Neutral Citation Number: [2022] CA (Bda) 4 Civ

Case No: Civ/2021/18

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. MR JUSTICE MUSSENDEN
CASE NUMBER 2020: No. AA348

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 18/03/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

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Between:

RELIANCE GLOBALCOM LIMITED

Appellant

- and -

MINISTER OF FINANCE

Respondents

Mr. David Kessaram of Cox Hallett Wilkinson Limited for the Appellant
Mr. Jeffery Elkinson of Conyers Dill and Pearman Limited for the Respondent

Hearing date(s): 2 March 2022

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APPROVED JUDGMENT

SMELLIE JA:

1. By this appeal, the Appellant challenges a production order which was obtained by the Respondent, the Minister of Finance, requiring the Appellant to disclose information relating to its financial affairs. The Production Order ("PO") was obtained pursuant to the International Cooperation (Tax Information Exchange Agreements) Act 2005, ("the Act") and in furtherance of a request from the Indian Tax Authorities under the Tax Information Exchange Agreement concluded between Bermuda and India at Delhi, on 7 October 2010 ("the TIEA").

2. The PO was first issued by the Supreme Court (per the learned Chief Justice) on the *ex parte* basis on 4 March 2020 and later upon review, reaffirmed by Justice Mussenden by his judgment of 10 November 2021. It is Mussenden J's judgment which is therefore the immediate subject of this appeal.

3. The PO was obtained upon an application made on behalf of the Minister under section 5(1) of the Act which reads as follows:

> "(1) *Where the Minister has received a request in respect of which information from a person in Bermuda is required, the Minister may apply to the Supreme Court for a production order to be served upon the person referred to in the request directing him to deliver to the Minister the information referred to in the request*".

4. This provision, which was introduced by amendment to the Act in 2013, replaced that which had allowed the Minister to issue Production Notices directly to respondents. Instead it vested in the Supreme Court, the jurisdiction to grant production orders for the enforcement of requests under Tax Information Exchange Agreements ("the Agreements"), upon application by the Minister to the Court for those purposes. Thus, without the grant of a production order by the Court, the Minister, although by section 3(1) of the Act deemed the "*competent authority*" for Bermuda for the purposes of the Agreements, may not, himself, compel the production of information for the purposes of complying with requests.

5. Section 5(2) of the Act explains the manner of the exercise of the jurisdiction by the Court upon an application for a production order, in the following terms:

> "(2) *The Supreme Court may, <u>if on such an application it is satisfied that conditions of the applicable agreement relating to a request are fulfilled</u> or where the court is satisfied with the Minister's decision to honour a request in the interest of Bermuda (sic), make a production order requiring the person referred to in the request –*
>
> *(a) To deliver to the Minister the information referred to in the request; or*
> *(b) To give the Minister access to such information,*
>
> *Within 21 days of the making of the production order*."
> [Emphases supplied].

6. The words in emphasis from section 5(2) identify what may be regarded as the first limb of the Court's jurisdiction, describing as they do the Court's primary responsibility to ensure that it is satisfied that the

conditions of the applicable agreement relating to a request are fulfilled, before it may grant a production order.

7. Whether this responsibility was properly undertaken and fulfilled by the Supreme Court is the central issue in dispute on this appeal.

8. The second limb of the jurisdiction – that which speaks, it must be noted, in somewhat vague terms to the Court being satisfied with the Minister's decision – is not in issue on this appeal because it was not the basis of the Minister's application to the Court, nor was it the basis upon which the Court granted the PO, either at the *ex parte* hearing or upon the review.

9. But given the vagueness of the language used, it may be helpful in future to note this Court's understanding of it here. As it is expressed in the disjunctive, it appears to envisage the Supreme Court being able to grant a production order, even while itself not being satisfied under the first limb that the conditions of the applicable Agreement are fulfilled, but if it is satisfied (presumably by appropriate certification to that effect) that the Minister is so satisfied and has decided, that it is in the interest of Bermuda to grant the request. Whether and to what extent any such decision of the Minister might be open to challenge will have to be determined by reference to the facts of any case in which he does so.

