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## Challenging The Minister's Refusal To Remit GST Bill Of Demand: *PHM v Minister of Finance*

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Recently, the High Court granted leave to the taxpayer in *PHM v Minister of Finance* (PHM Case) to initiate a judicial review against the Minister of Finance (MOF) for failing to exercise his powers under Section 62 of the Goods and Services Tax Act 2014 (GST Act).

The objection by the Attorney General Chambers to the taxpayer's leave application was dismissed by the High Court. The taxpayer was successfully represented by the firm's Tax, SST & Customs partner S. Saravana Kumar together with pupil, Amira Rafie.

### Facts

The taxpayer in this case is a subsidiary of a major Japanese multinational electronics company. The dispute is in relation to the taxpayer's submission for its Goods and Services Tax (GST) return for the last taxable period. Following the submission of GST return, the Royal Malaysian Customs Department (Customs) had conducted a GST Refund Verification and made a refund of about RM 300,000.00. However, 6 months later, the Customs abruptly issued a Bill of Demand for what is purportedly underpaid GST and further imposed a late payment penalty on the taxpayer. This had created a total GST liability of over RM 1.1million for the taxpayer.

The taxpayer had on multiple occasion engaged and written to the Customs to explain their position but to no avail. The Customs merely informed them that the Bill of Demand was raised because the earlier refund was made erroneously. Aggrieved by this, the taxpayer wrote to the MOF to explain their predicament and appealed against the Bill of Demand by way of a remission application pursuant to Section 62(1) of the GST Act. Unfortunately, the MOF rejected the application and provided no reason for the rejection.

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The taxpayer maintains that it had correctly submitted the GST returns and there had not been any procedural or substantive errors in the forms. Dissatisfied by the MOF's decision, the taxpayer proceeded to file an application for leave to file judicial review against the MOF for its refusal to exercise its statutory powers for remission.

## Remission Application

The taxpayer's application for remission of the Bill of Demand issued by the Customs was made pursuant to Section 62 of the GST Act and read together with Section 4(1) of the Goods and Services Tax (Repeal) Act 2018 (GST Repeal Act). Section 62(1) provides the following:

*"62. Remission of tax, etc.*

- (1) *The Minister may remit the whole or any part of the tax due and payable under this Act where he deems fit."*

Meanwhile, Section 4(1) of the GST Repeal Act further provides:

*"Continuance of liability, etc.*

- (1) *Notwithstanding the repeal of the Goods and Services*
- (a) *any liability incurred may be enforced; or*
- (b) *any goods and services tax due, overpaid or erroneously paid may be collected, refunded or remitted,*

*under the repealed Act as if the repealed Act had not been repealed."*

The Court of Appeal in the *Everise Sprint (M) Sdn Bhd* case in hearing an appeal in relation to a rejection of remission application by the MOF held that the MOF's decision in that case was invalid and null and void. The Court held that when MOF is conferred with a discretion under Section 14A of the Customs Act 1967 to grant remission, such discretion must

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be exercised upon objective appreciation of the evidence before him. A decision by the MOF premised on wrong appreciation of facts and the failure to consider relevant facts must stand quashed.

## Error Of Law

In the PHM case, it was submitted that the MOF had committed an error of law and exceeded its jurisdiction for failing to take into account the relevant facts and legal principles in making its decision to reject the remission application namely that:

- The Customs had conducted regular audits on the taxpayer but did not find any error or breach of the law.
- No issues were ever raised by the Customs on any procedural error or substantive error in the GST forms submitted by the taxpayer.
- The Customs had accepted the GST returns submitted by the taxpayer and accordingly proceeded to process the refund due to the taxpayer.
- The sum that was claimed by the Customs via the Bill of Demand has been duly paid by the taxpayer to the Customs as input tax throughout the taxation period.
- The Customs' action is akin to taxing the company twice (double taxation) in issuing the Bill of Demand after having accepted and processed the taxpayers GST returns as the taxpayer had accounted for the remaining GST payable.

The taxpayer further submitted that there is an issue of breach of natural justice whereby the taxpayer has a legitimate expectation that the Customs had correctly assessed the GST returns submitted by the taxpayers in processing the refund. The Court of Appeal in the *Hotel Sentral (JB) Sdn Bhd* case held that legitimate expectation as a concept is now a term of art capable of being enforced in law. It is incumbent upon the court to protect the interests of parties whose expectations have been created by the very conduct of public decision-making bodies when such

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expectations faces an onslaught by virtue of changes and / or reversals in decisions that had been acted upon by such parties.

Further, the taxpayer also argued that the MOF's decision in rejecting the remission application cannot be heard before the Customs Appeal Tribunal as contended by the Attorney General Chambers. This is because the subject matter at hand did not fall within the categories listed in Section 5 of the GST Repeal Act.

## Conclusion

The granting of leave for judicial review against the MOF for its refusal to exercise its statutory powers is in accordance with settled law that every exercise of statutory power cannot be arbitrary.

Additionally, this matter emphasises that the Customs Appeal Tribunal has limited jurisdictions to hear GST related disputes. In many instances upon the repeal of the GST Act 2014, the proper forum to challenge or review decisions by the Customs or the MOF in relation to GST matters is the High Court instead of the Customs Appeal Tribunal.

Authored by Amira Rafie, a pupil with the firm's Tax, SST & Customs practice.

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