Comptroller of Income Tax *v* BJY and others
[2013] SGHC 173

Case Number : Originating Summons No 184 of 2013

Decision Date : 13 September 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Alvin Chia Ken Li and Patrick Nai (Inland Revenue Authority of Singapore (Law Division) for the plaintiff; The first and second respondents unrepresented; Noelle Seet and Guo Longjin (RHTLaw Taylor Wessing LLP) for the third respondent.

Parties : Comptroller of Income Tax — BJY and others

Revenue law – International taxation – Double taxation agreement – Exchange of information

13 September 2013

Andrew Ang J:

Introduction

1 This was an application in Originating Summons No 184 of 2013 ("OS 184") by the Comptroller of Income Tax ("the Comptroller") pursuant to s 105J of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA") for an order that the first respondent bank [BJY] and the second respondent bank [Bank 2] release certain information, documents and bank records concerning the third defendant [BJX]. I allowed the Comptroller's application in an *inter partes* hearing in chambers, and now set out the grounds for my decision.

Factual background

2 The Comptroller made this application following a request for such information by Mr K Ramalingam, the Joint Secretary (Foreign Tax and Tax Research II) of the Central Board of Direct Taxes of the Department of Revenue of India ("the Competent Authority of India") by way of a letter dated 12 September 2012 ("the EOI Request"). Further correspondence was exchanged between the Comptroller and the Competent Authority of India in order for the Comptroller to clarify uncertainties in the EOI Request. This was done by way of a letter sent by the Comptroller to the Competent Authority of India dated 30 September 2011 to which the Competent Authority of India replied in a letter dated 29 May 2012 (such correspondence exchanged between the Comptroller and the Competent Authority of India being hereinafter referred to as the "Information Request Correspondence").

3 The EOI Request was made pursuant to 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 which entered into force on 27 May 1994 ("the Singapore-India DTA"). Specifically, the EOI Request was made under Art 28 of the Singapore-India DTA ("Art 28"), a provision for the purposes of exchange of information ("EOI") in relation to the administration of tax issues in Singapore and India. Art 28 was amended by the Second Protocol signed on 24 June 2011, which came into force on 1 September 2011.

4 The Information Request Correspondence was placed before the court by way of an affidavit filed on 26 February 2013 in support of OS 184 by Ms Chan Wei Ting ("Ms Chan"), a senior tax investigator with the Inland Revenue Authority of Singapore ("IRAS"). Ms Chan also recounted certain important claims relating to [BJX] in the main text of the affidavit which were taken from the Information Request Correspondence. I pause at this juncture to note that in the event the supporting affidavit is to be served on the person in relation to whom the information is sought pursuant to O 98 r 2(4) of the Rules of Court (Cap 322, R5 2006 Rev Ed) ("Rules of Court") (as was the case here), the letter of request made by the foreign competent authority required to be exhibited under O 98 r (2)(*b*) has to be excluded. This stricture is obviously for the benefit of the foreign competent authority whose investigations might be compromised by disclosure of the text of their letter of request. Therefore, the Comptroller must take care to ensure that only information taken from the letter of request from the foreign competent authority that is necessary for the hearing before the judge is included in the text of its affidavit. If there is any doubt, it would seem sensible to seek the consent of the foreign competent authority.

5 In the present case, the main text of the supporting affidavit made the following important assertions relating to [BJX] to establish why the EOI Request was made by the Competent Authority of India:

(a) The Competent Authority of India stated that [BJX] was running a Ponzi-like scheme in India with another Singapore company, [Company A], under which Indian residents who paid membership fees for e-magazine subscriptions were offered en-cashable reward points for bringing in new customers.

(b) [BJX] appointed over 140 distributors in India to operate this scheme, and three Indian companies, [Indian Company 1], [Indian Company 2], and [Indian Company 3] ("the Three Indian Companies") to collect the subscription fees in India. The Three Indian Companies remitted the moneys to [Company A] but the moneys were eventually paid into [BJX]'s bank accounts in Singapore.

(c) There are two banks accounts held by [BJX] in Singapore: [BJY Account] and [Bank 2 Account] (collectively referred to as "the Bank Accounts").