10. For the exercise of either limb of the jurisdiction, the "*conditions of the applicable agreement relating to the request*" referenced in section 5(2) of the Act must be satisfied. These are, of course, to be found in the Agreements and in this regard, the TIEA (typically of the Agreements) provides at Article 1 as follows:

> "*The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information*."
> [emphases supplied]

11. Article 4.2 explains that

> "*The term "relevant" wherever used in the Agreement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant notwithstanding that a definite assessment of the pertinence of information to an on-going investigation could only be made following the receipt of the information*."

12. Of further significance to this appeal, while at Article 5.1 of the TIEA it is stated that:

> "1. *The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1*..."

at Article 5.6 it is also stated that:

> "*The competent authority of the requesting Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the relevance of the information to the request:*
> *(a)…*
> *(b)…*
> *(b) …*
> *(d) the tax purpose for which the information is sought…"*
> [emphasis supplied].

13. It follows from all the foregoing, that the relevance of the information sought to the tax purposes of the request, must be explained by the requesting authority and will be of pivotal importance to the enquiry to be undertaken by the requested authority - here first by the Minister and later by the Court - for the purposes of the proper enforcement of a request in compliance with the TIEA. In other words, the information requested must be relevant to the "*determination, assessment and collection or the investigation or prosecution of the tax matters*" identified as being the subject of the request. And this will be required although, by Article 4.2, the definite assessment of the pertinence of the information to an on-going investigation, must be left to the requesting authority following receipt of the information.

Background

14. The contents of the request from India (the "Request"), provide the context for examining whether first the Minister and subsequently the Court, in considering the grant of the Request, fulfilled the requirements of section 5(2) of the Act and the TIEA.

15. The Request, although dated 10 December 2018, was sent on behalf of the Competent Authority of India under cover of a letter dated 27 December 2018 addressed to the Assistant Financial Secretary within the Ministry of Finance. The Covering Letter contained certain representations which have come to be of importance on the appeal and these are excerpted following[1]:

> "*Indian Tax Authorities are carrying out enquiries in the case of M/s Reliance Globalcom Limited (Formerly known as M/s Flag Telecom Group Limited). In the course of enquiries, it has been found by the Indian Tax Authorities that the Indian taxpayer has certain transactions with M/s Reliance Global Limited) ... a taxpayer of your country.*
> *2. The Indian Tax Authorities have requested for Information as per the 'Annexure' to this letter, which we believe is foreseeably relevant for the purposes of implementation of the Indian Income-Tax Act, 1961. It is informed that the Statute of limitations in this case is on 31.12. 2018. It may please be noted that the information sought in this case would be useful even beyond the date given at St No. 6 of the Annexure during Appellate stages and/or for other proceedings under the Indian Income-Tax laws in this case. Further, the information requested in this request is to ascertain the location of revenue related to certain transactions between M/s Reliance Globalcom Limited and an Indian company, M/s Tata Communications Limited in FY 2015-16. Thus the matter is different from the Investigation*

[1] Two copies of this letter are in the Record of Appeal (at pages 80 and 130, respectively). That at page 80 is partially illegible and had to be deciphered by comparison with that at page 130 which itself although complete, is in a barely legible print size. It was acknowledged by the parties that the Court below was presented with both versions.

> *based on which another request for the same Bermuda entity bearing ref No 170660/-BM-OE-0078-31 was made earlier. Accordingly, your assistance is solicited to provide the specific information as per the 'Annexure' attached to this letter as per the provisions of 'Exchange of Information' Article of Indo-Bermuda Tax Information Exchange Agreement."* [emphases added]

16. Further, by way of relevant background, other information provided by the Indian Tax Authorities in the 'Annexure' is significant.

17. First, at Box or St No [6] of the Annexure (that which is specifically cross-referenced in the Covering letter as set out above), it is stated that "*Urgent reply required due to Statute of Limitation",* with the date "*31.12.2018*" written in manuscript in the margin.

Next, at Box No [9] of the Annexure, it is spelt out that the "*Time period or taxable event for which or in relation to which information is sought is FY [(Financial Year)] 2015-16*".

