Comptroller of Income Tax *v* BKW and another
[2013] SGHC 205

Case Number : Originating Summons No 204 of 2013 (Summons No 1499 of 2013)

Decision Date : 04 October 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Patrick Nai, Jimmy Goh and Michelle Chee (Inland Revenue Authority of Singapore (Law Division)) for the applicant; Jonathan Lee (Rajah & Tann LLP) on watching brief for the first respondent; Renganathan Nandakumar, Noelle Seet and Guo Longjin (RHTLaw Taylor Wessing LLP) for the second respondent.

Parties : Comptroller of Income Tax — BKW and another

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

4 October 2013

Andrew Ang J:

Introduction

1 This was an application by the second respondent, [R] Ltd, in Summons No 1499 of 2013 ("SUM 1499") to set aside the order in Originating Summons No 204 of 2013 ("OS 204") which directed the first respondent, [BKW], to release to the Comptroller for transmission to the Indian tax authorities certain information, documents and bank records concerning [R] Ltd. After hearing the parties, I dismissed [R] Ltd's application. I now set out the grounds for my decision.

Factual background

2 On 4 March 2013, the Comptroller of Income Tax ("the Comptroller") filed OS 204 pursuant to s 105J of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Income Tax Act"). This application followed a letter requesting for information dated 28 December 2012 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"). This letter of request ("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 and enforcement 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.)

3 An affidavit was filed on 4 March 2013 in support of OS 204 by Koh Eng Chuan ("Koh"), a senior tax investigator with the Inland Revenue Authority of Singapore. In this affidavit, Koh recounted the following important assertions relating to [R] Ltd made by the Competent Authority of India to justify the EOI Request:

(a) In the course of investigations into the tax affairs of an Indian company, [S], the Indian

tax authorities conducted a raid and search at the office premises of [S] in Mumbai, India. In an office safe under the control of two employees of [S], a loose piece of paper was found bearing certain information regarding [R] Ltd's Singapore bank account with [BKW] ("the Paper").

(b) When confronted with the Paper, the joint managing director of [S] gave evasive replies about the nature of the entries made on the Paper. According to the Indian tax authorities, it was understood that when money was transferred from [S] to [R] Ltd's bank account in Singapore, [S] received an equivalent sum of cash in Indian Rupees within India. The Indian tax authorities noted that the Paper contained particulars of transactions taking place outside India which were not meant to be reflected in the regular account books of [S].

(c) In view of the above, the information requested in the Comptroller's application would assist the Competent Authority of India in:

(i) identifying the person in India who made the cash payments to [S] equivalent to the amounts deposited by [S] into [R] Ltd's bank account; and

(ii) ascertaining the details of hidden transactions which have potential income tax implications for [S] under Indian tax legislation.

Koh stated his belief that the EOI Request was justified in the circumstances of the case and was not contrary to the public interest under s 105J(3) of the Income Tax Act. Koh further averred that the EOI Request complied with the requirements set out in the Eighth Schedule of the Income Tax Act.

4 In the same affidavit, Koh exhibited a photocopy of the Paper, which contained the following information:

(a) The name and address of [BKW] in Singapore. The bank was described as the "RECEIVING BANK".

(b) The Society for Worldwide Interbank Financial Telecommunication (or SWIFT) code of [BKW].

(c) The name, address and account number of the correspondent bank in New York.

(d) The beneficiary's name listed as [R] Ltd.

(e) [R] Ltd's bank account number.

(f) The handwritten figure of "800".

I note that the Paper did not actually contain "particulars of transactions taking place outside India" as asserted by the Indian tax authorities (see [3(b)] above). However, the information on the Paper did suggest that there was a connection between [S] and [R] Ltd (see [16]–[17] below).

5 On this basis, the Comptroller's application in OS 204 sought, *inter alia*, an order requiring [BKW] to produce the complete bank records and all information and documents relating to [R] Ltd's bank account ("the Bank Account") from 1 April 2010 to 18 March 2011, including but not limited to the following:

(a) All documents pertaining to the opening of the Bank Account.