(d) The Three Indian Companies are considered by the Competent Authority of India to constitute permanent establishments for [BJX] in India. As such, the income of [BJX] that is directly or indirectly attributable to the permanent establishments in India is regarded by the Competent Authority of India as taxable under Indian law. However, the moneys remitted to the Bank Accounts have not been subject to tax.

6 Further to the information found in the Information Request Correspondence, Ms Chan also tendered [BJX]'s financial statements for the financial year ending 31 December 2011 ("the Financial Statements") as evidence of a business connection between [BJX] and the Three Indian Companies. The Financial Statements, as described by Ms Chan, indicate the following:

(a) Under the "ASSETS" column is an item named "Other receivables". A breakdown of "Other receivables" includes an item named "Net amounts due from collecting representatives".

(b) The item "Net amounts due from collecting representatives" is described as being commission income due to [BJX] from three external collecting representatives who are responsible for the collection and remittance of subscription moneys generated from the sale of e-magazine subscriptions, in regard to which [BJX] acts as distributor for an external party

publisher.

(c) The balance receivable from the three external collecting representatives consisted of the amounts owing from them, less the amount owing to the external party publisher and allowance for impairment. Importantly, Appendix 2 to the Financial Statements listed the Three Indian Companies as the trade debtors for which the allowance for impairment amounting to US$8,139,454 was made. The reason for the allowance was stated as "Bank account frozen".

7 Ms Chan, on behalf of the Comptroller, averred that certain information regarding the Bank Accounts would assist the Competent Authority of India in, *inter alia*, determining the actual amount of remittances received by [BJX] from India, tracing and identifying the ultimate recipient(s) of the remittances, and identifying any additional Indian or foreign entities involved in the Ponzi-like scheme.

8 On that basis, the Comptroller's application in OS 184 sought, *inter alia*, an order requiring [BJY] and [Bank 2] to produce the following information, documents and bank records:

(a) The bank account statements for the Bank Accounts and any other bank account held by [BJX] which had been opened after the closure of the Bank Accounts ("the Bank Account Statements"); and

(b) The bank records and documents in relation to the opening of the Bank Accounts and details of the Bank Accounts (including the application forms, account signatory authorisations, identity verification documents for the signatories, names of the account holders and beneficial owners (if any), and the addresses of the account holders and beneficial owners (if any)) (the "Account Opening Documents").

Procedural framework for EOI requests

9 Before setting out the grounds of my decision with regard to the application proper, I will first outline the procedural framework for the making of EOI requests and, in particular, how the present application was made.

10 For the implementation of EOI obligations under tax treaties entered between Singapore and other countries, the Income Tax (Amendment) (Exchange of Information) Act 2009 (No 24 of 2009) amended the ITA to include s 105A to s 105M and the Eighth Schedule. A request for information by a foreign competent authority to the Comptroller, where there is an arrangement for the avoidance of double taxation in force containing an EOI provision, is expressly provided for by s 105D of the ITA:

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.

The Singapore-India DTA is an avoidance of double taxation agreement ("DTA") that falls within s 105D.

11 The foreign competent authority must provide the information prescribed in the Eighth Schedule when making its request under s 105D, unless the Comptroller otherwise permits. The requirements in the Eighth Schedule are as follows:

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]

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.

12 It should also be noted that provision 4 of the Eighth Schedule was amended by the Income Tax Act (Amendment of Eighth Schedule) Order 2012, which took effect from 3 December 2012. As a result, the phrase "the relevance of the information to the purpose of the request" was taken out, such that the Eighth Schedule no longer makes any specific reference to relevance.

13 Once the Comptroller is satisfied with the request for information, he has various powers under the ITA to obtain information for the purposes of EOI. However, if the Comptroller is of the opinion that the information requested is protected from unauthorised disclosure under s 47 of the Banking Act (Cap 19, 2008 Rev Ed) ("Banking Act") or s 49 of the Trust Companies Act (Cap 336, 2006 Rev Ed) ("Trust Companies Act"), he is required by s 105J(1) of the ITA to apply to the High Court for an order under s 105J(2) granting access to the information.