And, at Box No [12] that:

> "*On the basis of enquiries conducted under the Indian Income Tax Act, 1961, it has been found that Reliance Globalcom Limited provided fibre optic cable capacity to an Indian client, Tata Communications Ltd, and collects fees for maintenance of the fibre optic network from Tata Communications Ltd. The tax payer's contention is that its revenue from such services is not taxable in India as there is no business connection with India, and it is not taxable as Fees for Technical Services as well. The Income Tax Department has been taxing such services. The place of control and management of the affairs of Reliance Globalcom is to be verified for the purposes of establishing its country of residence.*
>
> *The immediate parent company of the assessee is GCX Ltd, Bermuda and its ultimate parent is Reliance Communications Ltd, which is an Indian company*."

18. It is immediately apparent from the words in emphasis from the Covering Letter at [15] above and those from Box No [6] and No [9] of the Annexure - and ought to have been so when the Request was received circa 27 December 2018, -that the Request was concerned with a tax investigation for F.Y. 2015-16 in respect of which the statutory limitation period would expire on 31 December 2018.

19. From the face of the request, the limitation period would therefore have expired by the time the application for the PO came before the learned Chief Justice *ex parte* on 4 March 2020 and when it returned before Mussenden J for review in January and November 2021.

Earlier steps

20. In addition, it appears from the evidence in the Record of Appeal[2] that, on 22 February 2019, the Minister had earlier applied to the Supreme Court on the *ex parte* basis and obtained a production order

[2] Comprised in the Affidavit of Mahogany R Bean, consultant to the Respondent and which encloses the First and Second Affidavits of Rodney Harwicke Riley, Senior Corporate Counsel of GCX Limited and its subsidiaries, which include the Appellant.

to enforce the same Request. That order ("*the 2019 Production Order*") was served upon the Appellant on 26 February 2019, requiring it to produce the information requested within 28 days ; viz: by 26 March 2019.

21. The 2019 Production Order was however, subsequently withdrawn by the Minister. This, as explained by Mr Rodney Harwicke Riley, the Senior Corporate Counsel of the Appellant in his fourth affidavit, was primarily because it failed to identify anyone by name as being the subject of a tax investigation in India.

22. That came about against the background of an even more chequered history of requests by the Indian Tax Authorities relating to the beneficial owners of the Appellant and the Reliance Group to which it belongs - Messrs Mukesh Ambani and Anil Ambani. This history is also discussed by Mr Riley in his fourth affidavit. The following summary, taken from [4] to [8] of that affidavit, will suffice for the purposes of setting the context for this appeal as it relates to the PO:

> "4. *The 2019 Production Order.. is the fourth Production order (or Notice of Production) served on the Company emanating from the Government of India since 2012. The previous three Production Orders were all related to the same tax investigation. I suspect … that the latest attempt by the Government of India also arises out of the same tax investigation.*
>
> *5. The first demand for tax information was dated 3rd February 2012 ("the 2012 notice") and was issued at a time when the procedure for obtaining such information was by way of a notice issued by the Ministry of Finance… The information requested was duly provided to the Ministry of Finance for onward transmission to the Government of India.*
>
> *6. The second Production Order ("the 2015 Production Order") was dated 17th September 2015 and was made by the Court under the Act. It was also made against the Applicant Company [the Appellant]… the names of the taxpayers under investigation in India are disclosed, namely, "Ambani Mukesh Dhirubbai or the reverse thereof and Ambani Anil or the reverse thereof".*
>
> *7. The 2015 Production Order was the subject of a challenge by the Applicant Company which resulted in the order being discharged on account of material non-disclosure by the Ministry of Finance. The Judge's ruling was dated 23rd March 2016. The Ministry of Finance appealed the Judge's Ruling. However, the Court of Appeal dismissed the appeal*.
>
> 8. *In 2018 another Production Order was made this time against Flag Telecom Group Services Limited ("FTGSL"), another company in the Reliance Group. It was dated 12th July 2018 ("the 2018 Production Order").. The 2018 Production Order states who the subjects of the tax investigation in India were. They were the same subjects as named in the 2015 Production Order, namely Mukesh Dhirubbi Ambani and Anil Ambani. This Production Order was also challenged by the Applicant Company on the grounds that the Minister of Finance failed to disclose to the Court at the ex parte*

hearing certain material facts. The Minister did not dispute the Company's contention that there had been material non-disclosure. A Consent Order was entered on 12th October 2018 setting aside the 2018 Production Order."

23. The foregoing, in summary, is the background against which the PO was obtained from the Court by reliance upon the same Request - that of the 10 December 2018 - upon which the discontinued 2019 Production Order had been obtained.

