

LHAG Insights

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Civil Recovery for Unpaid Bill of Demand

In July this year, the High Court in *Restoran Wong Solo*¹ dismissed an appeal by the taxpayer against the summary judgment entered by the Sessions Court for the non-payment of service tax amounting to RM822,582.38, together with interest and costs.

While the decision illustrates the consequences of ignoring a bill of demand issued by the Royal Malaysian Customs Department (**Customs**), it also highlights the differences between a tax theory/concept and the law. For indirect taxes, especially in the context of goods and services tax (GST) and sales and service tax (SST), it is often argued that businesses are theoretically the agents who collect taxes on behalf of the government from the consumers. If the businesses failed to register under the respective Acts and thereby failed to charge GST/SST, could they then argue that they are not legally liable for the taxes since they did not collect the taxes in the first place?

Brief facts

The taxpayer operates a restaurant carrying on the business of selling food and drinks. After an audit conducted by Customs in 2012, it was found that the taxpayer's sales report showed an annual turnover of above RM3 million. Pursuant to Group C, Second Schedule of the Service Tax Regulations 1975 (**STA Regulations 1975**), a restaurant operating outside a hotel carrying on the business of providing and selling food and drinks with an annual sales turnover exceeding RM3 million should charge service tax.

¹ *Restoran Wong Solo (Shah Alam) Sdn Bhd & Ors v Kerajaan Malaysia* [2021] MLJU 1271

Customs issued a bill of demand (**BOD**) on 9 October 2015 for the sum of RM1,233,873.54 consisting of the undercharged service tax totalling RM822,582.38 and penalty totalling RM411,291.16. The penalty was later remitted by the Minister of Finance. However, the taxpayer failed and/or refused to pay the service tax raised in the BOD. Its main contention was that it wasn't licensed for service tax at the material time and thus did not collect any service tax from its customers.

Subsequently, the government of Malaysia commenced a civil action against the taxpayer and two of its directors for the unpaid service tax as civil debt due to the government under s 15(1) of the Service Tax Act 1975 (**STA 1975**). Before the Sessions Court, the government applied for summary judgment and the Sessions Court held in favour of the government. The two directors were held to be jointly and severally liable for the unpaid service tax. Aggrieved by the decision of the Sessions Court judge, the taxpayer appealed to the High Court. In short, the taxpayer's grounds of appeal were as follows:

- (i) Although the restaurant's annual sales turnover exceeded the RM3 million threshold, the taxpayer is not a taxable person as it was not licensed under the STA 1975 at the material time and consequently did not collect any service tax from its customers; and
- (ii) The government cannot make a civil recovery action against the taxpayer under s 15(1) of the STA 1975 without the taxpayer first being found guilty of an offence under s 29 of the STA 1975. The taxpayer's argument is that only after the conviction of an offence under s 29 can the court order the taxpayer to pay the service tax due and payable under s 40A of the STA 1975.

High Court dismissed taxpayer's appeal

The High Court, in dismissing the appeal, made, among others, the following observations:

- (a) Nowhere in the STA 1975 or the STA Regulations 1975 does it state that a person operating a restaurant outside a hotel shall only be a taxable person after it is licensed under the STA 1975. From a plain reading of the relevant provisions, it is clear that a person is a taxable person if:
 - (i) it is carrying on a business providing taxable service; and
 - (ii) its annual sales turnover of providing the taxable service reaches the prescribed threshold.

Section 7 of the STA 1975 expressly states that as a taxable person, it shall charge service tax and pay the tax to Customs.

- (b) The fact that the taxpayer did not apply for a licence under s 8 of the STA 1975 and continued to provide the taxable service at its restaurant means that it is guilty of an offence under s 29 of the STA 1975; it does not mean that the taxpayer is a non-taxable person. Further, the fact that the taxpayer did not charge and collect the service tax for the food and drinks sold to customers does not mean that service tax is not payable by the taxpayer.
- (c) The taxpayer's argument on s 40A of the STA 1975² (that the government cannot recover the amount of unpaid service tax as a civil debt unless the taxpayer is first convicted) is unsupported by the wordings in the STA 1975. Section 15 of the STA 1975 did not subject the government's right to civil recovery to the conviction of offence under s 29.

Key takeaways

While the taxpayer is theoretically correct in saying that it should not be paying the service tax out of its own pocket given that it had never collected them from customers, the High Court had little hesitation in following the express provisions of the STA 1975 to hold them liable for the unpaid service tax.

The repealed GST Act 2014 and the current Service Tax Act 2018 have very similar provisions, albeit with relative difference on the wordings and scope of tax. In fact, a "taxable person" is even more widely defined under both Acts to mean "a registered person or a person who is liable to be registered", while the former STA 1975 merely defines taxable person as "any person who is prescribed to be a taxable person".

Unlike the Income Tax Act 1967, the legislation for GST and SST does not expressly prohibit the court from entertaining any plea that the amount of tax sought to be recovered is excessive or incorrectly assessed. This could well be the reason why, in *Restoran Wong Solo*, the legal arguments on the correctness of the BOD, though rejected, were duly considered by the High Court.

Nonetheless, it should be highlighted that in any civil recovery proceedings for GST/SST, the production of a certificate signed by the Director General of Customs (DGC) is conclusive evidence of for the court to give judgement for that amount.

It goes without saying that taxpayers should not take a bill of demand lightly. Generally, a bill of demand will expressly provide that payment of the underpaid taxes be made within 14 days. Unless the taxpayer has successfully obtained a stay order from the High Court, payment needs to be made within the prescribed

² Where the court can order a person being convicted of offences under s 29/s 32 to pay service tax

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timeframe, failure of which may lead the government to commence civil action against the company and its directors or prohibit the directors of the company from travelling out of Malaysia.

If the taxes being assessed are of a substantial amount and cause undue financial hardship to the taxpayer, the taxpayer can apply for payment by instalment although this is subject to the discretion of Customs. It is also possible, though less common, for a taxpayer to be given an administrative standover by Customs on the payment of the underpaid taxes while applying for a remission from the Minister of Finance.

Conclusion

If a taxpayer disagrees with a Customs' BOD, a formal review application should be made promptly to the DGC/a notice of appeal should be lodged within 30 days to the Customs Appeal Tribunal. In exceptional circumstances where it can be shown that a clear lack of jurisdiction, a blatant failure to perform some statutory duty or, in appropriate cases, a serious breach of the principle of natural justice, the taxpayer may opt to appeal by way of a judicial review in the High Court within three months.

Be warned, though, that it is difficult for the taxpayer to challenge the correctness of the bill of demand at the stage of civil recovery proceedings.

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