

Customs e-Alert

25 JUNE 2018

Travel Restrictions Imposed By Customs

Customs and excise duty is levied on certain imports and exports. The Customs Act 1967 (**CA**) and the Excise Act 1976 (**EA**) govern the imposition and enforcement of such duty.

In enforcing the collection of customs and excise duties, one of the powers conferred on the Director General of Customs (**DG**) is that of imposing travel restriction on individuals who have outstanding duties owed to the government, as prescribed under Section 17A of the CA. The DG is similarly empowered under the EA to impose travel restriction on an individual for having failed to pay excise duty.

Essentially, in order for the DG to impose travel restriction on an individual, there must be a sum of customs or excise duty payable by an individual and there is reason to believe that he is likely to leave Malaysia without first settling the amount of duty payable.

What to do when travel restriction is imposed

Should the DG issue a certificate imposing travel restriction, immigration officers will be able to exercise any means necessary to prevent that individual from leaving Malaysia, including the seizure of travel documents, such as his passport.

Section 17A of the CA and Section 15A of the EA both prescribe that the travel restriction will continue to be enforced until the customs and excise duty is settled in full or a security is provided in the amount equivalent to the duty imposed. Nevertheless, if one feels aggrieved by the duty imposed and is not agreeable to pay the amount in order to discharge the restriction, there is an alternative measure by way of challenging such restriction at the High Court. The aggrieved person may file an application for judicial review under Order 53 of the Rules of Court 2012. The application will be one for an order of *certiorari* to quash the DG's decision to impose the travel restriction and an order of *mandamus* to compel the DG

Contact persons:

Datuk D. P. Naban

Senior Partner,
Tax, GST & Customs Practice
+603-6208 5858
dpn@lh-ag.com

S. Saravana Kumar

Partner,
Tax, GST & Customs Practice
+603-6208 5813
sks@lh-ag.com

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to lift the said travel restriction and allow the individual to leave Malaysia.

Nonetheless, one must keep in mind the possibility of a preliminary objection being raised against the application for leave, with the Attorney-General raising the issue of the ouster clause contained in Section 59A(1) of the Immigration Act 1959/63, which reads:

“59A. Exclusion of Judicial Review

- (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.”

In our view, the existence of an ouster clause will not in itself preclude an application for judicial review to challenge the imposition of travel restriction. One must be able to demonstrate that the duty imposed was improperly imposed and, accordingly, the issuance of the travel restriction was based on duty imposed without any basis in law or in fact.

Recently, in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and others* [2018] 1 MLJ 545, the Federal Court held that it is a stringent requirement that a discretion be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene. There are many more decisions by the superior courts that have ruled that ouster clauses must not be read to restrict the powers of the judiciary in reviewing the decisions of the executive.

Stay Of Travel Restriction

At the leave stage of the judicial review, the aggrieved individual may also apply for a stay order of the DG's decision to impose travel restriction until the disposal of the hearing. A stay order would essentially put the travel restriction on hold, leaving the individual free to leave Malaysia until such time that

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Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Scleris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122
Email: tax@lh-ag.com

the restriction is once again imposed on him. The necessity of a stay application is due to the fact that the disposal of the judicial review application may take some time, especially taking into account the appellate process. A stay would enable the aggrieved individual to carry on his daily affairs as usual pending the hearing of his judicial review application.

Conclusion

The imposition of travel restriction on an individual for the alleged failure to settle customs and excise duty levied is not necessarily lifted when the duties owed have been settled. There is an alternative that can be explored to set aside the travel restriction, in the form of a judicial review application. However, one must take into account all the potential challenges that may arise in the application and deal with them accordingly to ensure that the travel restriction can be challenged and subsequently set aside. This includes challenging the bill of demand raised by Customs as this would be the basis on which the DG imposes travel restriction.

Recently, we successfully represented a taxpayer in challenging the travel restriction order imposed by the DG of Inland Revenue. Please contact our tax partners Datuk D P Naban or Mr S Saravana Kumar at tax@lh-ag.com if you have any further queries.

**Published by the Tax, GST & Customs Practice,
Lee Hishammuddin Allen & Gledhill**

Contact persons:

Datuk D. P. Naban

Senior Partner,
Tax, GST & Customs Practice
+603-6208 5858
dpn@lh-ag.com

S. Saravana Kumar

Partner,
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sk@lh-ag.com

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50480 Kuala Lumpur
Malaysia
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Fax: +603 6201 0122
Email: tax@lh-ag.com