Allegations of non-disclosure

24. It was obviously to have been expected therefore, that full and frank disclosure of the history would have been given to the Court, when the application for the PO first came before the Chief Justice on the *ex parte* basis[3] on 4 March 2020 and again, when it came for leave for review and for actual review, before Mussenden J in January and November 2021 (the occasion on 10th November 2021, being the date of his Judgment which is the subject of appeal).

25. An alleged failure on the part of the Minister to fulfill this duty of disclosure is the subject of the first two of the five grounds of appeal. The other three grounds which are related, allege, as already mentioned, the failure on the part of the Court to have undertaken the necessary enquiry required by the TIEA, for fulfilment of its duties under the Act.

26. The allegation of non-disclosure was pressed, although it was acknowledged by the Appellant that the affidavit evidence of Mr Riley which discloses the history had been submitted to the Court, both for the purposes of the taking of the *ex parte* application by the Chief Justice and later, for the purposes of the review by Mussenden J.

27. The concern expressed nonetheless on behalf of the Appellant is that, as the *ex parte* application had been taken by the Chief Justice 'on the papers' and so without a hearing at which important aspects of the voluminous evidence would (or should) have been specifically brought to his attention by counsel, the history and its significance might have been overlooked. No written judgment was required or given to explain the basis upon which the *ex parte* decision for the grant of the PO was made and so it remains doubtful whether the history was fully recognised and considered by the Chief Justice.

28. However, the material placed before the Chief Justice on 4 March 2020 included the affidavit of Mahogany Bean which itself exhibited the various affidavits of Mr Riley discussed above and in which, Mr Riley, in even more comprehensive terms than as discussed above, described the history of the earlier requests.

29. Accordingly, the Appellant's complaint was not that the history had been concealed from the Court but that the Minister had not properly fulfilled his duty of disclosure advised by the case law, by specifically bringing to the attention of the Court, the evidence which could have weakened the application. That is said in this case, to have been the evidence of the failed attempts at obtaining production orders in

[3] In furtherance of section 5(5) of the Act which provides that an application for a production order may be made *ex parte*, Order 120 of the Rules of the Supreme Court (discussed below) states that such an application shall be made by an *ex parte* originating summons.

relation to the same tax investigation and, most proximately, the ill-fated 2019 Production Order which the Minister had been compelled to abandon on grounds of irregularity.

The duty of disclosure

30. There was before this Court on the appeal and could properly have been, no dispute as to the existence of the duty of disclosure. That the duty exists in Bermuda in relation to applications under the Act and is of a nature similar to that which arises when one is making an *ex parte* application for an injunction, must now be regarded as settled. It is the subject of a number of pronouncements by the Supreme Court and was most recently explained by this Court in ***Minister of Finance v AP***, Civil Appeal Ap of 2016, Judgment delivered 25 November 2016, per Bell JA, in these clear terms at [15]:

> "*Mr Elkinson [who along with Mr Kessaram seem habitually to appear on behalf of one side or the other in matters involving the Act] urged that the equitable principles were not applicable to applications of this nature. But the principles governing ex parte applications, both in terms of those governing the right to have access to the evidence presented to the judge, and those governing the obligation to give full disclosure of all material facts, are common law principles, and apply to ex parte applications whether made, as here, under the provision of the 2005 Act, or in the context of seeking equitable relief, such as when an application for a Mareva injunction is made*."

31. That being the nature of the duty of disclosure, the Minister was indeed obliged to have done more than simply put the evidence before the Chief Justice on the *ex parte* application. He was obliged, at the very least, to draw to the Court's attention and explain in clear terms that the same Request dated 10 December 2018 from the Government of India which would form the basis for the PO, had also been the basis for the 2019 Production Order which the Minister had discontinued and why the Minister was returning to Court by reliance upon it approximately a year later and despite being on notice of the expiry of the limitation period[4].

32. However, it must be recognised that the breach of the duty was ameliorated in this case, by the fact that the evidence of the history was also placed before Justice Mussenden, both when the matter came before him pursuant to section 5 (6B) of the Act for the grant of leave to apply for review (which he granted in limited terms by ruling dated 26 January 2021) and when the matter actually came for review resulting in the Judgment of 10 November 2021. All of the aforementioned affidavit evidence was brought to his attention and expressly considered by him in the context of both of those contested *inter partes* hearings.

