In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. AA040

IN THE MATTER OF A REQUEST FOR EXCHANGE OF INFORMATION UNDER THE INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) ACT 2005

AND IN THE MATTER OF AN ORDER OF THIS HONOURBLE COURT MADE ON 12 DECEMBER 2023 UNDER SECTION 5(2) OF THE ACT ("The 2023 Production Order")

BETWEEN:

THE MINISTER OF FINANCE

Applicant

-and-

IJK LIMITED

Respondent

RULING

Date of Hearing: **24 July 2024**
Date of Ruling: **25 September 2024**

<u>**Appearances**</u>: **Lauren Sadler-Best, Attorney-General's Chambers, for the Minister of Finance**
David Kessaram, Cox Hallett Wilkinson Limited, for the Respondent

RULING of Mussenden CJ

Introduction

1. By a Summons dated 12 January 2024, the Respondent IJK Limited (the "**Respondent**" or the "**Company**") seeks the grant of a right of review of an *ex parte* Production Order dated 12 December 2023 (the "**2023 PO**") issued by the Court pursuant to the Tax Information Exchange Agreement between the Government of the Republic of India and Bermuda (the "**TIEA**"). The Respondent also seeks disclosure of the documents filed with the Court by the Minister of Finance (the "**Minister**") on his *ex parte* application to obtain the 2023 PO and that it be stayed pending determination of the application.

The 2023 Production Order

2. The Minister received a request for information from the Government of India (the "**2023 Request**"). By way of the 2023 Production Order, the Court, pursuant to section 5(2) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (the "**2005 Act**"), ordered that the Respondent produce the following information to the Minister:

    1) Lists of assets (both current and non-current) of the Company along with location of the assets for fiscal year ("**FY**") 2013-14, FY 2014-15 and FY 2015-16.
    2) Information of all the employees of the Company, together with their location of work, country of residence, nationality and payroll expense (including salary, bonus, pension and other benefits) for FY 2015-16.
    3) Total payroll expense of the Company for FY 2015-16.
    4) The location and name of country of residence of senior management (such as Managing Director, Chief Executive Officer, Chief Financial Officer, Heads of Division or Departments) and their direct support staff for FY 2015-16.

5) The total income from transactions where both purchase and sale of goods is from/to its associated enterprises for FY 2015-16.

6) The income by way of royalty, dividend, capital gains, interest or rental income earned for FY 2015-16.

7) The total sales and other income for FY 2015-16.

8) The location of board of directors' meetings and names of persons who attended the meeting. If the meeting was conducted by circular resolution then the location of parties involved for FY 2015-16.

9) Copies of minutes of meetings and board resolutions for all board of directors' meetings for FY 2015-16.

10) The location of shareholders' meetings and the names of persons who attended the meetings. If the meeting was conducted by proxy vote, then the location of parties involved and the entity to which proxy vote was given for FY 2015-16.

11) Copies of minutes of meeting for all shareholders' meetings for FY 2015-16.

12) Information in relation to delegation of authority of board members to any executive committee/promoter/shareholder for FY 2015-16.

13) Information in regards the person(s) who is/are funding releasing/cheque signing authority in FY 2015-16.

14) The address of the principal place of business of the Company in FY 2015-16.

15) The address of the headquarters of the Company in FY 2015-16.

16) Copies of all documents submitted by the Company to the Bermuda Government for incorporation.

17) The names of beneficial shareholder(s) of the Company.

18) Copies of Return of Income filed by the Company in Bermuda for FY 2015-16.

19) Information on all bank accounts of the Company with bank account number, bank branch and authorized signatory name and country of residence.

20) Copies of bank statements of the bank accounts (as above) for FY 2015-16.

21) Identify the location(s) of all server(s) of the Company and Flag Operating Network Centre of the Company of the Company in FY 2015-16.

