



ANDERSEN®

**Judgment issued by the  
Supreme Court of Mauritius**

Fylakas Capital Ltd (“Applicant”)

v

The Director-General, The Mauritius Revenue Authority (“Respondent” or “MRA”)

2023 SCJ 508

In the matter of:

Sentinel Investments Ltd v MRA

and

Fylakas Capital Ltd v MRA

[mu.Andersen.com](https://mu.Andersen.com)

**Judgment issued by the Supreme Court of Mauritius**

**Fylakas Capital Ltd (“Applicant”)**

**v**

**The Director-General, The Mauritius Revenue Authority (“Respondent” or “MRA”)**

**2023 SCJ 508**

**In the matter of:  
Sentinel Investments Ltd v MRA  
and  
Fylakas Capital Ltd v MRA**

On 18 December 2023, the Supreme Court of Mauritius issued its judgment by setting aside the preliminary objections raised by the MRA.

The primary issue in the present case revolves around whether the MRA has satisfied the Judge in Chambers that the information requested meets the ‘foreseeable relevance’ standard or whether the applications are indeed a disguised means for the Indian Tax Authorities to lift the corporate veil of Aadhi Enterprises Private Limited (“Aadhi”) and look into the affairs of its shareholders which are companies incorporated in Mauritius.

**Facts of the case**

- Sentinel Investments Ltd (“Sentinel”) and Fylakas Capital Ltd (“Fylakas”) were requested to provide certain information and documents to the MRA following a request for exchange of information under Article 26 of the Double Taxation Avoidance Agreement between the Government of Mauritius and the Government of India (“DTAA”) by the Indian Tax Authorities.
- Sentinel and Fylakas are together referred to as the “Applicants”.
- The Indian Tax Authorities were investigating into the case of Aadhi, during which it was found that Sentinel had invested in Aadhi through the acquisition of shares at a high premium. The funds that Sentinel invested in Aadhi had been received from Fylakas, the sole shareholder of Sentinel.

**Analysis of the case**

Section 76(1) of the Income Tax Act 1995 (“ITA”) provides for only two cases for exchange of information, namely:

- for the determination of credits and exemptions in respect of taxes; or
- for the prevention of fraud.

It is only when the information sought satisfies the conditions laid down in Section 76(1) of the ITA that an application under Section 124(4)(b)(ii) of the ITA may be made.

In the present case, there has never been any question of fraud raised in the exchange of correspondence. In the Applicants contention, the only applicable limb is Section 76(1)(b) of the ITA, which cannot, by any means, apply to one of Aadhi’s shareholders and the shareholder of the latter.



# ANDERSEN<sup>®</sup>

The Applicants' disagreement to the request for information is for the below reasons:

- i. The requested information and documents are beyond the scope of Article 26 of the DTAA inasmuch as under paragraph 3(b) of Article 26 of the DTAA, tax authorities are prohibited from exchanging information and documents which are not obtainable under the laws or in the normal course of administration of that or of the other Contracting State;
- ii. The Indian Tax Authorities are trying to lift the corporate veil of Aadhi and look into the affairs of one of its shareholders, without complying with the established principles;
- iii. The MRA is making an abuse of the mechanism provided for under Article 26 of the DTAA, using the term 'foreseeable relevance' as a mere formula without a proper evaluation of the requests;
- iv. The MRA, having failed to satisfy the Judge in Chambers that the request for information is 'foreseeably relevant to the investigation being carried out by the requesting authority', has breached an essential condition for the disclosure of information under Article 26 of the DTAA and has merely acted as a rubber stamp;
- v. The MRA has engaged onto a fishing expedition;
- vi. The ex-parte applications, being concealed from both Applicants, represent an affront to the rule of law given that the MRA has adopted an opaque approach and failed to show how he has exercised his powers.

To support the request for information, the MRA raised the below preliminary objections in law:

- i. The applications fail to comply with Rule 3(b) of the Supreme Court (Judge in Chambers) Rules 2002 ("Rule 3(b)"); and
- ii. ex facie the said affidavits, the Applicants have failed to demonstrate how the orders dated 24th August 2022 fall foul of Section 124(4) of the ITA.