33. Moreover, in this regard, it must be recognised that in conducting his review of the matter, Mussenden J was not engaged in an exercise as if considering simply whether or not the Chief Justice had had the relevant evidence brought to his attention, but was himself engaged by way of reconsideration or rehearing *de novo*, upon an assessment of whether or not the PO should be granted. In that way he was

[4] This is of course, a distinctly different duty of disclosure than that which arises to disclose the contents of a request to the person who must respond to it, (as explained by this Court in ***Minister of Finance v AD [2015] CA Civ (Bda) 18*** and ***Minister of Finance v Bunge [2013] Bda LR 17***) once the Court has so directed pursuant to an application under section 5(6A) of the Act.

able, having regard to the evidence as to the conformity of the Request with the Act and the TIEA, to decide whether to affirm the PO or not. That the foregoing is its effect, is implicit from subsections 5(5), 5(6) and (6B) of the Act, when read with Order 120 rule 3 of the Rules of the Supreme Court. These provisions, in turn, state as follows:

> "5(5) *An application for a production order under this section may be made ex parte to a judge in Chambers and shall be in camera.*
> *(6) A person served with a production order under subsection (1) who is aggrieved by the service of the order may seek review of the order within 21 days of the date of service of the order…*
> *(6B) Upon application under subsection (6) having been filed with the court, the court shall decide whether to grant the person a right of review."*
>
> ***"120/3 Application for review of a production order***
> *3 An application for review of a production order within the meaning of –*
> *(a) Section 5(7) of the USA-Bermuda Tax Convention Act 1986; or*
> *(b) Section 5(6) of the International Cooperation (Tax Information Exchange Agreements) Act 2005,*
> *shall be made by summons upon notice to the Minister."*

34. This process, as Kay JA described it at [20] in ***Minister of Finance v AD*** (above), is "*an originating judicial process (which) necessarily carries with it the fundamental rights which inhere in such a process*." [emphasis added]. Accordingly, these provisions of the Act when read with the rules, contemplate a rehearing of the issues which affect the grant of a production order and this was what in fact took place before Mussenden J, albeit in the two stages of the grant of leave and the actual review hearing, discussed above.

Alleged failure to undertake the enquiry required by the Act and the TIEA

35. This heading gives a description of the remaining grounds of appeal which focus (a) upon the alleged failure on the part of the Minister to refuse the Request because the primary tax purpose for which the information was sought could no longer be fulfilled having regard to the expiry of the limitation period and (b) the alleged failure on the part of the Court, having had that fact brought to its attention, to recognize that the Request failed to comply with the requirements of the Act and the TIEA.

36. For the reasons discussed below, I find these grounds of appeal to be well-founded.

37. As set out at [14] to [18] above, the Covering Letter and its Annexure both draw attention to the expiry of the limitation period. The Request was presented nonetheless on the basis, as stated in the Covering Letter that "*the information sought in this case would be useful even beyond the dates given at St No.[6] of the Annexure during appellate stages and/or for other proceedings under the Indian Income-tax laws in this case.*"

38. But in what manner the information would "*be useful even beyond the dates given*" and for what "*appellate stages and/or ..other proceedings*" is wholly unexplained. No explanation is given of those

matters either in the Covering Letter or the Annexure and none was proffered to the Court on behalf of the Minister.

39. In the Minister's Minute (which formed part of the application to the Court), the Minister identified at [A], the Covering Letter as part of the Request. But as Mr Kessaram correctly submits, even if the Covering Letter could be treated as part of the Request, the putative "*Appellate stages*" and "*other proceedings*" could not be said to be a sufficient statement of the tax purposes for which the information was requested where the only such purpose identified in the Request, is that for which the limitation period is declared to be about to expire and thus to have expired by the time the Application was made to the Court.

40. Nor, for the same reasons, could the information requested properly be regarded, in terms of Article 1 of the TIEA, as "*relevant to the administration and enforcement of the domestic laws of the Contracting Parties [here India] concerning taxes covered by (the TIEA)*". Again, this is because the putative "*Appellate stages*" and "*other proceedings*" are not explained as being in any way connected to any particular tax purpose which could properly be the subject of the Request. In this regard, the Covering Letter also states, bearing of repetition here, that "*Further, the information requested in this request is to ascertain the location of revenue related to certain transactions between M/s Reliance Globalcom Limited and an Indian Company, M/s Tata Communications Limited in FY 2015-16*." However, this too appears to be a reference to the very matter for which the limitation period is stated as to set to expire on 31. 12. 2018.