Relevant provisions of the 2005 Act

3. Hargun CJ set out the relevant provisions of the 2005 Act in *Ministry of Finance v DEF Ltd* [2019] SC (Bda) 47 Civ.

> *"The preamble to the 2005 Act states that it is expedient to make general provision for the implementation of tax information agreements entered into by the Government of Bermuda with other jurisdictions and to enable the Minister to provide assistance to the competent authorities of such jurisdictions under such agreement.*
>
> *Section 5 of the 2005 Act deals with issuing of Production Orders by the Supreme Court. Section 5(1) provides that where the Minister has received a request in respect of which information from the person in Bermuda is required, the Minister may apply to the Supreme Court for the Production Order to be served upon the person referred to in the request, directing them to deliver to the Minister the information referred to in the request.*
>
> *Section 5(1A) provides that the Minister is not under a duty to make inquiries of the requesting authority in relation to any statements made or information given in respect of a request by the requesting authority.*
>
> *Section 5(2) provides that the Supreme Court may, if on such an application it is satisfied that conditions of the applicable agreement relating to a request are fulfilled or where the Court is satisfied with the Minister's decision to honour a request is in the interest of Bermuda, 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 making request of the Production Order.*
>
> *Section 5(5) provides that an application for a Production Order under this section may be made ex parte to a judge in Chambers and shall be in camera.*
>
> *Section 5(6) deals with challenge to the Production Order and the issue of disclosure of the material relied upon by the Supreme Court when it made the ex parte Production Order. Section 5(6) provides that 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 the service of the order.*
>
> *Section 5(6A) provides that a person served with a Production Order under subsection (1) who wishes to view the documents filed with the Court on the*

application for the Production Order (a) shall not be entitled as against the Minister to disclosure of such documents until the person has been granted a right of review under subsection (6B) and that the Court has directed disclosure of such documents as it considers appropriate for the purposes of the review; and (b) shall not (notwithstanding anything to the contrary contained in the Supreme Court Records Act 1955) be permitted to view such documents on the court file until such a right of review has been granted and the Court has directed disclosure of the documents.

Section 5(6B) deals with the determination of the right of review. It provides that upon the application under subsection (6) having been filed with the Court, the Court shall decide whether to grant the person a right of review.

Section 4 deals with the grounds for declining a request for assistance. Section 4(2) provides that the Minister may decline a request for assistance if:

(a) the information relates to a period that is more than six years prior to the tax in respect of which the request is made;
(b) the request pertains to information in the possession or control of the person other than the taxpayer that does not relate specifically to the tax affairs of the taxpayer;
(c) the information is protected from disclosure under the laws of Bermuda on the grounds of legal professional privilege;
(d) the requesting party would not be able to obtain the information (i) under its own laws for the purposes of the administration or enforcement of its tax laws; or (ii) in response to a valid request from the Minister under the Agreement;
(e) the disclosure of the information would be contrary to public policy; or
(f) the Minister is not satisfied that the requesting party will keep the information confidential and will not disclose it to any person other than (i) a person of authority in its own jurisdiction for the purposes of administration and enforcement of its tax laws; or (ii) a person employed or authorized by the government of the requesting party to oversee data protection."

<u>Test to be applied in considering whether it should grant the right of review under section 5(6B).</u>

4. In *DEF Ltd* Hargun CJ determined that the test to be applied in considering whether a party should be granted a right of review under section 5(6B) is that the Court has to be satisfied that there is an arguable ground for review of the Production Order made by the Court. He stated that this test is consistent with the test applied in relation to applications for judicial review.

5. In *DEF Ltd* Hargun CJ set out that the onus is on the Respondent to establish an arguable ground for review.

6. In *DEF Ltd* Hargun CJ stated as follows:

> *"… The current scheme of section 5(6A) and (6B) is based on the premise that the Court has to decide whether to grant the right of review without recourse to the documents which were made available to the Court on the ex parte application for the Production Order. In particular the Court is looking for grounds for declining assistance set out in section 4(2). …"*

7. The Minister may also decline a request to assist under the 2005 Act section 4(1) as read with the TIEA. The Minister has a discretion under the 2005 Act section 4(1) whether to grant a production order as follows:

> *"4. Grounds for declining a request for assistance*
> *(1) The Minister may decline a request for assistance where there is provision in the applicable agreement for him to do so."*

8. The TIEA, Article 7 entitled "*Possibility of Declining a Request for Information*" sets out the provisions for the Minister to decline a request:

> *"1. The competent authority of the requested Party may decline to assist:*
> *(a) where the request is not made in conformity with this Agreement; or*
> *(b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or*
> *(c) where disclosure of the information would be contrary to public policy (ordre public) of the requested Party."*

9. The Court has a discretion under section 5(2) of the 2005 Act whether to grant a production order. A right of review exists in respect of the Court's discretion, for example, if there was material non-disclosure on the *ex parte* application. In the Court of Appeal case of *Minister of Finance v AP* [2016] CA (Bda) 29 Civ, Bell J stated:

> "*At the end of the day, the point is a relatively narrow one – whether the common law safeguards applicable to ex parte applications generally are applicable to ex parte applications for relief under the 2005 Act. For the reasons above, I believe they are*".

