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Challenging Bills Of Demand: Sales Tax Exemption

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Recently, the High Court granted leave to HM, a taxpayer to commence judicial review to quash the bills of demand in respect of sales tax issued to HM.

This taxpayer was successfully represented by the firm's Tax, SST & Customs Partner, S. Saravana Kumar, together with associate, Yap Wen Hui.

Salient Facts

The taxpayer is a franchise holder of locally assembled motorcycles. After importing various components of the motorcycle, the taxpayer will have them assembled at the factory. In this respect, the taxpayer had obtained an Exemption Certificate to claim sales tax exemption for the imported components in the manufacturing of the motorcycle under the Sales Tax (Persons Exempted from Payment of Tax) Order 2018 (Exemption Order). However, the Director General of Customs (DG) raised Bills of Demand by arbitrarily imposing sales tax at the rate of 10% on the vehicle components for the motorcycles imported by the taxpayer. Being aggrieved by the decision, HM applied for judicial review to quash the DG's decision.

The DG's Position

The DG alleged that the taxpayer had failed to qualify for sales tax exemption on the imported components under the Schedule C of the Exemption Order as the components used in the assembly of the motorcycles are non-taxable finished goods. Condition (c), Column 4, Item 1 in Schedule C of the Exemption Order reads as follows:

> "*that the goods shall be used solely in the manufacturing of finished goods of the person mentioned in column (2)*"

REIMAGINING TAX SOLUTIONS

Based on the DG's contention, the interpretation of the word "finished goods" stated in Column 4, Item 1 in Schedule C of the Exemption Order should be limited to only taxable finished goods. The DG relied on the paragraph 6 of the Custom's Guide on Sales Tax Exemption under Schedule C of the Exemption Order as at 24.4.2019 (the Guide) which states that:

> *"Conditions for exemption under Item 1 and 2, Schedule C, Sales Tax (Persons Exempted from Payment of Tax) 2018 are:*
>
> *(i) The goods are approved by the Director General;*
>
> *(ii) The goods are imported or purchased from a registered manufacturer or a licensed warehouse under section 65 or licensed manufacturing warehouse under Section 65A of the Customs Act 1967;*
>
> *(iii) The goods shall be used solely in the manufacturing of taxable finished goods; and*
>
> *(iv) The approved person shall pay sales tax on goods that cannot be accounted for."*

Furthermore, the DG objected on the leave for judicial review application on the basis that the present matter should be ventilated before the Customs Appeal Tribunal under Section 96 of the Sales Tax Act 2018 (STA 2018). In view of the existence of alternative remedy, the DG further submitted that the remedies prescribed by Section 96 is solely confined to a review or appeal to the Customs Appeal Tribunal.

The Taxpayer's Submission

The general position enunciated by the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 is that judicial review is available in the following

exceptional circumstances despite the existence of an alternative remedy:

- Clear lack of jurisdiction
- Blatant failure to perform statutory duty
- A serious breach of the principles of natural justice

At the hearing of HM case, it was submitted that there are exceptional circumstances warranting the granting of leave.

First, the DG committed error of law and exceeded its jurisdiction in imposing the unlawful tax liability on the taxpayer by disregarding the fundamental principles of the interpretation of the law, whereby:

- It is trite law that taxing legislation must be interpreted strictly, "nothing is to be read in, nothing is to be implied" as enunciated by our Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1993] 4 CLJ 339. The word "finished goods" in Schedule C should refer to "taxable finished goods" and "non-taxable finished goods".

  As such, DR had acted erroneously by applying a narrow interpretation to the term "finished goods" to include only taxable goods to penalise the taxpayer with tax. The DG had clearly failed to give effect to Item 1 of Schedule C of the Exemption Order where a registered manufacturer who satisfies all these conditions stipulated in the Exemption Order is entitled for the sales tax exemption.

- Based on the principles established in *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916**,** the DG must have ascertained the Minister's underlying purpose of granting the tax exemption. The purpose of the Exemption Order is clearly to ensure that the prices of the "finished goods" would not be affected by any sales tax levied on the components used in the process of manufacturing the "finished goods". Therefore, it is not

> the Minister's intention to restrict the definition of "finished goods" to taxable finished goods only.

Second, there is no legal basis for the DG to impose such restrictive interpretation in respect to word "finished goods" through the Guide. According to the decision in *Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498 and *Metacorp Development v Ketua Hasil Dalam Negeri* [2011] 5 MLJ 447, it was held that the guidelines issued by the authority cannot be considered as law. The following judgment in *Multi-Purpose* is instructive:

> "*The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law."*

Third, the taxpayer's counsel further submitted that the wordings used in Section 96(1) of the STA 2018 are different from the Section 68(1) of the Sales Tax Act 1972 (which was repealed by the STA 2018). Section 96(1) of the STA 2018 reads:

> *"Any person aggrieved by any decision of the Director General may apply to Director General for review of any of his decision within thirty days from the date the person has been notified of such decisions provided that no appeal has been made on the same decision to the Customs Appeal Tribunal or court."*

In contrast, the only avenue which is available for the taxpayer is appeal to the Customs Appeal Tribunal which is final under Section 68(1) of the STA 1972 whereby Section 96(1) of the STA 2018 allows the taxpayer to also appeal to the court as an alternative.

Fourth, the present matter concerns purely a question of law in respect of the interpretation of the word "finished goods" to be determined by the High Court.

The High Court allowed the taxpayer's application for leave to commence judicial review and accepted the taxpayer's submission.

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Commentary

The granting of leave for the matter signifies that judicial review application remains an appropriate forum and remedy available to taxpayers where there are exceptional circumstances. The High Court's decision is in line with settled law that every exercise of statutory power cannot be arbitrary which was highlighted by the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and others* [2018] 3 CLJ 145 in the following passage:

> "*At the outset, it is axiomatic that any exercise of legal power including discretionary power, is subject to legal limits. Thus, it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be ultra vires and a court of law must be able to hold it as such…*"

Authored by Yap Wen Hui, an associate with the firm's Tax, SST and Custom department.