41. Neither the Minister nor Mussenden J (upon the review) appears to have recognized this crucial deficiency of the Request.

42. Instead, it appears from [9] of Ms Bean's Affidavit submitted on behalf of the Minister, that in order to address the limitation issue:

> "*The Treaty Unit has been in contact with the Requesting Authority to confirm that they wish to have this Request processed and, given that they do, in the circumstances, the Minister says it is appropriate that a Production Order issue in this matter.*"

43. But the mere wish of the Requesting Authority to have the Request processed could not absolve the Minister of his responsibility to ensure that the Request complies with the Act and the TIEA. In particular, to be satisfied that the information requested is shown to be relevant for the tax purposes of the Indian tax legislation for which the information is sought.

44. And it appears, from [43] of the Judgment of 10 November 2021, that the learned Judge was persuaded to a similar erroneous view of the significance of the mere wish of the Requesting Authority:

> "*Third, in respect of the expiry of the limitation period, I am satisfied with the explanation in the Consultant's [Ms Bean's] Affidavit that prior to filing the 2020 Application [which obtained the PO], she confirmed with the Indian authorities that they still required the information. On that basis, and upon a review of the Minister's Minute, I am satisfied that it was appropriate for the Minister to proceed with the 2020 Application even though there*

was a limitation period which had expired, but there were still various purposes for which there was a legitimate reason to proceed with the 2020 Application."

45. The learned judge proceeded, in [44] and [45], to explain his reasoning:

> "*In respect of the various purposes for which the Request was sought in the 2020 Application and whether it was irrelevant, oppressive and a fishing expedition, I am satisfied that the Request complied with the Bermuda-India TIEA. I agree with Mr Elkinson that it was for India to determine what is foreseeably relevant and that it does not have to be demonstrably relevant. I rely on the case of* ***Minister of Finance v AP***[5] *in that I am not satisfied that the Request has to give the level of detail argued for by the Respondent for the various purposes set out in the Request and Covering Letter. The Covering Letter itself stated that the India Tax Authorities believed the information requested was foreseeably relevant for the purposes of the Indian tax legislation. Also, the Minister's Minute demonstrated that the Minister considered the Request against the requirements of the Bermuda-India TIEA and was satisfied that he should proceed with the 2020 Application. As can be seen, that investigation included the determination, assessment and collection of income tax on revenue collected by the Respondent from fibre optic services and maintenance of the fibre optic network as well as for appellate and/or other proceedings under the Indian income tax laws in the case. [emphasis added].*
> *In respect of the actual information requested, I note the time period for which the information is sought to determine applicable taxation was "for the financial years 2015-16 [(Box 9 of the Request and in the Covering Letter)] although the information requested extends to the financial years 2013-14, 2014-15 and 2015-16 [Box 13 of the Request].In my view, I am inclined to give a wide extent to the 2013-2016 year range to fulfill the investigation purposes. I rely on the case of* ***Minister of Finance v AAA Group Limited***[6]

46. A number of observations are prompted by the learned judge's analysis.

47. First, the proposition accepted by him, that it was for *"India to determine what is foreseeably relevant and that it [the requested information] does not have to be demonstrably relevant"* does not accord with the different obligations and rights of the requesting and requested parties respectively imposed by Articles 4.2 and 5.6 of the TIEA, as set out at [11] and [12] above. When those provisions are properly construed, it would be for the Indian Authorities to assess pursuant to Article 4.2 for the purposes of making a request, the pertinence of the information sought to an ongoing investigation but the Bermudian Authorities must be satisfied, pursuant to Article 5.6, that the information sought is shown to be relevant to the tax purpose for which it is sought and it is in this latter context, to be discussed further below, that the foreseeable relevance of the information sought is to be considered. Nothing in ***Minister of Finance v AP*** (above) stands for the contrary proposition for which it is relied upon by the

[5] Referenced earlier in the Judgment at [38] as cited at [2016] Bda LR 34 SC

[6] No citation is given here or where this case is earlier referenced in the Judgment. I proceed on the basis that the reference is to the Supreme Court decision of the same name which was cited to this Court by the parties with the citation of [2016] SC (Bda)75Civ (1 July 2016) per Hellman J.

learned judge. As discussed at [30] above, that case establishes the duty of disclosure which is owed when an application for a production order is made to the Court[7].