10. The Court always has the ability to control its own process, for example, abuse of process, estoppel, case management or any other grounds that may arise as a matter of common law, equity or the Court's inherent jurisdiction.

11. In *DEF Ltd* Hargun CJ stated:

> *"26. The complaint that without knowing what information has or has not been provided to the Court by the Minister's application that the Respondents are unable to ascertain potential grounds for seeking to set aside the Order, made in the first and last sentences of paragraph 4 of the Jibreus Affirmation, would have been a perfectly justifiable and sustainable complaint prior to the latest amendments to section 5(6A) and (6B). However, in light of the current wording of Section 5(6A) and (6B) this ground by itself would not be sufficient for the Court to grant the right of review.*

12. In *Ministry of Finance v FGH Limited* [2022] SC (Bda) 85 Civ the Court stated:

> *[23]* "… the statutory scheme "… *does not contemplate that a person served with a production order is entitled to the supporting documents provided to the court at the ex parte hearing. However, a person served with the production order should be provided with the minimum information (not documents) so that he can determine whether there is an arguable claim for breach of the 2005 Act or the relevant TIEA.*"
>
> *[26] "In the Court's view the statutory right to seek a review of the production order, set out in section 5(6) of the 2005 Act, must entail that a person served with a production order is provided with the minimum information (not documents) from which he is able to determine whether there is an arguable breach of the 2005 Act and/ <u>or the relevant TIEA</u>. In the event the minister elects not to provide that minimum information to the person served with the production order, the Court will accept that they arguability threshold is met if it can be shown that there is a theoretical possibility that the provisions of the 2005 Act <u>or the relevant TIEA</u> had not been complied with. That possibility of a breach of the 2005 Act <u>or the relevant TIEA</u> will provide a sufficient ground for the Court to consider granting the right of review." (emphasis added)*

13. In *Minister of Finance v AAA Group Limited* [2016] SC (Bda) 75 Civ Hellman J stated:

> *"Where an application is made to the court pursuant to a letter of request, the applicant's duty of full and frank disclosure includes all material matters which are known or ought to be known by the requesting party. It is no answer to an allegation of non-disclosure that the applicant did not disclose such matters to the court because the requesting party did not disclose them to the applicant."*

14. In general, arguable grounds for a right of review can be established in reliance on (a) the grounds for declining assistance under section 4(1) and section 4(2) of the 2005 Act, (b) in respect of the common law safeguards applicable to *ex parte* applications in respect of non-disclosure in *ex parte* applications and (c) the Court's ability to control its own process.

15. In *Reliance Globalcom Limited v Minister of Finance* [2022] CA (Bda) 4 Civ (the "***2022 Reliance Judgment***") Smellie JA stated at paragraph 52 that unless the test of relevance was satisfied, a request may 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. In respect of relevance, at paragraph 51, Smellie JA referred to *AAA Group Limited* where Hellman J expressed the view that "relevance" means "foreseeably relevant", which was the standard of relevance in OECD model documents, and where the commentary on the meaning of "foreseeably relevant" set out:

> *"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 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."*

<u>The Evidence</u>

16. The factual grounds relied upon for seeking the right of review under section 5(6B) are set out in the Affidavit of a director of the Company (the "**Director**") sworn 19 January 2024 as follows:

    a. The 2023 PO had been procured in disregard of the Minister's duty of full and frank disclosure of material facts known to the Minister.

    b. The 2023 PO was in breach of the provisions of the TIEA entered into between the two countries on 7 October 2010.

