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Taxpayer Successfully Gets Bill Of Demand For Sales Tax Quashed*WMSB v Ketua Pengarah Kastam & Anor***Contact Persons:**

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On 6 September 2021, the High Court allowed the application for judicial review by WMSB to quash a bill of demand for sales tax issued by the Director General of Customs (DGC).

In essence, the DGC and the Royal Malaysian Customs Department (RMCD) had arbitrarily disallowed WMSB's application for sales tax exemption under Item 57, Schedule A of the Sales Tax (Persons Exempted From Payment of Tax) Order 2018 (Exemption Order).

WMSB was successfully represented by our Tax, SST & Customs Partner, S. Saravana Kumar together with associate, Ng Kar Ngai.

Brief Facts

WMSB is a company incorporated in Malaysia where it is principally engaged in trading of edible oil products. WMSB's products are sold to the overseas market. The commercial arrangements in WMSB's trading activity are consistent whereby WMSB sources for edible palm oil and packaging materials from Malaysian manufacturers.

The packaging materials will be delivered to the appointed packer of WMSB, who will fill the edible oil into the packaging materials. The appointed packer is also a Malaysian business entity. Given the nature and volume of the edible oil, the edible oil cannot be sold to the overseas market without being packed into the packaging materials.

Upon completion, the goods will be exported to WMSB's customers. The export declaration forms, i.e. Forms K2 are lodged in the name of WMSB as the exporter. In 2018, WMSB obtained a verbal confirmation from the RMCD that WMSB is eligible for the exemption on the purchase of the packaging materials under Item 57, Schedule A of the Exemption Order.

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WMSB was also granted 17 certificates of exemption by the DGC through the RMCD.

However, the DGC and the RMCD subsequently disallowed WMSB's claim for exemption in relation to the packaging materials on the following grounds:

- (a) WMSB's description of goods and tariff codes declared in the Forms K2 do not match with the packaging materials purchased.
- (b) The exemption is not intended for value added or processing activity.

Being aggrieved by the decision, WMSB applied for judicial review to set aside the said decision.

The High Courts Ruling

The High Court allowed WMSB's application for judicial review and accepted the arguments advanced on behalf of WMSB that:

- (a) The Exemption Order is effectively a subsidiary legislation made under the Sales Tax Act 2018 (STA) and, as such, would be equally applicable as the STA.

The DGC and the RMCD must therefore give effect to the Exemption Order where relevant and applicable, as the DGC and the RMCD would with any provisions of the STA.

- (b) The Exemption Order would be relevant and applicable if the conditions for such exemption are satisfied. The DGC and the RMCD must then give effect to the exemption and there is no discretion as to whether such exemption will be granted regardless of any factors.

This principle was applied in *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916.

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- (c) The necessary conditions for the exemption under Item 57, Schedule A of the Exemption Order have been satisfied as:
- (i) WMSB had obtained the certificates of exemption issued by the DGC through the RMCD.
 - (ii) WMSB had purchased the packaging materials from registered manufacturers.
 - (iii) The goods were exported within 6 months from the date of purchase.
- (d) WMSB's business operations must be seen in totality and not in isolation. As held in *Ketua Pengarah Hasil Dalam Negeri v Servier Malaysia Sdn Bhd* (2012) MSTC 30-038, it would be necessary for income tax purposes, to look at business as a whole set of operation directed towards producing income. Without the packaging materials, WMSB will not be able to export and sell the edible oil.
- (e) Further, pursuant to the decision in *Ketua Pengarah Hasil Dalam Negeri v Latex Manufacturing Sdn Bhd* (2016) MSTC 30-125, where there was no cancellation of a tax exemption granted, WMSB ought to be able to enjoy the tax exemption granted to it and the DGC and the RMCD are not allowed to disregard such tax exemption.
- (f) Relying on the Indian precedents on the enforcement of policies, i.e. exemptions, incentives and/or concessions implemented by the authorities, it is clear that the executive is bound by the policy decisions implemented by the legislature and the executive is prevented from imposing taxes against such policy decisions.
- (g) The Indian courts have also laid down the notion of promissory estoppel and held that the executive is prevented from 'blowing hot and cold' in the event a representation for tax incentive was made and the taxpayer has relied on such representation. Therefore, the DGC and the RMCD are estopped from denying

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WMSB the exemption which was granted pursuant to the Exemption Order.

- (h) It is erroneous of the DGC and the RMCD to impose their own conditions on WMSB when such conditions are not stipulated in the Exemption Order. In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1993] 4 CLJ 339, the Supreme Court held that there is no room for any intendment in interpreting a taxing statute.
- (i) By usurping the role of the Parliament and inserting their own requirements into the Exemption Order, the DGC and the RMCD had exceeded their powers and the decision was, therefore, unlawful as being an unreasonable exercise of power such that it becomes the duty of the court to intervene.
- (j) Additionally, WMSB had a legitimate expectation that it would be entitled to enjoy the tax exemption for the entire term granted to it. The principle of legitimate expectation is equally applicable in tax cases, as demonstrated in *Paramount Malaysia (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan & Anor* (2002) MSTC 3908.

Commentary

This decision affirms the principle that any exercise of power by a public authority is subject to legal limits and any act done in ignorance of the decisions of our courts and the relevant statutory provisions stand to be quashed.

In this regard, this decision is a strong authority for the proposition that taxpayers must be allowed to enjoy an exemption granted if all the conditions for the exemption have been satisfied. A public authority is not allowed to disregard such exemption arbitrarily or impose additional conditions to the grant of the exemption.

Interestingly, Parliament had amended Item 57, Schedule A of the Exemption Order through paragraph 2(b) of the Sales Tax (Persons Exempted from Payment of Tax) (Amendment) (No. 2) Order 2020 to include a condition 'that the goods shall not be used or carry out any further process after purchased or

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acquired'. However, this amendment only takes effect from 6 October 2020 onwards and does not apply retrospectively.

Authored by Ng Kar Ngai, an associate from the firm's Tax, SST and Custom department.

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