

14 DECEMBER 2021

## GST Exceptional Input Tax Claim Allowed By High Court

*KMSB v Ketua Pengarah Kastam & Anor*

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On 7 December 2021, the High Court allowed the taxpayer's judicial review application to challenge the decision of the Director General of Customs (DGC) in rejecting the taxpayer's claim for exceptional input tax (Exceptional ITC Claim). The taxpayer had made the claim under Regulation 46 of the Goods and Services Tax Regulations 2014 (GST Regulations 2014).

The taxpayer was successfully represented by the firm's Tax, SST & Customs partner S. Saravana Kumar together with associate, Nur Hanina binti Mohd Azham.

This alert summarises the arguments advanced by both parties in this matter.

### Background Facts

The taxpayer is involved in the business of manufacture and sales of automotive lighting products. In 2018, the taxpayer made an application for Exceptional ITC Claim to the DGC under Regulation 46(1) of the GST Regulations 2014. Together with the application, the taxpayer also submitted the relevant documentations including the sale and purchase agreement for the land and invoices in relation to the construction of the factory and assets to the DGC. However, the taxpayer's application for Exceptional ITC Claim was rejected by the DGC. The DGC did not provide any reason for its decision.

Subsequently, the taxpayer appealed to the DGC and highlighted that the taxpayer had fulfilled the requirements under Regulation 46(2) of the GST Regulations 2014. Nonetheless, the DGC maintained its position to reject the Applicant's claim for Exceptional ITC. Consequently, the DGC raised a Bill of Demand dated 14.8.2020 to the taxpayer. Being aggrieved by the DGC's decision, on 11 November 2020, the taxpayer filed an application for judicial review to challenge the

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said decision. On 12 April 2021, the High Court granted leave to the taxpayer to commence judicial review proceedings against the decision of the DGC.

## The Taxpayer's Submission

The arguments for the taxpayer can be summarised as follows:

- The DGC had erred in disallowing the taxpayer's Exceptional ITC Claim pursuant to Regulation 46(1) of the GST Regulations 2014 on the basis that GST Act 2014 has been repealed;
- Regulation 46(1) of the GST Regulations 2014 reads as follows:

*"Subject to subregulation (2), the Director General may authorize a taxable person to treat as if it were input tax, any tax paid on the supply of goods to the taxable person before the date with effect from which he was, or was required to be registered, or paid by him on imported goods before that date, for the purpose of a business which was carried on or was to be carried on by him at the time of such supply or payment."*

Regulation 46(1) must be read together with Section 30 of the Interpretation Acts 1948 and 1967, which states that the repeal of a written law in whole or in part shall not affect any right accrued or incurred under the repealed law.

- The taxpayer is entitled to claim Exceptional ITC under Regulation 46(1) of the GST Regulations 2014. It was not disputed that taxpayer has provided all supporting documents and the DGC have not averred any non-compliance by the taxpayer. The Exceptional ITC Claim was disallowed by the DGC on the basis that GST Act 2014 has been repealed.
- The taxpayer also relied on the *National Land Finance* case which held that where there is any ambiguity in a taxing statute, it must favour the taxpayer.

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Notwithstanding the fact that Regulation 46 of the of the GST Regulations 2014 allows the DGC the discretion to decide on an Exceptional ITC claim, this discretion is not unfettered. All legal powers have limits and discretion cannot be free from legal restraint as held in the *Sri Lempah Enterprise* case.

- Further, the DGC's decision would result in the taxpayer suffering additional business cost and such decision is in clear contradiction with the underlying spirit of the GST Act 2014.

## The Director General Of Custom's Response

The DGC's main argument in objecting to the taxpayer's judicial review application is on the basis that the taxpayer did not receive the relevant approval needed for a claim to be made under Regulation 46(1) of the GST Regulations 2014. The taxpayer had not challenged the DGC's decision to disallow the taxpayer's Exceptional ITC Claim, instead, the taxpayer is now challenging the Bill of Demand, which is consequent to the absence of approval required under Regulation 46(1) of the GST Regulations 2014.

Besides that, the DGC also submitted that the DGC has a discretion to allow or disallow the Applicant's Exceptional ITC Claim.

## The High Court's Decision & Commentary

Upon reading and hearing submissions by both parties, the High Court allowed the taxpayer's application for judicial review. The DGC had erroneously rejected the taxpayer's claim for Exceptional ITC and thus, the taxpayer is entitled to the Exceptional ITC claim.

This decision also reminds us that the repeal of the GST Act 2014 does not leave an aggrieved taxpayer without any recourse. The purpose of Regulation 46(1) of the GST Regulations 2014 is to enable businesses to claim for input tax incurred by them prior to their registration under the GST Act. A taxpayer is entitled to claim for Exceptional ITC as long as the requirements under Regulation 46(2) of the GST Regulations 2014 is satisfied. The DGC does not have

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unfettered discretion under Regulation 46(1) of the GST Regulations 2014 in deciding whether a taxpayer is entitled to Exceptional ITC.

Authored by Nur Hanina Mohd Azham, an Associate with the firm's Tax, SST & Customs practice.



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