

BERMUDA

COURT OF APPEAL

The Minister of Finance -v- Bunge Ltd [2013] **CA (Bda) 4 Civ**

CIVIL APPEAL - TAX INFORMATION EXCHANGE AGREEMENTS - DISCLOSURE OF BASIS FOR REQUEST - STATUTORY NOTICE TO DELIVER UP INFORMATION

This appeal was against the judgment of Hellman J dated 13 March 2013 which granted an application for judicial review made by Bunge Limited (“Bunge”) in relation to a statutory demand for information made by the Minister of Finance, the Appellant, under the *International Cooperation (Tax Information Exchange Agreements) Act, 2005* (the “2005 Act”). The 2005 Act “*makes general provision for the implementation of tax information exchange agreements entered into by the Government of Bermuda... with other jurisdictions*”. The relevant Agreement was made between the Governments of Bermuda and Argentina and came into force on 14 October 2011 (“the Agreement”).

Bunge, a company located in Bermuda, was served with a statutory Notice to deliver up information pursuant to Section 5 of the 2005 Act. It referred to a request for information received from the Government of Argentina in accordance with the Agreement, and it directed Bunge to deliver to the Minister all such information within Bunge’s possession, custody or control in relation to the ‘tax payer’ in question. The Notice contained the Minister’s assertion that the Request made by Argentina “*is in accordance with*” the Agreement; it specified some but not all of the information that the Agreement required Argentina to provide to Bermuda in support of its Request; and it included certain unexplained demands for information.

Bunge’s submitted that the person on whom a notice is served must know the terms of the request in order to determine that the Minister is entitled to the information pursuant to the Agreement. In order to comply with the Agreement, Bunge contended that Argentina must have provided to Bermuda with detailed information to support its request for the information sought and that Bunge was entitled to that information.

The Minister disputed that the terms of the request must be disclosed, contending that it was a document received in confidence from the Government of a foreign country, which it is not required to disclose under the terms of the 2005 Act.

It was held that on the true construction of the 2005 Act, the person on whom the notice is served is entitled to see, and the Minister is bound to produce, the terms of the Request, so far as they are relevant to the notice that is given. Without production of the terms of the Request, the person cannot know that the notice is valid. It was also held that disclosing the terms of the request in the above circumstances does not involve any breach of Bermuda’s international obligations under the Agreement.

It was noted in the Judgment that the submissions for the Minister came close to suggesting that the person on whom a notice is under Section 5 of the 2005 Act must accept the Minister’s decision that the notice is in accordance with the request received from the foreign state, thus (possibly) raising the constitutional issue as to whether the Minister has an unlimited discretion which cannot be questioned even by the Courts. It was highlighted that this would clearly be impossible as the face of Section 8A of the Act permits judicial review.

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