48. Second, the fact that the "*Minister's Minute demonstrated that the Minister considered the Request against the requirements of the Bermuda-India TIEA and was satisfied that he should proceed …"* can be no answer to the patent failure of the Request to provide information to the Bermudian Authorities to demonstrate, in the words of Article 6 (d), the relevance of the information sought "*to the tax purpose for which the information is sought."* That test is said by the learned judge to have been met because the investigation is for "*appellate and/or other proceedings under the Indian income tax laws in the case*". However, when one tests that proposition by asking "what case?", the closest one gets to an answer is the only case identified, that for which the limitation period is revealed to have expired.

49. Third, it appears that in order to address the limitation issue arising from the fact that the "*time period for which the information sought*" is "*for the financial years 2015-16 [explained in] Box 13 of the Request*", the learned judge noted that "*I am inclined to give a wide ambit to the 2013-2016 year range (identified) to fulfill the investigation purposes*", relying on ***Minister of Finance v AAA Group Limited*** (above). However, where the only stated tax purpose is the case for which the limitation period has expired and no explanation is given for what is meant by "*appellate and/or other proceedings*", widening the ambit of the period for the investigation does not cure the defect in the Request, it only compounds it. In other words, there is an impermissible conflation of what the learned judge describes as the "*investigation purposes*" of the Request, with its "*tax purposes*"

Analysis in the light of other local and international case law and commentary.

50. In ***Minister of Finance v AAA Group Limited*** (above) Hellman J did indeed consider the significance of the concept of relevance, by among other things, reference to Article 1 of the OECD Model Tax Information Exchange Agreement (which has served as a template for the Agreements[8]) and the Commentary to Article 26 of the OECD Model Tax Convention ("the Commentary"). In both of those Models, the standard used is "*foreseeably relevant*", whereas in the TIEA, the standard used as stipulated by Article 1 (above at [10] and [40]) is that the information sought and provided must be "*relevant*" to the administration and enforcement of the domestic laws of the requesting Party concerning taxes covered by the TIEA.

51. Hellman J, at [50] expressed the view that "*relevant*" means "*foreseeably relevant",* that which is the standard of relevance in Article 1 of the OECD Model TIEA as well as in Article 26 of the OECD Model Tax Convention. He then went on to adopt the following helpful gloss from the Commentary on the meaning of "foreseeably relevant", which I am also content to adopt for present purposes:

> "*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… At the same time, paragraph I [of Article 26] does not obligate the requested*

[7] Although, at first instance (cited as [2016] SC (Bda) 30 Civ (23 March 2016), there was discussion of the "foreseeably relevant" test by Hellman J at [45] to [59].
[8] Available at www.oecd.org/taxation.

State to provide information in response to requests that are 'fishing expeditions', ie: speculative requests that have no apparent nexus to an open inquiry or investigation."

52. This helpful commentary, while recognising the generous ambit to be given to the test of relevance, also recognises that unless it is satisfied, a request may well be regarded as a mere fishing expedition where it does not meet the test for failure to explain why the information requested is thought to be relevant to the tax purpose, (or in the practical sense, the tax investigation or case) for which it is sought.

53. It is in this sense that apprehension of a fishing expedition, seen against the background of the history of this matter, and expressed on behalf of the Appellant, might be regarded as justified.

