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The *De Minimis* Principle In Tax Laws

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The meaning of the maxim *De Minimis Non Curat Lex* is 'Diminutives are not noticed by law' (the law cares not for small things)[1]. This is a long-established rule of general application. However, this principle has not been applied by the Malaysian courts in the context of taxation laws.

The Court of Appeal has accepted the applicability of the *De Minimis* principle in a tax appeal. The tax appeal concerns the transition period from the sales tax regime to the goods and services tax regime in the year 2015. Under the Sales Tax Act 1972, tax was payable upon the manufacturing or importation of the goods. Therefore, all goods that were still held by businesses as at 1.4.2015 (the cut-off date of the sales tax regime) would have already been subjected to sales tax. In order to remedy this situation of double taxation faced by taxpayers, the Government has introduced a special refund mechanism of the sales tax paid through Sections 190 and 191 of the Goods and Services Tax Act 2014 (GST Act 2014).

In this appeal, the taxpayer challenged the Director General of Customs' (DGC) decision that rejected the taxpayer's application for the sales tax refund (Special Refund Application).

Background Facts

The taxpayer is a company involved in the business of operating a chain of supermarkets and hypermarkets in Malaysia. In its ordinary course of business, the taxpayer had purchased stock that were sourced from its international and local suppliers to sell the same in its outlets in Malaysia. The taxpayer is also a registered person under the GST Act 2014.

In September 2015, the taxpayer submitted a Special Refund Application to the DGC. Together with the application, the taxpayer also submitted an audit certificate that was signed by its approved company auditor, confirming that the special refund information furnished by the taxpayer was prepared in

[1] Words, Phrases & Maxim (Legally & Judicially Defined) Volume 5

REIMAGINING TAX SOLUTIONS

accordance with the requirements under Sections 190 and 191 of the GST Act 2014.

The total amount of refund claimed by the taxpayer was RM 7,349,369.98 for 60,350,342 items. The entire Special Refund Application consisted of 17,113 pages. In January 2017, the DGC rejected the taxpayer's special refund application, but no valid reasons were given.

In February 2017, the dissatisfied taxpayer filed an application to the DGC as acquired under the GST Act for a review of his own decision that rejected the taxpayer's Special Refund Application. Subsequently, in March 2017, this review was rejected on the basis that it contained incorrect information. Unfortunately, no details were given by the DGC in relation to the alleged incorrect information.

Aggrieved by the DGC's decision in rejecting the review's application, the taxpayer commenced a judicial review proceeding to challenge it. In January 2019, the High Court dismissed this judicial application and held that the DGC's decision was not illegal, irrational, or unreasonable as the taxpayer's application contained some incorrect. Although the inaccuracies make up less than 0.4% of the total amount of claim, the High Court held that the DGC was entitled to refuse the Special Refund Application based on the literal words of Section 191(3) of the GST Act 2014.

The taxpayer appealed to the Court of Appeal on the basis that the errors contained in the Special Refund Application comes within the *De Minimis* principle. The Court of Appeal accepted the taxpayer's position and reversed the High Court's decision.

Sections 190 And 191 Of The GST Act 2014

In brief, the requirements stated under Section 190(1) of the GST Act 2014 are as follows:

(a) The claimant (taxpayer claiming for the special refund) has to be a registered person under the GST Act 2014 as at 1.4.2015.

(b) The claimant has to hold the goods on 1.4.2015 for the purposes of making a taxable supply.

(c) The goods are taxable under the Sales Tax Act 1972 and sales tax has been charged to and paid by the claimant.

(d) The claimant must hold the relevant supplier's invoice providing that it is the recipient for which sales tax has been charged or import documents proving that the claimant is the importer, consignee or owner for which sales tax has been paid.

The relevant part of Section 191(3) of the GST Acts 2014 reads:

> "*Where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented –*
>
> *(a) he shall not be entitled to a special refund and the officer of goods and services tax may revise such claim*;"

Meaning And Applicability Of The *De Minimis* Principle

As mentioned above, the *De Minimis* principle is a principle of general application. In essence, the principle means that the court will not give effect to something of a trivial and negligible nature. The court will consider the circumstances and examine the mistake or error in question.

The principle of *De Minimis* has been applied by the Federal Court, Court of Appeal and High Court in various circumstances[2]. Case laws have also established that it would be wrong to make an exhaustive classification of cases whereby this principle should or should not be applied. The applicability of this principle is well summarised by the High

[2] *Boon & Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd & Ors* [1973] 1 MLJ 101, *Citibank N.A. v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, *Hong Siew Sin & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 90, *Malaysia International Consultants Sdn Bhd v R.R. Chelliah Brothers* [2009] MLJU 107

Court in *Yap Chin Hock v Minister of Home Affairs & Anor and other applications* [1989] 3 MLJ 423:

> "*Where trifling irregularities or even infractions of the strict letter of the law of little or no consequence are brought to the notice of the court, the maxim de minimis non curat lex (the law does not concern itself about trifles) is of frequent practical application. As was well put by Sir W Scott in the Reward 2 Dod 265, 269, 270: 'the court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, de minimis non curat lex. If the deviation were a mere trifle, which if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.' Accordingly, this ground of objection fails.*"

The main issue to be determined by the Court of Appeal in this appeal is whether the High Court erred in not applying the *de minimis* principle in regard to the inaccurate information contained in the taxpayer's Special Refund Application.

