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16 JULY 2019

Is Government Subsidy Subject To GST?

Yesterday, the High Court granted leave to a taxpayer to commence judicial review proceedings against the Director General of Customs (**DGC**) to set aside best judgment assessments for goods and services tax (**GST**). The assessments were in the form of three bills of demand (**BOD**) raised under Section 43 of the Goods and Services Tax Act 2014, for GST amounting to approximately RM10 million. The High Court also granted an interim stay order against the payment of the disputed GST.

The taxpayer was successfully represented by Tax, SST & Customs partner, S Saravana Kumar together with associate, Ivy Ling, and pupil, Desmond Liew.

Brief Facts

The taxpayer manufacturers essential food product and participated in a price stabilisation scheme initiated by the government. By virtue of the participation in this scheme, the taxpayer received subsidy from the government. The taxpayer relied on the GST Guide on Government, Local Authority and Statutory Body (**GST Guide**) which was published by the DGC and did not account GST on the subsidy received. Paragraph 24 of the GST Guide expressly provides that the government grant and subsidy are either out of scope or are regarded as non-supplies and, hence, are not subject to GST.

Following a GST closure audit, the DGC reneged on the GST treatment stated in the GST Guide and took the position that the subsidy received by the taxpayer is subject to GST at the rate of 6%. The taxpayer explained that there was no supply made by them to the government, and hence, no GST was chargeable on the subsidy received. Further, it has relied on the GST Guide issued by the DGC. Notwithstanding this, the DGC proceeded to issue the BOD.

High Court Ruling

The High Court granted leave to the taxpayer to challenge the BOD. In our written submission, we raised the following:

- As the GST Act 2014 was repealed pursuant to Section 3 of the GST (Repeal) Act 2018, the taxpayer cannot avail itself of the GST Appeal Tribunal remedy as it has been abolished.

- The taxpayer cannot rely on Section 5 of the GST (Repeal) Act 2018 to submit a review application under Section 124(1) under the GST Act 2014 or to appeal to the Customs Appeal Tribunal (which replaced the GST Appeal Tribunal) as:
 - (i) After the appointed date, i.e. 1.9.2018, the taxpayer can no longer apply for review under Section 124(1);
 - (ii) As the BOD were raised under Section 43, it is not a decision reviewable under Section 124(2) of the GST Act 2014; and
 - (iii) The present case is not an appeal pending before the GST Appeal Tribunal.
- Accordingly, judicial review is the only avenue available to the taxpayer to challenge the BOD.

Conclusion

This matter is probably one of the earliest disputes arising from GST closure audits before the High Court, where it is now recognised that judicial review is the only avenue to challenge the decision of the DGC following the repeal of the GST Act 2014.

If you require legal representation to challenge any assessment raised by Customs for GST, sales tax or service tax, please contact our Tax, SST & Customs partners **Datuk D P Naban** or **S Saravana Kumar** at tax@lh-ag.com

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Published by the Tax, SST & Customs Practice

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