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Landmark GST Refund Ruling – Taxpayer Entitled To Input Tax Credit

LDMSB v Ketua Pengarah Kastam & Anor (2021)

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On 17 June 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 application for input tax credit refund (ITC refund). The taxpayer's application was premised pursuant to Section 57 of the Goods and Services Act 2014 (GST Act 2014) read together with Sections 4(1)(b) and 8(2) of the Goods and Services Tax (Repeal) Act 2018 (GST Repeal Act 2018).

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 landmark matter, which is regarded as the first case of its kind in Malaysia.

Background Facts

The taxpayer is in the business of project management and development management. In 2018, the taxpayer had incorrectly accounted for Goods and Services Tax (GST) to the DGC in the GST returns filed by them. The taxpayer had inadvertently not taken into account two tax invoices amounting to approximately RM 1.7 million for the expatriate staff labour cost which was incurred in the course of the taxpayer's business. As a result of this, the taxpayer had over accounted for GST by not offsetting the input tax against the output tax.

On 26 June 2020, the taxpayer made an application to the DGC, via a letter, to claim for the ITC refund. Together with the application, the taxpayer also submitted the relevant documentations including the proof of payment being incurred for the expatriate staff labour cost. However, the taxpayer's application for ITC refund was rejected by the DGC via a letter dated 7 August 2020 (DGC's Decision). The DGC's reason for

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rejecting the taxpayer's application for ITC refund is on the basis that the application was made out of time whereby the DGC took the view that a taxpayer must submit their application for ITC refund within 120 days from the appointed date.

Dissatisfied by the DGC's Decision, the taxpayer wrote to the DGC to review its decision in rejecting the taxpayer's ITC refund application. Subsequently, in October 2020, the DGC rejected that taxpayer's review application on the premise that the taxpayer has applied for a review on the same issue and that a decision has been issued. Being aggrieved by the DGC's decision, the taxpayer, on 5 November 2020, filed an application for judicial review to challenge the said decision. On 16 December 2020, 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:

- Had the GST Act 2014 had not been repealed, the taxpayer would be entitled to claim for refund if the input tax amount exceeds that of the output tax pursuant to Section 38(3) of the GST Act 2014.
- The taxpayer is entitled to claim for ITC refund pursuant to Section 57 of the GST Act 2014, Sections 4(1)(b) and 8(2) of the GST Repeal Act 2018 and regulation 38 Goods and Services Tax Regulations 2014.
- Section 57 of the GST Act 2014 and regulation 38 of the Goods and Services Tax Regulations 2014 clearly stipulate that a claim for refund of tax that has been overpaid or erroneously paid and a claim for input tax can be made within 6 years.
- Section 4(1)(b) of the GST Repeal Act 2018 allows for claims for refund of tax that has been overpaid or erroneously paid to be made as if the GST Act 2014 had not been repealed.

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- Section 4(1)(b) and Section 8(2) of the GST Repeal Act 2018 must be read together with the principle that the repeal of a written law in whole or in part shall not affect any right accrued or incurred under the repealed law.
- Thus, the taxpayer is clearly within time to make the claim for ITC refund notwithstanding the DGC's position that an application for ITC refund must be made within 120 days from the appointed date.
- The DGC's contention that the taxpayer's letter dated 26 June 2020 is not an application for ITC refund is without basis as it is clearly stated in the taxpayer's letter that they are making an application for ITC refund.
- Furthermore, the DGC's letter dated 7 August 2020 constitutes as a decision made by the DGC. The DGC's act of disallowing the claim for ITC refund had deprived the taxpayer of their right to claim for input tax credit and thus, the taxpayer has been adversely affected.

The Custom's Response

The DGC's main argument in objecting to the taxpayer's judicial review application is on the basis that the DGC's letter dated 7 August 2020 is not a decision that is amenable to judicial review. The said letter was merely in reply to the taxpayer's letter to the DGC that was issued in June 2020. In addition, the DGC was also of the view that the taxpayer's application for ITC refund was not a proper application but was just a letter seeking for confirmation from the DGC on whether the taxpayer is entitled to ITC refund.

Besides that, the DGC also submitted that Section 8(1) of the GST Repeal Act 2018 stipulates that any claim for input tax must be made within 120 days from the appointed date and thus, the taxpayer was out of time to make the claim for ITC refund.

The High Court's Decision

Upon hearing the submissions by both parties, the High Court allowed the taxpayer's application for judicial review. The High Court ruled that the DGC had erroneously rejected the

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taxpayer's claim for ITC refund and thus, the taxpayer is entitled to the ITC refund. Further, the taxpayer was also awarded interest at the rate of 8% per annum on the ITC refund sum from the date the refund was due to the taxpayer. million.

It is notable that this is the first case of its kind in Malaysia where the scope of Section 4(1)(b) and Section 8 of the GST Repeal Act 2018 in relation to input tax refund was examined by the High Court. This decision also reminds us that the repeal of the GST Act 2014 does not leave an aggrieved taxpayer without any recourse. A taxpayer is entitled to claim for any GST that has been overpaid or erroneously paid so long as it is within the stipulated time period of 6 years.

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

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