14 In the present application, the Competent Authority of India made the EOI Request under s 105D, in compliance with the Eighth Schedule requirements. However, the information requested by the Competent Authority of India, consisting of banking documents, was protected from unauthorised disclosure under the s 47 of the Banking Act.

15 Accordingly, the Comptroller applied under s 105J for the Bank Account Statements and Account Opening Documents. The Comptroller also served notice of its intention to do so on [BJY] and [Bank 2] pursuant to s 105E(1)(*b*) of the ITA on 25 February 2013, and on [BJX] pursuant to s 105E(1)(*a*) on 26 February 2013. Section 105E(1) reads as follows:

> After receipt of a request under section 105D for any information which, in the opinion of the Comptroller, is information referred to in subsection (2) [*ie*, information provided from unauthorised disclosure under s 47 of the Banking Act or s 49 of the Trust Companies Act], the Comptroller shall serve notice of the request by ordinary post on —
>
> (*a*) the person identified in the request as the person in relation to whom the information is sought; and
>
> (*b*) the person identified in the request as the person who is believed to have possession or control of the information.

16 After receiving notice from the Comptroller, [Ms XYZ], a director of [BJX], on behalf of [BJX] filed an affidavit on 25 March 2013 to oppose the application made by the Comptroller. On 8 April 2013, [BJX] took out Summons No 1823 of 2013 seeking, *inter alia*, leave for [BJX] to be made a party to the Comptroller's application in OS 184. After hearing the application in chambers on 8 April 2013, I granted leave for [BJX] to be added as a party to OS 184.

17 Generally, the Comptroller's application may be made *ex parte* (O 98 r 2(1) of the Rules of Court), and such applications will be heard *in camera* (see s 105J(8) of the ITA). However, the court under s 105J(6) retains the discretion to allow the application to be made in the presence of the person in relation to whom the information is sought, the person alleged to have possession or control of the information, or the person against whom the order is to be made. Accordingly, I exercised my discretion to allow the application to be heard *inter partes*.

18 The parties appeared before me in chambers on 5 July 2013 for the hearing of the application, and it is to the main issue in OS184 which I now turn.

The main issue

19 The main issue before me was whether the order sought by the Comptroller under s 105J ought to be made. This required me to identify the conditions that had to be satisfied for an order to be made, and then to consider whether those conditions were satisfied in the present application by the Comptroller.

Analysis

The conditions to be satisfied before an order is granted

20 Before making an order sought under s 105J, the High Court must first be satisfied that the two conditions set out under s 105J(3) are met:

105J.— (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.

21 These two conditions will be addressed, and applied to the facts of the present case, in turn.

Would making the order be justified in the circumstances?

22 As previously mentioned (above at [10]), s 105J was introduced into the ITA by the Income Tax (Amendment) (Exchange of Information) Act 2009 (No 24 of 2009). During the Parliamentary Debate on the Second Reading of the Income Tax (Amendment) (Exchange of Information) Bill (*Singapore Parliamentary Debates, Official Report* (19 October 2009) vol 86 at cols 1602–1625) ("the Parliamentary Debates"), the Minister for Finance Mr Tharman Shanmugaratnam ("the Minister") noted that the amendments to the ITA were to "allow Singapore to implement the internationally agreed Standard for the exchange of information for tax purposes upon request". The Minister explained what this "Standard" was, as well as the ambit and nature of its application (at cols 1602–1604):

The Standard in its current form was first published by the Organisation of Economic Cooperation and Development (OECD) in 2005. It was most recently articulated in the OECD 2008 Model Tax Convention on Income and on Capital, and sets out how tax jurisdictions should address cross border tax evasion by entering into effective information sharing arrangements through their Avoidance of Double Taxation Agreements (DTAs).

…

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.

Additionally, the 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.

[emphasis added]

23 The Minister's speech, therefore, made clear that the amendments to the ITA were meant to bring Singapore in line with the internationally agreed Standard on EOI for the administration or enforcement of domestic tax laws, by enhancing the level of assistance that Singapore could provide to foreign States that are parties to DTAs with Singapore. The Standard, however, does not dictate that all requests for information made by a foreign competent authority must be acceded to. There is a countervailing need to ensure that information which is statutorily protected under Singapore law from unauthorised disclosure is not divulged without warrant.

