

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. <sup>G0149</sup> OF 2015

IN THE MATTER OF THE TAX INFORMATION AUTHORITY LAW (2014)  
REVISION

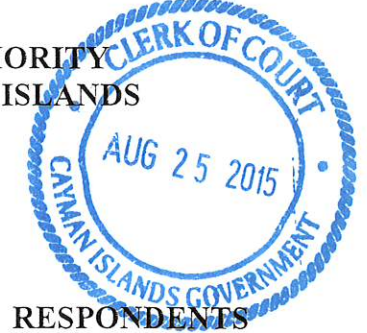
BETWEEN

- (1) NORWIN LEE ARONFELD
- (2) SHEILA ARONFEFLD

APPLICANTS

AND

- (1) CAYMAN ISLANDS TAX INFORMATION AUTHORITY
- (2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
- (3) TROPICAL TRADER CO II LTD
- (4) SIR TURTLE BUILDING CO LTD
- (5) WE FIVE LTD



RESPONDENTS



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APPLICATION FOR LEAVE TO  
APPLY FOR JUDICIAL REVIEW

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TO: The Clerk of the Court  
Law Courts Building  
George Town  
Grand Cayman

Name, address and description of applicant(s)	<p>Norwin Lee and Sheila Aronfeld</p> <p>10 Market Street  PO Box 222  Grand Cayman,  KY1-9006</p>
Judgment, order, decision or other proceeding in respect of which relief is sought	<p>The decision of the Tax Information Authority of the Cayman Islands (“CITIA”) of unknown date (the “Decision”) to accede to a request (the “Request”) by the Inland Revenue Service of the United States (“IRS”) made pursuant to a tax information sharing agreement entered into between the governments of United States and the Cayman Islands, that CITIA obtain private documents in the Cayman Islands belonging and confidential to the Third, Fourth and Fifth Respondents and/or containing information relating and/or confidential to the Applicants and thereafter deliver the documents obtained to the ATO for the purposes of judicial proceedings currently before the United States Courts.</p>

**TAKE NOTICE** that the Applicants seek the following Relief against the First Respondent, namely:

1. Leave pursuant to Order 53 Rule 3(1) of the Grand Court Rules to bring these proceedings by way of judicial review.
2. An Order that the Applicants have leave to bring these proceedings on behalf of the Third, Fourth and Fifth Respondents with a direction that they be required to take no active part in the proceedings.

3. A direction pursuant to Order 53 Rule 3(10)(a) that the grant of leave to bring these proceedings by way of judicial review shall operate as a stay of the Decision until further order of this Court.
4. A declaration that the Decision was *ultra vires* of the powers granted to CITIA by the Tax Information Authority Law (2009 Revision) (the "TIA Law").
5. An Order for Certiorari that the Decision be quashed.
5. Declarations pursuant to the Constitution that the Section 17 Amendments and/or the Section 8 Amendments are incompatible with Articles 7 and 9 of the Bill of Rights.
6. A declaration that the instructions given to the Third to Fifth Respondents under Section 20 of the TIA Law, more particularly described below, were invalid.
7. An order that CITIA do provide the Applicants with copies of all documents held by it in any way related to the Request, including but not limited to, all correspondence between CITIA and the IRS.
8. Such further and other relief as this Honourable Court may deem just; and
9. Costs.

### **GROUND ON WHICH RELIEF IS SOUGHT**

**AND TAKE NOTICE THAT** the grounds of this Application are as follows

#### **I. Background to Relevant Legislation**

1. The Government of the Cayman Islands has entered into a number of agreements with the governments of other jurisdictions for the exchange of information relevant to the administration and enforcement of domestic tax laws.
2. The legislation in the Cayman Islands which governs the implementation of the various tax information sharing agreements is the Tax Information Authority Law 2014 Revision ("the TIA Law") and the entity which implements the TIA Law pursuant to Section 5 thereof is CITIA.

3. By agreement dated 29 November 2013 the Governments of the Cayman Islands and the United States entered into a tax information sharing agreement (the “Tax Agreement”).
4. The terms of the Tax Agreement were incorporated into the law of the Cayman Islands following notification to the United States government pursuant to Article 13 of the Tax Agreement effective on 14 April 2014).
5. Under paragraph 1 of Schedule 1 the Cayman Islands agreed to provide information which is “foreseeably relevant to the administration and enforcement of domestic laws of [the United States] concerning [federal] taxes” being those taxes covered by the Agreement.
6. Upon receipt of a request from the IRS CITIA was required as a matter of fairness and/or by way of natural justice to give notice to persons whose rights would be affected by a decision to comply with the request.
7. Section 7(1) of the TIA Law requires CITIA to determine whether the request was in compliance with Schedule 16 and if so to execute the request in accordance with the TIA Law.
8. Section 17(1) of the TIA Law provides as follows:

*“an individual who is the subject of a request made by a requesting Party solely in relation to a matter which is not a criminal matter or an alleged criminal matter, shall if the individual’s whereabouts or address in the Islands is made known to the Authority, be served with a notice by the Authority advising of the existence of a request specifying that individual, the jurisdiction making the request and the general nature of the information sought; and any individual so notified may within fifteen days from the date of receipt of the notice, make a written submission to the Authority specifying any grounds which he wishes the Authority to consider in making its determination as to whether or not the request is in compliance with the provisions of the relevant Scheduled Agreement...”*

