Comptroller of Income Tax *v* BLM
[2013] SGHC 212

Case Number : Originating Summons No 331 of 2013 (Summonses Nos 3108-3113 and 5041 of 2013)

Decision Date : 17 October 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Patrick Nai Thiam Siew, Vikna s/o Thambirajah and Jimmy Goh (Inland Revenue Authority of Singapore) for the plaintiff; Sundareswara Sharma (ATMD Bird & Bird LLP) for the applicant.

Parties : Comptroller of Income Tax — BLM

Revenue Law – International Taxation – Double taxation agreement Civil Procedure – Stay of Proceedings

17 October 2013 Judgment reserved.

Choo Han Teck J:

1 This was an application by the plaintiff for the disclosure of various bank statements by the Inland Revenue Authority of Singapore ("IRAS") to the National Tax Agency of Japan ("J-NTA") pursuant to s 105J of the Income Tax Act (Cap 134, Rev Ed 2008) ("the Act") and art 26 of the Agreement between the Government of the Republic of Singapore And the Government of Japan for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income ("the Treaty"). I granted the application on 31 May 2013. The account holders in question applied for leave to intervene and also to stay or discharge that order.

2 On 22 November 2012, J-NTA issued a letter of request ("the Request") to IRAS, requesting disclosure of various bank statements from the defendant bank, BJM. This related to ongoing tax examinations in Japan in relation to the applicant, a Japanese national, and seven other account-holders. IRAS reviewed the Letter of Request. On 19 April 2013, it made an *ex parte* application to the High Court pursuant to s 105J, read with ss 105BA, 105D and 105F of Act and O 98 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), for the following orders:

(a) That the defendant produce within 21 days from the date of the Order all bank statements for the period 1 January 2006 through 31 December 2011 (both dates inclusive) in relation to eight accounts held by the account holders listed, including the specified accounts which they named in the summons itself;

(b) That the defendant produce copies of the documents named in the summons to an authorised officer of the plaintiff or applicant not later than the end of the period of 21 days from the date of the Order;

(c) Subject to the preceding sub-paragraph, no person is to inspect or take a copy of any document relating to these proceedings without leave of the High Court under s 105J(9) of the Act; and

(d) That the Order shall have effect and remain in force until such Order is varied or discharged.

3 In the accompanying affidavit, IRAS set out the grounds of its application, exhibited the Request, and stated its belief that the Request set out all the information prescribed in the Eighth Schedule of the Act and that the conditions specified in s 105J(3) were fulfilled. In other words, IRAS's application fulfilled all the requirements set out in s 105D of the Act and O 98 r (2)2 of the Rules of Court.

4 IRAS also served the applicant with notice of the application on 15 April 2013. Counsel for the applicant and IRAS appeared before me four times in May 2013. Counsel for the applicant, Mr S Sharma ("Mr Sharma") submitted, *inter alia*, that the Request was invalid as it was made pursuant to a tax examination and not investigations into tax evasion. Mr Sharma also argued that the relevant tax authority in Japan had withdrawn its investigations into the applicant. Finally, Mr Sharma submitted that the J-NTA had no right to make the Request in the first place as under Japanese law, the applicant would have no obligation to disclose equivalent information in Japan.

5 The Act provides a two-step process for filtering out unmeritorious requests. The first step is an assessment of the Request by IRAS. The second is an order by the High Court. Section 105J of the Act provides that the High Court may make an order that a person having possession or control of information protected from unauthorised disclosure under the Banking Act (Cap 19) disclose that information to an authorised officer upon fulfilment of the following two conditions:

(a) That 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.

6 How the court should assess such justification is set out in the Eighth Schedule of the Act. This schedule sets out the information to be included in a request for information under Part XXA of the Act. The information given must also be foreseeably relevant for carrying out the provisions of the Treaty or the administration and enforcement of the tax laws of the requesting country; see *Comptroller of Income Tax v AZP* [2012] SGHC 112 ("*AZP*").

7 During the Parliamentary Debate on 19 October 2009, a concern was voiced about the need to protect the privacy of persons affected by requests for information which were not made *bona fides* or were made simply as a "fishing expedition". Mr Tharman Shanmugaratnam responded by explaining that such requests "would be screened out [through the process set out in] the Eighth Schedule, which spells out very clearly the information that a requesting jurisdiction has to provide to IRAS when it makes its request". Mr Shanmugaratnam stated that the two-stage process provided by the Act was intended to filter out "fishing expeditions" and not to stifle the effective exchange of information. The relevant institution in this process is IRAS. The reason for this was stated by Mr Shanmugaratnam during the Parliamentary Debates as follows

> IRAS has substantial experience in handling foreign requests and tax administration, and will be competent in making an assessment of whether a request constitutes a fishing expedition.

8 There needs to be a balance between not stifling effective cooperation and the need to protect privacy. This is a balance which has already been struck by Parliament. The responsibility for determining whether a request for information is valid is primarily IRAS's. By the time it reaches the High Court, the High Court's responsibility is to assess that application in accordance with the formal

requirements provided under the Eighth Schedule of the Act. In many respects, the High Court's role is an administrative one. There is little room for the Court to examine the substantive merits of the application, much less the necessity of granting the Request. That is not the Court's function and neither is it within the Singapore Court's jurisdiction or competence to adjudicate on the purely domestic issues in the Japanese jurisdiction.