24 The concerns raised by the Minister are reflected in the Eighth Schedule requirements, and also in most of the recently signed or amended DTAs (including the Singapore-India DTA). Such considerations must be taken into account by the court in deciding whether the making of an order under s 105J is *justified in the circumstances*.

25 In this context, two considerations were pertinent for my decision: (a) whether the information requested was foreseeably relevant; and (b) whether the information requested disclosed a trade, business, industrial, commercial or professional secret or trade process ("Business Secrets"). I will deal with them *seriatim.*

Was the information requested foreseeably relevant?

26 It has to be recognised that the foreign competent authority when making a request for information cannot always be certain that the information sought will prove to be relevant to its investigation. At that point it has not obtained that information and it has to make its request based on what information is already in its possession. That suggests that the threshold for relevance cannot be set too high. However, it must still have some basis for making a request for information. Speculative requests (or fishing expeditions) with no apparent nexus to any inquiry or investigation concerning tax matters should not be allowed.

27 Art 28(1) of the Singapore-India DTA provides some guidance on the degree of relevance the Comptroller must show in order to satisfy the court:

> The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant* for carrying out the provisions of [the DTA] or to the administration or enforcement of the domestic laws concerning taxes ... imposed on behalf of the Contracting States, … [emphasis added]

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 DTA 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.

29 This view was well articulated by an OECD Commentary (known as the "Update to Article 26 of the OECD Model Tax Convention and its Commentary, approved by the OECD Council on 17 July 2012") accompanying Art 26 of the OECD Model Tax Convention, which is *in pari materia* to Art 28 of

the Singapore-India DTA. The OECD Commentary (at para 5) explains that:

> … *The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent* and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. ***In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. 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. 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 are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are "fishing expeditions", i.e. speculative requests that have no apparent nexus to an open inquiry or investigation*** . [emphasis in original in bold italics; emphasis added underlined]

30 In the present case, based on the information provided in Ms Chan's affidavit and the Information Request Correspondence, I found that the EOI Request was not a speculative one nor, for that matter, a "fishing expedition". The taxpayer under investigation, [BJX], was clearly identified. The purpose of the EOI Request was also sufficiently elaborated upon: the Competent Authority of India needed the information to determine the actual amount of moneys received by [BJX] from the Three Indian Companies, and to trace those moneys to identify the ultimate recipient(s) and any additional masterminds behind the Ponzi-like scheme.

31 There was also sufficient evidence to establish a connection between the tax investigations on [BJX] and the information in the Bank Accounts. It was not disputed that [BJX] was involved with the Three Indian Companies, and [Ms XYZ] also stated in her affidavit that [BJX] contracted with the Three Indian Companies. The Financial Statements further supported the Comptroller's view that remittances were most likely made from the Three Indian Companies to [BJX]. The Bank Account Statements would allow for the movement and amount of moneys transferred to be traced. The Account Opening Documents would allow the Competent Authority of India to investigate the identity of the person behind [BJX] to see whether that person has infringed Indian tax laws in connection with the alleged Ponzi-like scheme.

32 Counsel for [BJX], Ms Noelle Seet ("Ms Seet"), sought to persuade the court that the information requested was not foreseeably relevant because the Competent Authority of India "must first show that [BJX] is subject to India's tax laws". [note: 1] In doing so, Ms Seet relied on the only reported judgment on EOI requests made pursuant to s 105J of the ITA thus far, *Comptroller of Income Tax v AZP* [2012] 3 SLR 690 ("*AZP*"), for the proposition that clear and specific evidence of a connection between the information requested and the enforcement of India's tax laws was necessary to show foreseeable relevance. Ms Seet interpreted this to mean that there must be "clear

and specific evidence that [BJX] is subject to India's tax laws by reason of it having conducted business through a [permanent establishment] in India" [note: 2]. Accordingly, Ms Seet submitted at length that [BJX] was not liable to pay tax under Indian law. However, I found that it was not for this court to make pronouncements on whether [BJX] would indeed be liable for taxes under Indian law, and Ms Seet's submissions on this point were therefore irrelevant. When this was put to Ms Seet, she accepted the point but submitted further that the application should not be decided until the Indian courts found that [BJX] was indeed liable to pay taxes in India. That, however, would be putting the cart before the horse. The Competent Authority of India should not have to establish that [BJX] is liable to pay taxes under Indian law when seeking the very information which is foreseeably relevant to helping them establish [BJX]'s liability.

