Sales Tax Refund: High Court Rules in Favour of Taxpayers

by Jason Tan Jia Xin

Last year, the High Court saw a flurry of applications for judicial review filed by taxpayers aggrieved by the Director General of Customs' ("DGC") decision to reject their requests for sales tax refunds. Having exhausted all their respective remedies, the taxpayers were left with little choice but to pay both sales tax and goods and services tax ("GST") on the same goods — which would clearly be tantamount to double taxation — or commence court action against the DGC.

As a prelude to the cases in court, following the introduction of GST, taxpayers scrambled to apply for sales tax refunds in respect of goods held in hand on 1 April 2015. The conditions for refund are, in fact, plain and simple as stipulated in sections 190 and 191 of the Goods and Services Tax Act 2014 ("GST Act"). In essence, a full refund can be obtained if:

(a) The taxpayer is registered under the GST regime as at 1 April 2015;

(b) The taxpayer held the goods as at 1 April 2015 for the purposes of making a taxable supply under the GST Act;

(c) The goods are taxable under the Sales Tax Act 1972 ("STA") and sales tax has been charged and paid by the taxpayer; and

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

It is also expressly provided under s 190(4) of the GST Act that the refund shall not apply to:

(a) goods that have been capitalised under accepted accounting principles;

(b) goods that have been used partially or incorporated into some other goods;

(c) goods held for hire, goods held for other than business use and goods not for sale or exchange;

(d) goods on which sales tax has been paid under the STA before 1 April 2015 and subsequently to be exported where a claim for drawback on the sales tax paid is to be made; and

(e) goods on which the taxpayer is allowed to claim for a deduction of sales tax as a licensed manufacturer under s 31A of the STA.

However, in various instances, the DGC has rejected applications for sales tax refunds on the grounds that the taxpayers did not lower the price of goods after the implementation of GST.

High Court Decisions

(i) VS Sdn Bhd v DGC

In one of the first cases before the High Court, we represented VS Sdn Bhd in its judicial review application to challenge the rejection of the company's sales tax refund application by the DGC.

We argued that the DGC's decision was tainted with illegality, and decided unreasonably and in excess of his jurisdiction based on the following grounds:

(a) Sections 190 and 191 of the GST Act do not stipulate the increase or decrease of price as a condition for sales tax refund. Matters pertaining to the increase of price of goods after the implementation of GST are governed by the Price Control and Anti-Profiteering Act 2011, which is under the purview of the Ministry of Domestic Trade, Co-operatives and Consumerism.

(b) The DGC could not impart laws of a completely different piece of legislation to a sales tax refund application. Nor could he also step into the shoes of an entirely separate government agency and enforce the laws of the latter. He must instead decide on an application based on the existing conditions set out in the provisions of the GST Act. Doing otherwise would render his decision to reject an application as invalid as he would not have complied with the statutory provisions provided.

(c) In any event, if a taxpayer satisfies all the conditions stated under the GST Act, it should immediately be entitled to the sales tax refund. Any additional conditions set forth and required by the DGC are purely administrative guidelines that do not have the force of law.

(d) The DGC's reliance on the Australian case of *Avon Products Lty Limited v Commissioners of Taxation* [2006] HCR 29 on sales tax refund was without any legal basis. This is on the premise that unlike the Malaysian provision on sales tax refund, the Australian stipulation contains a specific condition that taxpayers in that jurisdiction could not "pass on" the sales tax element to the purchasers of its goods. However, this condition is absent in the GST Act.

(e) There was clearly double taxation as both sales tax and GST were charged on the same goods. In the event a refund is not provided, it will clearly constitute double taxation and thus, a form of unjust enrichment.

Interest imposed for refund of sales tax

The High Court agreed with all our arguments and held that the DGC's decision was issued without any legal basis. In delivering its oral grounds, the court specifically stated that the DGC could not impart a different set of legislation to a sales tax refund application. In this regard, the court directed the DGC to refund the sales tax in question to the taxpayer.

Further, the High Court agreed with our submission that interest must be imposed on the sum due to the taxpayer, and imposed interest at a rate of 5% per annum, starting from 45 days from the date of the decision until the monies were refunded in full. This also serves as the first decision in which interest was imposed for the refund of sales tax.

Stay application filed by DGC

The DGC also filed an application for a stay of execution of the High Court's order pending its appeal before the Court of Appeal. However, the application was dismissed as the High Court agreed with our submission that there were clearly no special circumstances that warranted a stay to be granted. In fact, the High Court agreed that the DGC had deprived the taxpayer of such sales tax for several years and therefore, on a balance of convenience, it would be prejudicial to the taxpayer if a stay were granted.

(ii) S (M) Sdn Bhd v DGC

In another judicial review application before a different judge where we acted for *S (M) Sdn Bhd*, the High Court ruled that the DGC's decision was again *ultra vires*, illegal and made in excess of his jurisdiction.

In addition to the arguments in *VS Sdn Bhd*, we argued in this matter that the DGC had clearly exceeded his authority as granted by the GST Act. In fact, the DGC had encroached into the jurisdiction and authority of another ministry.

Further, it is illegal for the DGC to rely on an internal Customs guideline that states "no increase in price of goods" as a condition to obtain a sales tax refund application. It is trite law that any internal guideline that is inconsistent with the primary legislation does not have any force in law. We also argued that the DGC failed to even produce the said internal Customs guideline before the court and therefore, the same could not be relied on.

The High Court agreed with all our arguments in this case and held that the DGC's decision was made without any legal basis.

Conclusion

The consistent judgments handed down by different High Court judges in both these cases are of great significance for other cases to follow. In fact, these decisions also pave the way for a new wave of taxpayers embroiled in similar situations to take legal action. **LH-AG**

About the author

Jason Tan Jia Xin (tjx@lh-ag.com) is a senior associate with the Tax, GST & Customs Practice at Lee Hishammuddin Allen & Gledhill. Jason's work consists mostly of Customs disputes, trade facilitation and applications for anti-dumping duties and safeguard measures. Recently, he successfully assisted the local steel industry in obtaining safeguard measures for two steel products.