c. The Respondent (and another Bermuda company within the group of companies) had been served with five previous production orders issued by the Supreme Court of Bermuda over the years from 2012 – 2020 – all made at the request of the Government of India:

   i. Three of the previous production orders (the 2012 PO, the "**2015 PO**", and the "**2018 PO**") were sought in connection with the tax investigations of the same two taxpayers (the "**Two Taxpayers**");

   ii. The 2015 PO was challenged on the basis of a failure to make full and frank disclosure. The Supreme Court upheld the challenge and the Minister appealed the decision but was unsuccessful on appeal;

   iii. The 2018 PO (against the Respondent under an earlier name) was also challenged on the basis of the Minister's failure to make full and frank disclosure to the Court. The Minister did not contest these allegations and a consent order was entered on 12 October 2018 setting the 2018 PO aside.

   iv. The fourth production order (the "**2019 PO**") was objected to by the Respondent on the basis that it was fundamentally flawed in that respect as well as being oppressive. The Minister issued a notice of discontinuance unilaterally, without explanation or disclosure of the request. The 2019 PO sought information about the Company for the same period as now sought under the 2023 PO. The Director believed that the 2019 PO still existed because the notice of discontinuance was a voluntary stay of enforcement as no order was made quashing it, thus at present there were two production orders in respect of the same period, namely FY 2015-2016.

   v. The fifth production order (the "**2020 PO**") sought information relating to FY 2013-2014, FY 2014-2015 and FY 2015-2016. The Company was successful on appeal for judicial review when the 2020 PO was set aside. The Director referred to the *2022 Reliance* Judgment in respect of its emphasis on the duty of full and frank disclosure by the Minister which included setting out the full procedural history and that a request must

clearly show the relationship between the information requested and the tax purposes to be served.

d. The Company was assured by its Indian tax advisers that the Indian Tax Authorities ("**ITA**") had completed their assessment of the income tax return for the Company for the FY 2015-2016 and that there are appeal proceedings under way in India against the assessment.

e. That the Company queried the Minister about the reason for the 2023 PO because something must have gone awry in India which caused the request for information for the determination of income tax liability in respect of FY 2015-2016 for which the Company had already been assessed. The Minister had replied that the ITA had pursued all means in India to obtain the information requested and that the ITA took the view that the Company had provided evasive and incomplete responses which prompted the request. The Minister stated that it was his view that the requested information was foreseeably relevant to the determination of the assessment and collection of the taxes, the recovery and enforcement of claims or the investigation or prosecution of tax matters. The Company's tax advisers replied that the assertions could not be true because: (i) the Company had complied with all notices for details; (ii) the ITA had never asserted that the Company was not providing requested information; and (iii) that if the Company had failed to comply with a notice requesting information, the ITA would have made a Best Judgment Assessment of tax based on the information that it had. It did not do so, meaning that the assessing office had all the information it had requested in order to make the assessment that it did.

f. The Company had filed its returns of income for FY 2015-2016 and the outcome was an Assessment order which is under appeal. Therefore, the information requested in the 2023 PO cannot be relevant to a determination and assessment of income tax, as it had already been made. Even if it was relevant a notice under the Indian legislation could have been made for its production in India.

g. There were no outstanding notices issued by the ITA for information relating to the assessment for FY 2015-2016.
h. That the 2023 Request is irregular and/or failed to disclose to the Minister facts that it was material for the Court to know in considering the *ex parte* application.

17. The Company also relied on a Court of Appeal Judgment which was in respect of a production order issued by the Minister against the Company pursuant to a request from India for the same tax period FY 2015-2016 and the underlying request in that case (the "**CoA Judgment**").

18. Mr. Wayne Brown, Assistant Financial Secretary for the Ministry of Finance filed an affidavit sworn 14 March 2024 in response to the Director's affidavit. He stated the following:
    a. The Minister had placed all relevant evidence before the Court and satisfied its duty to provide full and frank disclosure, complying with the provisions of the TIEA, the Act and relevant case law such that the Director's affidavit failed to give rise to a right of review and a right to disclosure of the documents used in the *ex parte* application.
    b. The 2019 PO was discontinued by the Minister and as such it does not remain and the discontinuance was not a voluntary stay of enforcement, with the result that the 2023 PO is the only extant production order relating to FY 2015-2016.
    c. The Director's affidavit shows that there is a dispute between the Company and the ITA, which in turn were not matters for investigation by the Minister. The Minister was concerned with ensuring that the request complied with the TIEA and satisfied the relevance test.
    d. The Company's application and contentions are not arguable, that there has been no failure to give full and frank disclosure and there has been no breach of the TIEA.