33 The present case was also distinguishable from *AZP* where the application for an order under s 105J was rejected. In *AZP*, Choo Han Teck J found that the information requested was not foreseeably relevant because the request for information and the supporting evidence adduced were not sufficiently clear and specific for two reasons:

(a) The Indian tax authority was investigating an Indian national for tax offences, and alleged that moneys were transferred by him to two bank accounts in Singapore. The account holders themselves, however, were not the subject of any investigation by the Indian tax authorities.

(b) The only evidence relied upon by the Indian tax authority linking the Indian national to the account holders were two unsigned transfer instructions allegedly issued by the Indian national to the two accounts. However, the transfer instructions being unsigned could not constitute sound evidence of any actual transactions taking place between the Indian national under investigation and the two account holders.

In the present case, the account holder is itself subject to investigations by the Competent Authority of India. Furthermore, there was sufficient evidence that [BJX] was conducting business in India through the Three Indian Companies, and that funds were possibly transferred from the Three Indian Companies to [BJX] via the Bank Accounts.

34 As an aside, I note that Choo J in *AZP* analysed the requirement of foreseeable relevance as a separate condition from the two conditions found in s 105J(3). Choo J's analysis, however, does not contradict my analysis in this case, since foreseeable relevance is undoubtedly an *important but not sufficient consideration* in deciding whether an order granting access to information requested is *justified in the circumstances*. Furthermore, Choo J's explanation (at [14] of *AZP*) that "evidence of the use of the Accounts for the purposes complained of in India" would provide justification for the application in *AZP* is consistent with my analysis of the test of foreseeable relevance.

Would the information requested disclose any Business Secrets?

35 Another consideration the court needs to take into account is expressed in Art 28(3)(c) of the Singapore-India DTA:

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

…

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)

Disclosure of information that would be contrary to public policy constitutes the condition in s 105J(3)(*b*) and will be dealt with below at [43]–[45].

36 If the information requested by the foreign competent authority falls within the scope of "trade, business, industrial, commercial or professional secret or trade process" (*ie*, Business Secrets), the Comptroller is under no obligation to supply such information.

37 No doubt, protection must be accorded to Business Secrets, since disclosure of such information may cause irreparable prejudice to the owner of the information. However, given that s 105J was implemented to bring Singapore in line with the internationally agreed Standard on EOI, it follows that what constitutes the scope of Business Secrets must be determined with this purpose in mind. The OECD Commentary at para 19.2, in this regard, is helpful:

> 19.2 In most cases of information exchange no issue of trade, business or other secret will arise. A trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship). *The determination, assessment or collection of taxes as such could not be considered to result in serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information revealed the proprietary formula used in the manufacture of a product.* The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly. [emphasis added]

38 It can be seen that the OECD Commentary views narrowly the scope of Business Secrets which would be protected from disclosure under the EOI regime. This must be right in order for the EOI scheme not to be rendered ineffectual. Business Secrets that qualify for protection from disclosure must constitute the exception and not the norm.

39 Furthermore, in considering any potential prejudice that might be suffered by the owners of Business Secrets through the release of such information, the court must also take into account the confidentiality obligations found in Art 28(2) of the Singapore-India DTA which provides as follows:

> 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. …

This was also pointed out by the Minister during the Parliamentary Debates (at cols 1621–1622):

> … it is important that information shared with the requesting authority does not fall into the wrong hands. The internationally agreed Standard recognises this as a key concern for many

countries, and has hence made the confidentiality of any exchanged information a key tenet of the Standard. This is therefore explicitly spelt out in our DTAs which incorporate the Standard. Any information received by any jurisdiction in the course of processing or making a request shall be treated as secret in the same manner as information obtained under the domestic laws of that jurisdiction, and may only be disclosed to persons or authorities concerned with the assessment and collection of, enforcement or prosecution in respect of, determination of appeals in relation to the relevant taxes. Such persons and authorities shall use the information only for such purposes.

