

## BERMUDA SUPREME COURT

### ***Ministry of Finance -v- (1) E (2) F (3) H*** **[2014] SC (Bda) CIV 43 (30 May 2014)**

### INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) ACT, 2005 (THE "ACT") - PRODUCTION ORDERS - FAILURE TO SPECIFY HOW INFORMATION IS TO BE PROVIDED - REQUESTS THAT DO NOT CONFORM WITH THE REQUIREMENTS OF THE RELEVANT TAX INFORMATION EXCHANGE AGREEMENT ("TIEA")

Certain amendments to the Act came into force in December 2013 which required the Minister of Finance to make applications for information or document production to the Court. A successful application results in a production order. The party served with the Order may apply to the Court to set it aside or vary it. In this case the Defendants sought to do just that.

The production order in question sought information on various matters such as the Defendants' activities, the means used to carry them out and the date and means of acquisition of licenses, patents and intangible assets.

The Defendants submitted that they were unable to give effect to the request on the basis that the request required information but failed to specify how that information was to be provided. The Defendants submitted that this put the Defendants in the invidious position of having to provide information but not knowing what is required to satisfy that requirement. The Judge held that there was no merit to this objection as "*Information*" is defined broadly in the Act and includes "... *any fact ... in any form whatsoever that is relevant or material to tax administration or enforcement*". That definition does not require that the fact must be provided in the form of a pre-existing document.

The Judge was also asked to order that the Plaintiff should bear the costs of one of the Defendant's compliance with the production order on the grounds that it was an independent third

party operating at arm's length from the taxpayer under investigation. Consideration of this point was adjourned to give the parties the opportunity to make more detailed submissions.

Of particular interest, it was submitted by Counsel for the Minister that any non-conformity with the requirements of the relevant TIEA was outweighed by the concern of a possible accusation by the requesting State that Bermuda was not complying with its treaty obligations. In response to this argument, the Judge stated, *obiter*, that it was extremely doubtful that it would be lawful to honour a request on these grounds alone in circumstances where the request did not conform to the TIEA.

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