9. Section 17 was amended by the Tax Information Authority (Amendment)(No2) Law 2014 in 2014 (“the Section 17 Amendments”) inter alia as follows:
  - 9.1. The words “in the Islands” following “whereabouts or address” were introduced in the section as set out above.
  - 9.2. The words “the subject of a request” were defined to mean “the individual identified in a request who is under examination or investigation”.
  - 9.3. Before the Section 17 Amendments the requirement to give notice applied in respect of any person who was the subject of a request and whose whereabouts were known.
10. Under Section 17 the persons who were the subject of a request in non-criminal matters are entitled to make representations to the CITIA.
11. In reaching a decision under Section 7(1) the CITIA is required to take account of representations made by anyone under Section 17.
12. Under Section 8(4) of the TIA Law (as applied in the case of a request under Schedule 1):
  - 12.1. CITIA has to apply to a judge of the Grand Court for an order for production in circumstances when it considers it necessary to obtain the information specified in a request if that information is required for criminal proceedings.
  - 12.2. Only when the request was not being made for any criminal proceedings can CITIA itself serve a notice without application to the Court, but subject to compliance with the notice requirements of Section 17.
13. A Judge hearing an application by CITIA for a production order has a discretion to make an order if the conditions in Section 8(7) of the TIA Law are satisfied, including the absence of any reasonable grounds for not granting the request pursuant to the TIA Law and, in this case, the Tax Agreement.

14. The requirement to notify a person who is the subject of a request of the existence and substance of a request so as to enable that party to make representations to the CITIA and/or the necessity to seek production by making an application to a Judge under Section 8(4)(a) are essential safeguards for a person affected by the request for information to ensure that his rights of privacy and confidentiality are not unfairly prejudiced.
15. Section 8 of the TIA Law was also amended by the Tax Information Authority (Amendment)(No2) Law 2014i (the Section 8(4) Amendments), when the following amendments were introduced.
  - 15.1. Section 8(4)(a) was amended by deleting the words “or related investigations” after “proceedings”.
  - 15.2. Section 8(4)(a) provides that “For the purposes of subsections (4) and (13) the word “proceedings” means criminal proceedings.”
16. Section 20 of the TIA Law 20 provides that, *“if so instructed by [CITIA], the particulars of and all matters relating to a request shall be treated as confidential, and no person who is notified of a request.... shall disclose the fact of the receipt of such request or any of the particulars required or documents produced or information supplied to any other person, except that person’s attorney-at-law and such other persons as the Authority may authorise, for such period as he may be notified by [CITIA].”*
17. In a case where CITIA does not strictly observe the procedure for executing a request it procures an invasion of privacy in contravention of Article 9 of the Bill of Rights and/or a breach of confidence and/or an unlawful violation of the Confidential Relationships (Preservation) Law (2009 Revision) (“CRPL”) and the person producing documents is also in contravention of CRPL and without statutory authority or other protection under the TIA.

## II. The Decision to Comply with a Request by IRS pursuant to the Tax Agreement

18. The First and Second Applicants are naturalised citizens of the Cayman Islands but also remain taxpayers in the United States.
19. The Third to Fifth Respondents are companies incorporated and registered in the Cayman Islands which have only ever carried on business in the Cayman Islands and which have no connection with the United States other than as described below.
20. The First and Second Applicants are both shareholders of the First to Third Respondents.
21. The Applicants are the subject of a criminal tax investigation being conducted by the IRS in the United States.
22. On or about 22 July 2015 each of the Third to Fifth Respondents were served by CITIA with Notices to Produce Information pursuant to Section 8(4)(b) of the TIA Law (“the Production Notices”).
  - 22.1. The Production Notices referred to a “request” made pursuant to an agreement but did not identify the Authority making the request, the date, its scope or indeed provide any information about the request.
  - 22.2. The information requested identified the Applicants.
23. Purportedly under Section 20 the Third to Fifth Respondents were instructed by the CITIA not to disclose the existence or nature of a request to anybody.
24. It is to be inferred that the Production Notices were served on the Third and Fifth Respondents pursuant to decision made by CITIA under Section 7 of the TIA Law to comply with a request by the IRS made in connection with the investigation into the Applicants.