40 Therefore, the harm that might be suffered by the taxpayer because confidential documents are provided to a foreign competent authority should not be overstated. I further note that this is consistent with the OECD Commentary (at para 19.1):

> In its deliberations regarding the application of secrecy rules, the Contracting State should also take into account the confidentiality rules of paragraph 2 of the Article. The domestic laws and practices of the requesting State together with the obligations imposed under paragraph 2, may ensure that the information cannot be used for the types of unauthorised purposes against which the trade or other secrecy rules are intended to protect. *Thus, a Contracting State may decide to supply the information where it finds that there is no reasonable basis for assuming that a taxpayer involved may suffer any adverse consequences incompatible with information exchange*. [emphasis added]

41 In the present case, Ms Seet submitted (albeit in the context of s 105J(3)(*b*) that disclosure of the information was contrary to the public interest) that [BJX]'s primary business is in the trading of heavy equipment and spare parts, and that the banking documents requested from [BJY] and [Bank 2] would identify [BJX]'s customers and suppliers, none of whom has any connection with India. According to Ms Seet, these documents were akin to customer and supplier lists, and therefore were trade secrets. I rejected this submission. I found that the banking documents requested by the Comptroller did not fall within the narrow scope of Business Secrets. Moreover, the confidentiality provisions apply.

42 In light of the findings made, and taking into account all the circumstances of the application before me, I found that the making of the order under s 105J was justified.

Would making the order be contrary to the public interest?

43 Section 105J(3)(*b*) provides that the court must be satisfied that the making of an order under s 105J(2) is not contrary to the public interest. The definition of "public interest" was addressed by the Minister during the Parliamentary Debates (at cols 1620–1621):

> ***… "Public interest" under the Act covers the same grounds as "public policy" as stated in the internationally agreed Standard .*** The internationally agreed Standard has the concept of "public policy" or what they call in French, *ordre public*. ***It covers especially national security interests, or sensitive information held in the vital interests of the requested country*** … "Public interest", as used in the Act, does not depart in substance from what is envisaged under the internationally agreed Standard, under its public policy provision. [emphasis added in bold italics]

44 In accordance with the internationally agreed Standard, Art 28(3)(c) of the Singapore-India DTA provides that Singapore is not obligated to supply information the disclosure of which is contrary to public policy. The OECD commentary (at para 19.5) further explains this limitation with regard to

EOI as only being relevant in "extreme cases":

> … such a case could arise ***if a tax investigation in the requesting State were motivated by political, racial, or religious persecution*** . The limitation may also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested State. ***Thus, issues of public policy*** *(ordre public)* ***rarely arise in the context of information exchange between treaty partners*** . [emphasis added in bold italics]

45 Therefore, what constitutes public interest for the purposes of s 105J(3)(*b*) ought to be interpreted in a manner consistent with the Minister's explanation referred to at [43] above and the OECD Commentary. My view is that public interest in this context does not extend to giving another layer of protection for: (a) information that is protected from disclosure under s 47 of the Banking Act and s 49 of the Trust Companies Act; or (b) Business Secrets. With regard to the former, the very fact that s 105J(1) permits the Comptroller to apply to court for an order granting access to such protected information must mean that the making of such order cannot *ipso facto* be against the public interest. Otherwise, the condition in s 105J(3)(*b*) would render s 105J(1) nugatory.

46 As regards the latter, (*ie*, Business Secrets), the position is already stated at [35]–[40] above. Business Secrets are protected from disclosure to the Competent Authority of India and that is all there is to it. Where, in the context of a s 105J(1) application, the information sought is not only protected from disclosure under s 47 of the Banking Act or s 49 of the Trust Companies Act, but is also a Business Secret, the court should decline to make an order for such information to be disclosed simply because by reason of its being a Business Secret, it would not be justified in the circumstances to so order (*ie*, the condition in s 15J(3)(*a*) would not be met) and not because it is contrary to the public interest.

