian national.

14 In the light of the fact that the requirement of foreseeable relevance was not met, I need not deal with the other two requirements of whether granting the application was justified in the circumstances of the case and not contrary to the public interest. However, for the sake of completeness, I will say that even if a tenuous connection between the Indian national and Company X and Company Y could have been shown such that the requirement of foreseeable relevance was satisfied, I am of the view that consideration as to whether the application was justified is a process that envisages more evidence than presently adduced. This should include evidence of the use of the Accounts for the purposes complained of in India. The third element of public interest (concerning national security) does not arise in this case. It was not alleged that the information sought would involve "national security interests, or sensitive information held in the vital interests" of Singapore (*Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at col 1620).

15 For the foregoing reasons, the application was dismissed without prejudice to the Comptroller making a fresh application, if further information is provided to the Comptroller.