Submissions of the Company

19. Mr. Kessaram submitted that the Company's core argument was that on the facts before the Court, the 2023 Request does not comply with the TIEA in that the information requested relates to the determination, assessment and collection of income tax for FY 2015-2016 for which a limitation period in India had already expired. Thus, the requested information in the 2023 PO cannot be relevant to the same tax purpose as the collection of income tax for the period in question was time-barred in India. Further, or in the alternative, if the information ordered in the 2023 PO is required for the determination of the Company's appeal, the present request is devoid of any foreseeable relevance to the determination of that issue given that the ITA had already made an assessment of the tax payable by the Company in that regard.

20. Mr. Kessaram submitted that the Company had met the requirements to show an arguable case for the following reasons:

   a. The unchallenged evidence of the Director shows that the Company filed its income tax return for FY 2015 – 2016.
   b. The information sought in the 2023 PO does not identify the tax purpose in India for which the information is required.
   c. The information sought by the 2023 PO is the same information that was sought in the 2020 PO, which was set aside by the Court of Appeal in the CoA Judgment.
   d. The tax purpose of the 2020 PO was the determination, assessment and collection of income tax for FY 2015 - 2016. The limitation period for this tax expired on 31 December 2018.
   e. The ITA made an assessment of income tax payable by the Company on its tax return for FY 2015-2016.
   f. Although the Company had appealed the assessment of income tax for FY 2015 -2016, the ITA had enough information to make the assessment.

g. The request in this case is, therefore, devoid of any foreseeable relevance to any tax purpose for which the request was issued given that the collection of income tax for FY 2015 - 2016 is statute-barred; or, alternatively, the ITA has already made an assessment. Thus, it was a "fishing expedition" for an undisclosed tax purpose. He relied on the judgment of Smellie JA at para 52 of the 2022 Reliance Judgment.

h. The Minister could not have been satisfied (or, at the very least, would have been skeptical had he reviewed the request with a critical eye) that the length and breadth of the information requested was relevant to any legitimate tax purpose of the ITA. Had the Minister scrutinized the request for compliance with the requirements of the Act and the TIEA with the knowledge he already possessed, he would have either gone back to the Competent Authority of India for clarification or, at the very least, expressed his reservations to the Court on the *ex parte* application, which was made on the papers.

21. Mr. Kessaram submitted that although the Minister did go back to the Competent Authority of India, from the answers given, it does not appear that the right answers were asked, arguing that the question ought to have been "for what tax purpose was the information requested relevant?"

    a. If the answer was that it was for the determination, assessment and collection of income tax for FY 2015 – 2016, the Minister should have asked "why is this information relevant after the expiry of the limitation period on 21 December 2018?"

    b. If the answer was that it was for the purpose of the Company's appeal, the Minister should have asked "why is he information relevant when you have already made an assessment of income tax on the Company's income tax return for FY 2015 – 2016?"

22. Mr. Kessaram submitted that on the evidence before the Court, no answer could have been provided by the Competent Authority of India to show that the request underlying the 2023 PO was compliant with the TIEA.

23. Mr. Kessaram submitted that nowhere in the 2023 PO is it stated for what tax purpose in India the information sought is required and thus in such absence, it is to be deemed that the Company has an arguable right of review. He argued that it was clear that the information sought relates to FY 2015 – 2016 but beyond that it was not clear what was the precise tax purpose. He referred to the Company's inquiry to the Minister and submitted that the Minister in reply did not state what the tax purpose was and even at the hearing the Company still did not know what the tax purpose was, noting that the tax purpose could not be the Company's income tax return for FY 2015 – 2016 or its appeal against the assessment. He argued that this was a breach of Article 5, paragraph 6(d) which mandated that the requesting party shall provide "*the tax purpose for which the information is sought*".