47 As mentioned (above at [41]), Ms Seet submitted that the information requested by the Competent Authority of India constituted a trade secret and should be respected and protected. However, Ms Seet made her submission with reference to the condition under s 105J(3)(*b*), and argued that the disclosure of trade secrets would constitute an infringement of the rights of [BJX] which is contrary to the public interest. For the reasons set out above, Ms Seet's submission was untenable.

48 Accordingly, I found that making the order under s 105J(2) was not contrary to the public interest.

Conclusion

49 For the reasons set out above, I found that the two conditions in s 105J(3) were both satisfied.

50 Pursuant to s 105J(2), I allowed the Comptroller's application, and ordered that:

(a) [BJY] produce, within 21 days, the following information, documents and bank records for the period of 1 April 2010 to 31 March 2011:

(i) The bank account statements for:

(A) the [BJY Account]; and

(B) any other bank account held by [BJX] which had been opened after the closure

of the [BJY Account]; (the bank accounts mentioned in paragraphs 1(a)(i) and (ii) shall hereafter be collectively referred to as the "[BJY] Accounts");

(ii) Bank records and documents in relation to the opening of the [BJY] Accounts and details of the [BJY] Accounts (including the application forms, account signatory authorisations, identity verification documents for the signatories, names of the account holders and beneficial owners (if any), and the addresses of the account holders and beneficial owners (if any));

(iii) Bank records and documents in relation to any remittances from the [BJY] Accounts and details of any remittances from the [BJY] Accounts (including the names of the banks, branches and account holders to whom the said remittances had been made from the [BJY] Accounts, and the dates, amounts and reference numbers of the said remittances); and

(iv) Bank records and documents in relation to any moneys credited into the [BJY] Accounts and details of any moneys credited into the [BJY] Accounts (including the names of the banks, branches and account holders who had credited the said moneys into the [BJY] Accounts, and the dates, amounts and reference numbers of the said credits).

(b) [Bank 2] produce, within 21 days, the following information, documents and bank records for the period of 1 April 2010 to 31 March 2011:

(i) the bank account statements for:

(A) the [Bank 2 Account]; and

(B) any other bank account held by [BJX] which had been opened after the closure of the [Bank 2 Account]; (the bank accounts mentioned in paragraphs 2(a)(i) and (ii) shall hereafter be collectively referred to as the "[Bank 2] Accounts");

(ii) Bank records and documents in relation to the opening of the [Bank 2] Accounts and details of the [Bank 2] Accounts (including the application forms, account signatory authorisations, identity verification documents for the signatories, names of the account holders and beneficial owners (if any), and the addresses of the account holders and beneficial owners (if any));

(iii) Bank records and documents in relation to any remittances from the [Bank 2] Accounts and details of any remittances from the [Bank 2] Accounts (including the names of the banks, branches and account holders to whom the said remittances had been made from the [Bank 2] Accounts, and the dates, amounts and reference numbers of the said remittances); and

(iv) Bank records and documents in relation to any moneys credited into the [Bank 2] Accounts and details of any moneys credited into the [Bank 2] Accounts (including the names of the banks, branches and account holders who had credited the said moneys into the [Bank 2] Accounts, and the dates, amounts and reference numbers of the said credits).

(c) [BJY] and [Bank 2] are to produce copies of the said material under [50(a)] and [50(b)] above to an authorised officer of the Comptroller for him/her to take away not later than the end of the period of 21 days.

(d) Subject to [50(c)] above, no person may inspect or take a copy of any document relating to these proceedings without the leave of the High Court under s 105J(9) of the ITA.

(e) The order shall have effect and remain in force until it is varied or discharged.

51 I also ordered that [BJX] pay the Comptroller's costs fixed at $4,000.

[note: 1] [BJX] Skeletal Submissions at para 27.

[note: 2] [BJX] Skeletal Submissions at para 35.