The High Court rejected the application of the *De Minimis* principle in the taxpayer's judicial review application and held the following:

> *"Premised on the above cases, it is the submission of the Applicant that this Court has the jurisdiction to dismiss something which is trivial in nature. The incorrect information in relation to the 100% claim is merely 0.79% and the sales tax involves is RM1,146.43, which is only about 0.015% of the total value. With regards to the 20% claim, the correct information constitutes only 0.014% of the total amount of items claimed by the Applicant.*
>
> *However, it is not for this court to say that the incorrect information was trivial in nature and therefore this application should be allowed. This court is only to ascertain if the Respondent*

> *has complied with the GST Act when he made the Decision. In this case, this court is satisfied that the Respondent has complied with the GST Act when he made the decision."*

Before the Court of Appeal, the taxpayer argued that the principle of *De Minimis* is not a new or unfamiliar concept in revenue / taxation laws. This is especially so if this principle is expressly recognised in the GST Regulations 2014 whereby Regulation 37 allows a supplier to treat exempt supplies as taxable supplies if the amount of exempt supply of a mixed supplier is within the limit specified under the *De Minimis* rule provided (i.e. less than RM 5,000 per month and does not exceed 5% of the total of all supplies).

In comparison to the whole Special Refund Application, the alleged inaccuracies are insignificant and trivial. The taxpayer is also willing to forgo the claim on the goods where the unintended inaccuracies relate to. This is especially the case when none of the inaccuracies in the taxpayer's Special Refund Application equate to no more than 0.4% of the total amount claimed.

Further, the taxpayer argued that such *strictness or inflexibility would lead to injustice or miscarriage of justice* in the application of Section 191(3) of the GST Act 2014. In other words, the Courts have the inherent jurisdiction to apply the principle of *De Minimis Non Curat Lex* to disregard the inaccuracies in the taxpayer's Special Refund Application as the circumstances justify such exercise of discretion.

Upon hearing both parties, the Court of Appeal unanimously allowed the taxpayer's appeal and directed the DGC to refund the total amount claimed by the taxpayer less than the value in relation to the inaccurate information in the Special Refund Application.

Doctrine Of Proportionality

The De Minimis principle is also related to the established doctrine of proportionality. It is equally important for any response by the governing authority to be proportionate to the errors in question.

Hence, the taxpayer also argued that the DGC's decision to reject the taxpayer's Special Refund Application due to minor inaccuracies is wholly disproportionate to the objective of Parliament in providing a special refund mechanism for the taxpayers. It is trite that the response of the Executive to any state of affairs must be proportionate to the object a legislative sought to be achieved[3].

The Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 has also established that the proportionality of an authority's decision may be a ground on which that decision could be reviewed by the judiciary. This essentially widens the scope and reach of the review jurisdiction of our courts in Malaysia.

Therefore, by applying the principle of proportionality, the DGC's decision in taking a strict interpretation of Section 191(3) of the GST Act 2014 and to reject the taxpayer's Special Refund Application in its entirety due to trivial inaccuracies, completely defeats the purpose of the introduction of Sections 190 and 191 of the GST Act 2014 which were meant to remedy the double taxation situation faced by taxpayers. Hence, the DGC's decision is amenable to judicial review.

Conclusion

The Court of Appeal's decision strengthens the position that the principle of *De Minimis* has to be applied generally in circumstances which warrants its application and that revenue / taxation laws are not excluded from this principle. The Court of Appeal has also indirectly reinforced the position that the courts are not bound by the harsh and strictness rule in the application of Section 191(3) of the GST Act if such interpretation will lead to injustice or miscarriage of justice. It is trite that there is now a statutory recognition for courts to take a purposive approach in the interpretation of statutes (taxing statutes included). Sections 190 and 191 of the GST Act 2014 are transitional provisions specifically enacted to remedy situations of double taxation and to provide relief.

[3] *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19

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This decision also serves as a reminder that all decisions and measures taken by public authorities must be fair, reasonable, and proportionate to the objective a particular provision sought to achieve. The reach and extent of the court's jurisdiction to review an administrative action is not limited to narrow grounds such as procedural impropriety, illegality, irrationality but may also include proportionality. Therefore, decisions made by public authorities (including tax authorities) that are disproportionate can be challenged via judicial review proceedings.

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