<u>Submissions of the Minister</u>

24. Mrs. Sadler-Best submitted that the Company has been provided with sufficient information such that it cannot argue that that the arguability threshold has been met by virtue of a theoretical possibility that the provisions of the Act or the TIEA have not been complied with. She submitted that in respect of the grounds for declining assistance as set out in the section 4(2) of the Act, the Company has no arguable basis on which to allege that any ground in section 4, have been engaged in the context of the 2023 PO. She also stated that the Court would have been satisfied when considering the request, that the conditions of the TIEA were fulfilled, which was stated in the 2023 PO.

25. Mrs. Sadler-Best submitted that there was no basis on which the Company could reasonably allege that the Minister did not satisfy himself that the information was indeed "relevant". She referred to the correspondence that flowed between the Minister and the Company which included the history of the past production orders and the fact that the Minister had made further inquiries with the Competent Authority of India to ensure that it was not a fishing expedition and that the requested information was foreseeably relevant to the ITA's ongoing investigation.

26. Mrs. Sadler-Best referred to paragraph 21 of the CoA Judgment where the Court stated that the 2019 PO was subsequently withdrawn by the Minister because it had been explained that it failed to identify anyone by name as being the subject of a tax investigation in India. Therefore, there was only one production order in existence in respect of the FY 2015–2016.

27. Mrs. Sadler-Best rejected the Company's submission which was that the request was irregular on the basis of an assertion that the ITA have completed their assessment on the Company's income tax return for the FY 2015–2016. She referred to the similarities alleged in *DEF* at paragraph 28 about a production order covering areas covered by earlier disclosure. There Hargun CJ ruled that that assertion cannot be relied upon as giving rise to an arguable ground. Thus, whether the 2023 PO may already cover areas addressed by the Company does not give rise to an arguable ground for leave to review.

28. Mrs. Sadler-Best submitted that the point about the ITA having already completed their assessment for FY 2105 – 2016 went beyond the scope of the Minster's duty and the Court's jurisdiction. She argued that the Company sought to have the Minster embark on a mini-trial which the Court of Appeal stated in the *2022 Reliance* Judgment at paragraph 59, is an approach that was "*sensibly admonished in the cases*". The Minster was only required to probe "*as may be appropriate for the purposes of clarification*". Thus, in light of the history of the matter, the Minister had fully complied with the requirement.

29. In respect of the duty of full and frank disclosure, Mrs. Sadler-Best submitted that all relevant matters were placed before the Court in the *ex parte* application, including the history of the previous production orders and the relevance of the latest request. She argued that there could be no finding now that there was a breach of duty as the Minister ensured that the 2023 proceedings were conducted in a manner that was fully cognizant and compliant with the *2022 Reliance Judgment*.

30. Mrs. Sadler-Best submitted that the company must persuade the Court that there is some basis which gives rise to an arguable or *prima facie* case that there is some material deficiency in the application before the Court and the matter needs further investigation and a full hearing which can only take place if the applicant is provided the documents that were before the Court on the *ex parte* application. She argued that there was no such evidence as the Minister had fulfilled his obligations and thus the Court should safeguard against fishing expeditions. She submitted that the Company had provided no basis as to why they should be entitled to see the documents supporting the *ex parte* application and thus the Court should exercise its discretion against the grant of leave to review the materials and order that the Company should be required to comply with the 2023 PO within a reasonable time.

Analysis

31. In my view, the Respondent should be granted a right of review for several reasons.

32. First, I accept that the information sought in the 2023 PO is the same information that was sought in the 2020 PO which was set aside by the Court of Appeal. Thus the 2023 PO is a repeat of a request which was not allowed by the Court of Appeal for various reasons. In my view, the very fact of this circumstance by itself warrants a review and thus meets the test that there is an arguable ground for review. To this point, I do not accept Mrs. Sadler-Best's argument that these circumstances are similar to those of *DEF* at paragraph 28 which dealt with requests which required information where there had been earlier disclosure. To my understanding, the Company's position is that: (i) the previous production orders were unsuccessful for one reason or another and disclosure was not made; and (ii) the Minister had been informed that the ITA's position was that the Company had provided evasive and incomplete responses, thus the ITA was seeking additional information to that already disclosed.

