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## Challenging The Customs' Bills Of Demand: Conditions Imposed Upon The Issuance Of Duty-Free Licence

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Recently, the Federal Court in a landmark ruling in *SMSB v Ketua Pengarah Kastam & Anor* unanimously dismissed the application for leave to appeal filed by the Director General of Customs (Customs) with costs. Dissatisfied with the decision of the Court of Appeal which held that the Bills of Demand issued by the Customs were *ultra vires*, the Customs sought leave from the Federal Court to challenge the Court of Appeal's decision.

Our Senior Partner, Datuk D.P. Naban and Tax, SST & Customs Partner, S. Saravana Kumar together with associate, Chew Ying represented the taxpayer and successfully opposed the Customs' application.

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

### Background Facts

The taxpayer is a company which operates a duty-free shop situated between the Malaysian and Thai immigration checkpoints in the border town (i.e. buffer zone) in Northern Peninsula Malaysia. Since the commencement of the taxpayer's business in the early 1990s, the Customs have consistently granted licences under Section 65D of the Customs Act 1967 (CA) for it to operate the duty-free shop. The licences issued were valid for two years.

In the year 2014, the Customs issued the said duty-free licence to the taxpayer. However, subsequent to the issuance of the licence (approximately five months later), the Customs unilaterally imposed additional conditions to the licence issued. Similarly, in the year 2016, the Customs sought to impose the same additional conditions approximately three months after the licence was issued. No reasons were given by the Customs as to why the additional

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conditions should be imposed after the issuance of the licence.

In the year 2017, the Customs raised Bills of Demand for approximately RM 38.9 million of import and excise duties on the basis the taxpayer did not comply with the additional conditions imposed upon the licences issued in the years 2014 and 2016. The taxpayer commenced judicial review proceedings to challenge the said Bills of Demand.

The High Court refused the taxpayer's judicial review application and held, among others, that the Customs is empowered to impose any conditions upon duty-free shop licences and such conditions can be imposed at any time, even after the issuance of the licence.

In June 2020, the Court of Appeal reversed the High Court's decision and held that conditions imposed by the Customs must be specified in the licence at the time it was issued. Consequent to this, the Customs filed an application for leave to appeal to the Federal Court against the Court of Appeal's decision.

## Threshold For Leave Before The Federal Court

It is trite that leave to appeal to the Federal Court will only be granted if it can be shown that the matter falls within the scope of Section 96(a) of the Courts of Judicature Act 1964. In brief, it has to be shown that the decision of the Court of Appeal involves a general principle which has not been decided by the Federal Court or a decision by the Federal Court will be of a public advantage.

The Federal Court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51 has summarised the principles applicable in granting leave to appeal. Amongst others, the Federal Court stressed that leave will not normally be given in issues such as statutory and agreement interpretation if such interpretation is likely to be relevant to only a particular factual situation. In other words, if the proposed leave questions are only relevant to the parties in dispute, leave should not be granted as they are not of public importance.

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### The Customs' Arguments Before The Federal Court

The main questions posed by the Customs in its leave application for the determination of the Federal Court were:

- In a case of renewal of licence, whether licence condition must be specified in the licence when it is renewed, when the same condition has been imposed under the expired licence?
- If the above question is answered in the negative, whether it makes any difference for the same condition to be appended subsequent to the renewal of the licence?

In support of their application, the Customs argued that the present matter relates to the renewal of licence as opposed to the issuance of new licence under Section 65D of the CA. As such, the same conditions shall apply to the renewed licence unless there is a change in conditions whereby parties will renegotiate. The Customs also argued that as the additional conditions to the licence issued in the year 2016 are the same as the conditions of the licence issued in 2014, the taxpayer was well aware of the additional conditions and should have complied with them.

Further, the Customs highlighted that the answers to the proposed questions are in the interest of the general public as the concept of renewal of licence is pertinent in other commercial transactions and that there were no authoritative decisions in relation to such renewals.

### The Taxpayer's Response

The taxpayer's counsel submitted that the duty-free licences were issued pursuant to Section 65D of the CA, which governs only the grant, withdrawal, suspension and cancellation of the licences by Customs. Nothing in Section 65D of the CA refers to the renewal of licences. This could be clearly contrasted with statutory provisions that clearly provide for the renewal of licences or empowers the relevant authorities to renew licences. Examples of such provisions can be found in the Communications and Multimedia Act 1998, Commercial Vehicles Licensing Board Act 1987 and

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Land Public Transport Act 2010. In drawing a difference to renewed licences and new licences which are not stipulated in Section 65D, the Customs was seeking to re-write Section 65D(1) of the CA 1967 and its scope.

Further, the Court of Appeal had examined the wordings of Section 65D thoroughly, especially the phrase “specify in the licence”. Conditions must only be imposed upon the issuance of a licence and no conditions can be imposed after the issuance of the licence as that would go against the meaning of the word “specify” in Section 65D, which also means stating explicitly, definitely and certainly.

## Commentary

Upon hearing the submissions by both parties, the Federal Court unanimously dismissed the Customs’ application and upheld the Court of Appeal’s decision. The Federal Court agreed with the taxpayer’s submission that as nothing in Section 65D of the CA speaks of renewal of licences, the questions posed by Customs were not factually supported. It is notable that this is the first case of its kind in Malaysia where the scope of Section 65D was examined by our courts.

This decision enforces the notion that authorities are only empowered to act within the perimeter of the relevant statutory provisions. Should authorities fail to act in accordance with what was expressly provided or stated in the legislations, their actions can be subject to the scrutiny of the judiciary.

This decision also reminds us that while the governance by statutes and the standard practice of regulatory authorities may differ, one must always be guided by the express wordings of the legislations and not the other way round.

Authored by Chew Ying, an Associate with the firm’s Tax, SST & Customs practice.

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