9 Given the statutory scheme, it was also not the place of the Singapore High Court to enquire into the propriety of the J-NTA request under Japanese law. I took note of art 26(3)(b) of the Treaty, which stated that a request for information would not impose on a Contracting State that an obligation to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State. However, I found that this was amply provided for in the Eighth Schedule, which requires the Request to state its conformity with the law and administrative practices of the country of the competent authority. This is ultimately a matter of Japanese law. Japan is the proper forum for determining whether the J-NTA request was proper. It would not have been proper for me to make a pronouncement on what was and was not permissible under Japanese law. It could not, therefore, be a ground on which to reject that application. The role of this court is to be satisfied that the affidavit filed by the plaintiff in support of the application has complied with the Act, and in particular, the Eighth Schedule.

10 In the present case, the Request complied with the Eighth Schedule. The IRAS had stated its opinion that the Request was justified and valid (i.e. it was not a fishing expedition). Mr Sharma's submission that the Request pertained to a tax examination and not an investigation of tax evasion was, with respect, not a relevant consideration in determining whether to grant the application. There is nothing in the Eighth Schedule that suggests that a disclosure of the information requested is only permitted when there is an investigation into tax evasion. Different countries will have different mechanisms for investigating tax evasion. Information will be required at different stages. As mentioned above, the Eighth Schedule therefore requires a statement that the request is in conformity with the law and administrative practices of the country of the competent authority. The content of that statement will vary depending on the law and administrative practices of the country in question. There was such a statement in this case. The J-NTA made clear that the Request was for the purpose of potential tax evasions as the accounts requested for were under the control of the applicant's family or companies controlled by the applicant's family and were suspected of being used to hide undeclared income. This fulfils the requirements in the Eighth Schedule as well as the requirement of foreseeable relevance in *AZP*. Mr Sharma's argument about the stage of investigation was not persuasive without more.

11 Mr Sharma also asserted that the J-NTA had withdrawn its investigation into the applicant. However, Mr Sharma produced no proof of this despite the fact that he had almost a month to ascertain this information with J-NTA. If it were the case that the information was no longer required, then it would fall to J-NTA to withdraw the Request. IRAS had no information from J-NTA about this.

12 I thus granted the application in the terms requested (and laid out above at [2]) after the 31 May 2013 hearing (the 31st May order).

13 On 20 September 2013, the applicant filed a complaint against J-NTA in Japan. On 25 September 2013, Mr Sharma filed Summons No 5041 of 2013 ("SUM 5041") to stay or discharge the 31st May order pending a determination of the issues of Japanese law before the Tokyo District Court. The facts have not changed except in one material aspect: the applicant has since commenced proceedings in Japan. The arguments Mr Sharma raises are the same, *viz* that the J-NTA acted improperly under Japanese law by making the request. According to Mr Sharma, the J-NTA had no right to the information requested and had not exhausted all legal avenues in Japan to obtain

them.

14 Mr Sharma's application to discharge or vary the 31st May order was characterised as a conflicts of law issue requiring resolution by the Japanese courts. This is, however, not an accurate characterisation. There is no pending suit in Singapore and no legal issue of Singapore law to be determined. An application for a stay within the context of conflicts of law would employ the doctrines of *lis alibi pendens* and *forum non conveniens*. These doctrines require the applicant to prove that there are pending suits which engage the same or similar issues before the courts of two competing jurisdictions. The court before which the application is brought then has the option of discontinuing the local proceedings or, in appropriate circumstances, granting a stay of proceedings; see *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] SGCA 50 (at [36]). It will be apparent that neither of these doctrines operates in this context. The only issue of law to be determined, on Mr Sharma's arguments, is Japanese law. There are thus no grounds for stay of the 31st May order under common law conflicts of law principles.

15 There is also no statutory basis from granting a stay or discharge of the 31st May order. I have already set out my reasons for granting the 31st May order. Section 105J(4) of the Act permits any person in relation to whom information is sought to apply to have an order discharged or varied within seven days from the date of the Order. The purpose of this provision is to give an opportunity to any person affected by a request for information to be heard by the Court. In the present case, the applicant has had ample opportunities to canvass his case before the court. Mr Sharma has filed numerous applications and made extensive submissions and arguments on his behalf. Submissions and further submissions have been filed. Mr Sharma has not raised any points in SUM 5041 which he had not already made and which I had not already considered when making the 31st May order. There are simply no grounds to exercise my discretion to discharge the order to make any variation to that order. In any event, I should note that SUM 5041 was made out of time if indeed Mr Sharma had been intending to avail himself of s 105J(4) of the Act.

16 In light of this, there are also no grounds to permit the other account holders to intervene. The accounts in question belong either to the applicant's wife or to companies controlled by the applicant and his family. Their interests have been adequately represented by the applicant and by Mr Sharma. There are no separate matters specific to the other account-holders which would affect the facts in this case and with it, my decision.

17 For the reasons given above, the 31st May order stands and the application in SUM 5041 to stay or discharge the 31st May order is dismissed. Summon Nos 3108 to 3113 of 2013, relating to the application by the other account holders to intervene this suit are also dismissed.