33. Second, I agree with Mr. Kessaram that the information sought in the 2023 PO does not show the tax purpose in India for which the information is required. To that point, I also

accept that the tax purpose for the previous request was the determination, assessment and collection of income tax for FY 2015-2016 for which the limitation period expired on 31 December 2018. On the basis that the tax purpose is likely the same for both requests due to the same information being requested, I agree with Mr. Kessaram that there is an arguable ground of review.

34. On the one hand, the evidence highlighted by Mr. Kessaram shows that the limitation period had expired and thus a proper question to be asked is what is the relevance of the information requested after the expiry of that limitation period. On the other hand, the ITA had already made an assessment of income tax payable for FY 2015-2016 which the Company had appealed and which remains to be heard. Thus, a proper question to be asked is why is the information relevant when an assessment had already been made of the income tax on the Company's income tax return for FY 2015-2016. I do not accept Mrs. Sadler-Best's arguments that on this point the Company sought to have the Minister embark on a mini-trial. In my view, applying the principle set out in paragraph 59 of the *2022 Reliance Judgment*, it was appropriate for the Minister to probe further for some clarification as to what was the purpose of the request as it related to the tax assessment or the appeal from such assessment.

35. At this point, I do note that correspondence flowed between the Minister and the Company, as well as between the Minister and the Competent Authority of India, but I do agree with Mr. Kessaram that despite that correspondence and the fact that the information requested pertained to FY 2015-2016, the tax purpose was not disclosed to the Company. Here I rely on *FGH Limited* where in the absence of some minimum information, namely whether the information was required in respect of the assessment, or the appeal or some other purpose, then the Court is bound to accept that the arguability threshold is met where it can be shown that there is a theoretical possibility that the provisions of the 2005 Act or the TIEA has not been complied with. In my view, there is a possibility that there was a breach of Article 5.6(d) that the tax purpose was not disclosed, in that the tax purpose for which the information was sought was not provided to the Minister.

36. Third, on the evidence, in paragraph 18 of *the CoA Judgment*, Smellie JA set out that the 2018 Request was concerned with a tax investigation for FY 2015-2016 in respect of which the statutory limitation period would expire on 31 December 2018. At paragraph 19, Smellie JA stated that from the face of the request, the limitation period would therefore have expired by the time the application for the production order came before the then Chief Justice *ex parte* on 4 March 2020 and when it was returned before me for review in January and November 2021. The 2023 PO is now several years later and again on the face of the present production order, the limitation period remains relevant but expired since 31 December 2018. At paragraphs 35–49, Smellie JA analysed the 2018 Request in light of the limitation period finding in essence that it was for the Bermuda Court to satisfy itself, pursuant to Article 5.6 that the information sought was shown to be relevant to the tax purpose for which it is sought and where the limitation period had expired for that tax purpose, then it called for an explanation as to why the request was a valid one. In my view, that reasoning applies to the 2023 PO and thus it now calls for review.

37. Fourth, in light of the reasons stated above, and without a need to repeat them, I accept Mr. Kessaram's inclination that the 2023 Request could be devoid of any foreseeable relevance to any tax purpose, and thus the question arises as to whether the request was a fishing expedition for an undisclosed tax purpose, especially on the basis that the limitation period had expired.

38. Fifth, I have considered the arguments of Mrs. Sadler-Best. For the reasons set out above it follows that I do not accept her arguments that the arguability threshold has not been met by the Company. Despite the further correspondence between the Minister and the Company and the further enquiries made by the Minister of the Competent Authority of India, in my view, the Company has satisfied the arguability test. To that point, I am satisfied on the evidence, that in light of all the circumstances, the Company has made out its case for disclosure of the documents relied on in the *ex parte* application.

Conclusion

39. The Respondent has satisfied the Court that it has arguable grounds for review of the 2023 PO and thus I grant a right of review of the 2023 PO and I so order.

40. I grant the Respondent's application for disclosure of the documents filed with the Court by the Minister to obtain the 2023 PO. I order that the Respondent should be provided with as much information of the 2023 Request as necessary, redacting any sensitive material, to show that the requirements in Article 5, paragraph 6(a)-(h) have ben complied with.

41. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Company against the Minister on a standard basis to be taxed by the Registrar if not agreed.

Dated 25 September 2024

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HON. MR. LARRY MUSSENDEN

CHIEF JUSTICE