54. There are other helpful pronouncements to be found in the case law.

55. The Canadian Courts in ***Blue Ridge Trust Co v Minister of National Revenue***, 23 ITLR 747 recognised at [89], that it was not for the Courts, in reviewing the lawfulness of a request for assistance under article 26 of the French-Canadian Tax Convention, to perform a "*close analysis of the facts and the law of the requesting state or to substitute its opinion*" for that of the competent authority. That Court also went on to recognise however, (at [90], following case law from the Court of Justice of the European Union) in terms of ready applicability here, that "*the courts must merely verify that the information order (the production order) is based on a sufficiently reasoned request by the requesting authority concerning information that is not – manifestly – devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued."*

56. Coming from New Zealand, we see dicta which seek to establish the kind and intensity of scrutiny which the Court should impose to ensure compliance with the requirements of domestic legislation and the Agreements. In ***CIR v Chatfield & Co Ltd*** 21 ITLR 614, the Court of Appeal for New Zealand had to consider standards for the grant of requests from the Korean National Tax Service for information relating to the tax affairs of a Mr Huh, a Korean national with New Zealand residency. The Korean Tax Service had begun an investigation into Mr Huh's affairs and made a request for information (held by Mr Huh's tax agent in New Zealand, Chatfield & Co) to the New Zealand Commissioner of Inland Revenue under article 25 of the New Zealand-Korea Double Taxation Agreement[9]. The Commissioner issued 15 notices under the Tax Administration Act, requiring Chatfield to furnish information it held about 15 companies.

57. Chatfield challenged the Commissioner's decision to issue the notices on several grounds, including that the Commissioner as the competent authority, had not satisfied herself as to the matters required by the legislation and the double taxation agreement. The Commissioner responded, inter alia, that the appropriate intensity of review only required the Court to determine that the decision to issue the 2014 notices was valid on its face. However, the Court held that before making her decision to issue the notices, the Commissioner had to satisfy herself about all the relevant requirements of the Tax Administration Act and the relevant articles (2 and 25) of the double taxation agreement. And that the intensity of review was the "correctness standard", meaning that the Commissioner as the competent authority, and the court, had to interpret and apply the applicable New Zealand law and articles 2 and

[9] *Which required that the information requested be "necessary" unlike under the OECD Convention which required that it be "foreseeably relevant".*

25 of the double taxation agreement correctly and to scrutinize the request for compliance with them. The competent authority had been entitled to take the statements in the request letter at face value provided that she was not put on inquiry as to some irregularity.

58. I would consider a similar intensity of review to be applicable in this matter under the TIEA and generally, to requests under the Agreements. Such intensity of review, while it avoids notions of the exercise of discretion and subjective evaluation of the merits of a request, it confirms that a request must be scrutinised to ensure strict compliance with the domestic law and the applicable Agreement. And it would follow, that in a case where the competent authority is put on inquiry as to some irregularity (such as in this case the expiry of a limitation period), inquiry must be duly undertaken to ensure strict compliance (in the present case with the relevance test).

59. To be clear, this does not mean that the requested authority should embark upon "*a mini-trial*", an approach which has been sensibly admonished in the cases. See, for instance, ***Assessor of Income Tax and Holmcroft Properties Limited and Another*** (High Court Isle of Man, CHP 2016/24) per First Deemster Doyle at [134] where it is also advised however, that while the correctness of the material provided by the requesting state would not ordinarily be questioned, it may be proper to undertake such "*probing as may be appropriate for the purposes of clarification*".

60. Pulling the strands of learning from the case law together, the following principles emerge for application here:

(i) The test of relevance requires that the Request shows the relationship between the information requested and a tax purpose covered by the TIEA.

(ii) The Minister, having been put on enquiry, was entitled to and should have probed with the Indian Authority, how it was that the Request related to a tax purpose covered by the TIEA despite the expiry of the limitation period applicable to the only tax purpose identified.

(iii) That relationship must be demonstrated even though neither the Minister nor the Court would embark upon a close analysis of the facts of the Request nor the laws of the requesting state so as to substitute their own view.

(iv) The function of the Court, in light of its jurisdiction to make and to review production orders, is at minimum, to satisfy itself that the Request is strictly in compliance with the requirements of the Act and TIEA, and here in particular, with the relevance test.

(v) While the Court would not lightly depart from the views taken by the Minister,, the Court is entitled to do so and, in a case such as the present where, in the absence of some much clearer explanation, the information sought is not shown to be relevant for the tax purpose for which it is avowedly sought, the Court is obliged to do so.

61. The result is that the appeal must be allowed and it is so ordered.

62. Subject to any submissions to be made in writing within 14 days, the Appellant shall have its costs of the appeal and of the application for leave to review and the review carried out by Mussenden J.

BELL JA:

63. I agree.

CLARKE P:

64. I, also, agree. The appeal is accordingly allowed.