(b) All documents executed by the account holder and beneficial owner in relation to the Bank Account, including all documents in relation to the history of changes of the name, address and any other matters of the account holder and beneficial owner.

(c) Bank account statements for the Bank Account, including all documents and records indicating the dates, amounts and reference numbers of deposits and withdrawals in respect of the Bank Account.

6 At an *ex parte* hearing on 14 March 2013, I granted an order in terms of the Comptroller's application in OS 204 ("the Order").

7 Subsequently, [R] Ltd filed SUM 1499 praying for, *inter alia*, a discharge of the Order. On 4 July 2013, I reserved judgment after hearing the parties' full arguments in SUM 1499. Two weeks later on 18 July 2013, I dismissed [R] Ltd's application to set aside the Order.

8 Before I analyse the merits of this application, it would be appropriate to set out the following brief facts about [R] Ltd. [R] Ltd was incorporated in the British Virgin Islands on 17 May 2007. It has one corporate director and one corporate shareholder. [R] Ltd is in the business of coal trading and investing in securities and financial products.

9 I would also mention at this point that the procedural framework for EOI requests has been set out comprehensively in *Comptroller of Income Tax v BJY* [2013] SGHC 173 ("*Comptroller v BJY*") at [9]–[18]. I therefore do not propose to set out the framework again in the present case.

The issue

10 The issue before me was whether the Order granted in OS 204 ought to be set aside on the ground that the conditions in s 105J(3) of the Income Tax Act for granting the Order had not been satisfied.

Analysis

The conditions to be satisfied before an order is granted

11 Before making an order sought under s 105J of the Income Tax Act, the court must first be satisfied that the two conditions under s 105J(3) are met. Sections 105J(2) and (3) of the Income Tax Act read as follows:

(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.

12 These two conditions will be considered in turn and applied to the facts of the present case.

Was the making of the Order justified in the circumstances?

13 In deciding whether the making of an order for the disclosure of information under s 105J of the Income Tax Act is justified in the circumstances, the court will have regard to the internationally agreed standard on EOI for the administration or enforcement of domestic tax laws (*Comptroller v BJY* at [23]). This internationally agreed standard is reflected in the requirements of the Eighth Schedule of the Income Tax Act and in most of the recently signed or amended DTAs (*Comptroller v BJY* at [24]). In the present case, the following principles were considered:

(a) The requested information must be foreseeably relevant for carrying out the provisions of the DTA or to the administration or enforcement of the requesting State's domestic tax laws (*Comptroller v BJY* at [27]–[28]). This standard of foreseeable relevance only requires a reasonable possibility that the information will be relevant at the time a request is made. Whether the information, once provided, actually proves to be relevant is immaterial (*Comptroller v BJY* at [29]).

(b) No disclosure will be made of trade, business, industrial commercial or professional secrets or trade processes ("Business Secrets") (*Comptroller v BJY* at [35]–[37]).

14 Applying the first of these principles, I found that the requested information was foreseeably relevant to the administration or enforcement of Indian tax law. The taxpayer under investigation, [S], was clearly identified. The purpose of the EOI Request was also sufficiently elaborated upon: the Competent Authority of India needed the information to identify the person in India making cash payments to [S] and ascertain details of hidden transactions that might have potential income tax implications for [S] under domestic Indian tax law. In particular, the requested account-opening documents might shed light on the personalities involved in the operation of the Bank Account and the movement of funds out of Singapore. This, together with the requested bank statements, would enable the Indian tax authorities to ascertain the existence and details of hidden transactions (see [3(c)(ii)] above) affecting [S]'s tax liability in India.

15 Counsel for [R] Ltd, Mr Nandakumar, sought to argue that there was no evidence of any connection or actual dealings (business or otherwise) between [S] and [R] Ltd.