## **Judgment of the Supreme Court**

### Compliance with Rule 3(b)

Rule 3(b) states that where the jurisdiction of the Judge in Chambers is being invoked as 'Juge des Référés' under Article 806 of the Code of Civil Procedure, it shall so be specified or where it is laid down in any other specific enactment, the Act together with the relevant provision shall, where applicable, be specified.

In the present case, the Applicants are seizing the Judge in Chambers' jurisdiction to revise and/or discharge the disclosure orders granted.

Therefore, the Applicants cannot be taxed for having failed to comply with Rule 3(b) inasmuch as they have clearly specified in their respective applications that the jurisdiction of the Judge in Chambers is being seized on the authority of Attorney General (The Honourable) (supra). Hence, the first limb of MRA's preliminary objections failed.



# ANDERSEN®

## Foreseeable relevance test

The MRA missed the crucial and axiomatic point that he has himself failed to satisfy the Judge in Chambers that the information requested by the Indian Tax Authorities meets the 'foreseeable relevance' test.

The points flagged in the present case are as follows:

- i. Article 26(1) of the DTAA clearly mentions that the competent authorities shall exchange such information as is foreseeably relevant for carrying out the provisions of the Convention.
- ii. Article 5(5) of the Agreement on Exchange of Information on Tax Matters sets out the information which the competent authority of the applicant party shall provide to the competent authority of the requested party when making a request for exchange of information so as to demonstrate the foreseeable relevance of such information. This includes, inter alia:
  - a. the identity of the person under investigation;
  - b. a statement of the information sought and the form in which the applicant party wishes to receive the information from the requested party;
  - c. the tax purpose for which the information is sought
  - d. a statement that the request conforms with the law and administrative practices of the applicant party; and
  - e. a statement that the applicant party has pursued all means available in its own territory to obtain the information.
- iii. The MRA did not annex a copy of the requests made by the Indian Tax Authorities.
- iv. Under Section 76 of the ITA, it is clear that information sought by a foreign tax authority can only be in relation to tax matters of an entity in the jurisdiction of that authority; in the present case, India. Indeed, Section 76(1)(b)(ii) of the ITA can only mean fraud relating to tax. Similarly, in Section 76(3)(g) of the ITA, information in respect of any person not resident in Mauritius can only be information relating to the tax affairs of that person. This can be gathered from a holistic reading of Section 76 of the ITA as a whole.
- v. By reading Section 76 of the ITA as a whole, it is, therefore, clear that the information sought has to be in relation to the tax affairs of Aadhi in India. The Indian Tax Authorities are not seeking information about Aadhi, but about the shareholder of Aadhi and the shareholder of the shareholder of Aadhi.
- vi. The foreseeable relevance test applies to both the requesting and the requested state.

In the absence of a copy of the request for exchange of information from the Indian Tax Authorities in the ex parte applications and how the information sought is foreseeably relevant to the tax affairs of Aadhi in India, it cannot be verified whether the request for information satisfy the foreseeable relevance test.

The preliminary objections raised by the MRA were therefore set aside.

The Supreme Court further held that the Orders granted on 24 August 2022 are discharged, without prejudice to the MRA making a proper application and annexing the relevant documents and information disclosing that the information sought is foreseeably relevant to the tax affairs of Aadhi in India to enable the Judge in Chambers to make a proper evaluation.

It can therefore be deduced that applications for such ex parte Orders need to be done in the proper manner with all relevant information by the MRA.



# ANDERSEN®

## Author



**Zaynab Hisaund**

Senior Tax Manager, Andersen in Mauritius

## CONTACT US

### Andersen in Mauritius

Level 4, Alexander House, 35 Cybercity Ebene 72201, Mauritius

**Phone:** +(230) 403 0850 | **Fax:** +(230) 403 0851

**Email:** [info@mu.Andersen.com](mailto:info@mu.Andersen.com) | **Website:** [mu.Andersen.com](http://mu.Andersen.com)

#### DISCLAIMER

*The information in this e-newsletter was prepared by Andersen (Mauritius) Limited to provide potential clients with a broad overview of the opportunities available in Mauritius. While all reasonable care has been taken in the preparation of this e-newsletter, Andersen (Mauritius) Limited accepts no responsibility for any errors it may contain, whether caused by negligence or otherwise, or for any loss, however caused, sustained by any person that relies on it. Readers are advised to consult with appropriate, qualified professional advisors before taking action. Andersen (Mauritius) Limited will be pleased to discuss any specific issues.*