### **III. Grounds on which the Applicants’ Decisions are Challenged.**

25. The request seeks as one of the categories of documents the following “*any and all company records including but not limited to all transaction pertaining to [the Applicants]. This must include any financial records including loan contracts,*

*interest or dividends paid, payable accounts, contribution accounts, distribution accounts, certificates, sales contracts, cash account, receivable accounts, loan accounts, capital accounts and sales/purchase of stock and purchase contracts.*

26. The requirement to produce information in these terms was impossible wide and amounts to fishing in that it seeks information which is not or could not reasonably be supposed to be foreseeably relevant and/or which is otherwise oppressive and/or an unreasonable and/or disproportionate invasion of the rights of the Applicants and/or Second to Fifth Respondents, contrary to Articles 6 and 9 of the Bill of Rights.
27. Neither the Applicants nor the Third to Fifth Respondents had been provided by CITIA with:
  - 27.1. any notice of the existence of the request and the substance of such request under Section 17(1) of the TIA Law or otherwise.
  - 27.2. any opportunity under Section 17(1) of the TIA Law or otherwise to make representations
28. The Applicants should have been served with Notice and been afforded an opportunity to be heard under Section 17(1) of the TIA Law or as a matter of fairness.
29. Alternatively, if it is to be contended that CITIA did not believe that the Third to Fifth Respondents were the subject of a criminal investigation, it will be contended on behalf of the Third to Fifth Respondents as follows:
  - 29.1. the Section 17 Amendments were unconstitutional as contravening the rights of the Applicants and/or the Third to Fifth Respondents under Articles 7 and 9 of the Bill of Rights when considered in the context of the fact that this would disable the Third to Fifth Respondents from making representations or challenging any decision made under Section 7 until after the service of the Notices of Production.
  - 29.2. CITIA failed to take any steps to inform itself adequately or at all whether the request was made in the context of criminal proceedings in considering whether it was necessary to serve a Notice under Section 17 of the TIA Law. Had CITIA

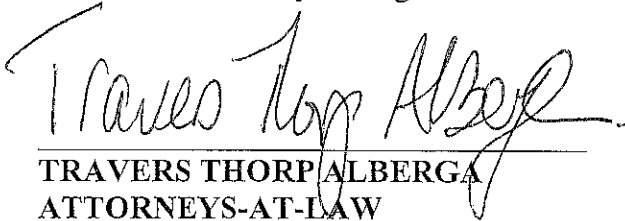
determined that the Request related to a non-criminal matter then it should have served a notice on the Applicants under Section 17 as amended.

30. Had CITIA served notice on the Applicants and/or the Third to Fifth Respondents and received representations CITIA would not have decided to comply with the Request and/or would have applied to the Court under Section 8(4)(a) and/or there was a reasonable chance that it would not have complied with the request or that it would have applied to the Court and that the Court would have rejected the request.
31. In the premises the decision of CITIA to comply with the Request was fatally flawed in that it disabled itself from considering information and representations from the Applicants and/or Third to Fifth Respondents.
32. Further, CITIA should have notified the Applicants and/or Third to Fifth Respondents of the Decision and allowed them a fair opportunity of applying to the Court to challenge its decision in order to ensure that the contravention of their rights under Article 9 of the Bill of Rights were not infringed disproportionately and/or to ensure that under Article 7 of the Bill of Rights the Applicants had a hearing before an independent and impartial tribunal in the determination of their respective rights under Article 9 and/or their rights of confidence.
33. The effect of the Section 8(4) Amendments was to create a new category of case in which neither notification under Section 17 nor court application under Section 8 were required, namely a criminal investigation where proceedings had not been commenced. In such cases following the amendments CITIA was not obliged to notify the individual that is subject to the investigation (because of the Section 17 Amendment which limited notification to non-criminal cases) or to apply to a Judge (because of the Section 8(4) Amendments which removed all investigations from the requirement to apply to court) thereby denying the subject of an investigation the fundamental safeguards of notice and/or judicial consideration of the request.
34. Alternatively, but for the Section 8(4) Amendments and/or the Section 17 Amendments CITIA would have been obliged to notify the Applicants and/or the Third to Fifth

Respondents or apply to the Court under Section 8(4)(a) of the TIA Law. In eliminating any requirement for notice or judicial oversight in cases of criminal investigations the Section 8(4) Amendments and Section 17 Amendments were unconstitutional as contravening the rights of the Applicants and/or the Third to Fifth Respondents under Articles 7 and 9 of the Bill of Rights.

35. CITIA imposed a requirement on Section 20 without any or any proper consideration being given as to whether that requirement was proportionate inasmuch as it prohibited disclosure to shareholders or restricted the ability of the Applicants and the Third to Fifth Respondents to challenge the Production Notices. The Applicants will rely on the fact that requirements under Section 20 are imposed indiscriminately in all cases by CITIA without any consideration being given as to the necessity for doing so. The Applicants will say that the instruction given under Section 20 of the TIA Law to the Third to Fifth Respondents was invalid.
36. By letter dated 12 August 2015 the Applicants' attorneys, Travers Thorp Alberga, notified CITIA that the Cayman Companies understood that the Request had been made to CITIA by the IRS and that it was the Cayman Companies' view that the Production Notices were ultra vires and unlawful. The 21 August 2015 letter to CITIA requested that CITIA provide a copy of the Request.

**DATED** the 25<sup>th</sup> day of August 2015



**TRAVERS THORP ALBERGA  
ATTORNEYS-AT-LAW  
FOR THE APPLICANTS**

**THIS APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW** was **FILED** by **TRAVERS THORP ALBERGA**, Cayman Islands, Attorneys-at-law for and on behalf of the Applicants whose address for service is that of its said Attorneys-at-law.