16 In my judgment, the information on the Paper regarding the Bank Account was significant. It contained all the details necessary for a transfer of funds, including SWIFT and bank codes. The level of detail contained in the Paper, viewed together with the fact that the Paper was found in [S]'s safe under the control of [S]'s associate vice president and his subordinate, was sufficient to establish a connection between the tax investigations on [S] and the Bank Account. Although the existence of actual dealings between [S] and [R] Ltd would have strengthened the Comptroller's case, this was not a prerequisite for an order under s 105J of the Income Tax Act. As mentioned, the relevant inquiry was whether disclosure was justified in the circumstances, taking into account the foreseeable relevance of the information requested. In this case, the Comptroller was not required to establish the existence of actual transactions when it sought the very information required to establish the existence of the transactions.

17 Moreover, the highly suspicious circumstances of this case fortified my view that the requested information was foreseeably relevant. Neither the employees of [S] nor [R] Ltd could offer any explanation regarding the provenance of the Paper. Given that the Paper was found in a safe of two trusted [S] employees and on [S]'s premises, I found the lack of any explanation regarding the Paper highly suspicious. In the circumstances, I could not accept the submission that there was no connection or relationship between [S] and [R] Ltd.

18 Mr Nandakumar further submitted that the identity and bank details of [R] Ltd's customers were confidential and amounted to trade secrets. He argued that disclosure of their identities and bank account details would inevitably prejudice [R] Ltd's relations with its customers and undermine its goodwill, reputation and business.

19 While it was true that no disclosure would be made of Business Secrets under Art 28(3)(c) of the Singapore-India DTA, Mr Nandakumar was unable to demonstrate how the identity and bank details of [R] Ltd's customers fell within the scope of Business Secrets as contemplated in the Singapore-India DTA. It would be useful at this juncture to set out the observations made by this court in *Comptroller v BJY* on the definition of Business Secrets (at [37]–[38]):

> 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:
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> > 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]
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> 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.
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> [emphasis in original]

20 Applying the definition of Business Secrets discussed above, I was unable to accept Mr Nandakumar's submission. I found that the information relating to [R] Ltd's customers was not akin to the character or nature of patent applications or secret trade formulae and did not fall within the

narrow scope of Business Secrets protected from disclosure under Art 28(3)(c) of the Singapore-India DTA. I would add that Mr Nandakumar was unable to show how the disclosure of [R] Ltd's customer information might lead to severe financial hardship beyond the general assertion that disclosure of [R] Ltd's customer information would undermine its goodwill, reputation and business.

21 Furthermore, the strict confidentiality obligations placed on the Indian tax authorities under Art 28(2) of the Singapore-India DTA would serve to allay any concerns regarding prejudice arising from the disclosure of information:

> 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*. … [emphasis added]

22 In conclusion, I found that it was justified to order the disclosure of the requested information.

Was the making of the Order contrary to public interest?

23 Section 105J(3)(*b*) of the Income Tax Act 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 discussed at length in *Comptroller v BJY* at [43]–[46]:

> 43 … The definition of "public interest" was addressed by the Minister during the Parliamentary Debates (at cols 1620–1621):
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> > ***… "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]
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> 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":
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> > … 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]
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> 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 105J(3)(*a*) would not be met) and not because it is contrary to the public interest.

[emphasis in original]

24 As mentioned above at [18], Mr Nandakumar submitted that the requested information was confidential information that amounted to a trade secret. Mr Nandakumar also submitted that the Indian tax authorities had not shown why production of the documents requested would not be contrary to public interest.

25 This submission was misconceived on two levels. First, Mr Nandakumar's bare assertion that the Indian tax authorities had failed to show why the Order was not contrary to public interest did not advance [R] Ltd's case in any meaningful way because the burden of proving that the Order was contrary to the public interest was actually on [R] Ltd. Second and on a more fundamental level, the making of the order under s 105J(2) of the Income Tax Act was plainly not contrary to public interest. For example, it did not, by any stretch of the imagination, prejudice Singapore's national security interests. Nor has it been suggested that the Indian tax authorities' investigations was motivated by political, racial or religious considerations.

Conclusion

26 For the above reasons, I dismissed [R] Ltd's application and ordered costs of $3,500 to the Comptroller.