

Trade & Customs e-Alert

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Procedural Fairness In Anti-Dumping Investigation

Recently, in *Downer Utilities Australia Pty Ltd v Commissioner of the Anti-Dumping Commission* [2019] FCA 1190, the Federal Court of Australia affirmed the importance of procedural fairness in the investigation and review, respectively, by the Australian anti-dumping authorities, i.e. the Commissioner of the Anti-Dumping Commission (**Commissioner**) and the Anti-Dumping Review Panel (**Review Panel**).

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Background Facts

The taxpayer imported five separate consignments of steel sections for the construction of a solar power plant. The first consignment, imported as a test sample, was worth significantly less than the four subsequent consignments.

Under the Australian regime, an interim dumping duty and interim countervailing duty is payable by the taxpayer on the importation of the steel sections upon their release into Australian home consumption. Thereafter, the taxpayer may make an application for assessment of its final liability, which has to be within six months from the end of the importation period to the Commissioner. Unless the application is rejected, the Commissioner is required to calculate the provisional amount of duty payable. Where the interim amount paid exceeds the provisional amount, the Commissioner must make a recommendation to the Minister for the excess amount paid to be refunded. Failure by the taxpayer to make the necessary application would result in the interim duty paid being taken as the final duty payable. Where an application has been rejected by the Commissioner, the rejection decision is reviewable by the Review Panel.

Following the release of the steel sections into Australian home consumption, the taxpayer duly paid the interim dumping and countervailing duty on the importation of all five consignments of steel sections. As the importation period was to end on 2.7.2017, the taxpayer had until 2.1.2018 to file its application with the Commissioner. The taxpayer engaged an agent, who filed the application on 29.12.2017, well within the six-month period.

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In making the application, the taxpayer's agent had downloaded the "Duty Assessment Calculation" spreadsheet from the Anti-Dumping Commission's website. However, issues arose with the spreadsheet, i.e. with the auto-sum function in the Assessments Data sheet and in filling out particular columns.

The taxpayer's agent contacted the Commission on or around 29.12.2017 to ensure that it had received sufficient information for the taxpayer's application, only to be told that there was no one available over the Christmas and New Year period. The Commission also did not contact the agent regarding the application before the end of the six-month period. Subsequently, the Commission notified the agent that the application had been rejected for failure to:

- include the first sample consignment.
- establish that the taxpayer's opinion of normal value and countervailable subsidy was correct.
- identify a specified amount by which the amount of interim duty paid exceeded the total duty payable.

On the taxpayer's application for review of the Commissioner's decision, the Review Panel upheld it. The Review Panel accepted the taxpayer's contention that sufficient evidence had been provided in the application to establish that the taxpayer's opinion of normal value and countervailable subsidy was correct. However, the Review Panel:

- agreed with the Commissioner on the basis that the first consignment had not been included and because no specified amount of the excess interim duty paid had been identified in the application.
- rejected the taxpayer's contention that it ought to be given the opportunity to remedy the defects in its application caused by the malfunctioning spreadsheet.

Judicial Review Application

The taxpayer sought to challenge both the decisions of the Commissioner and the Review Panel by way of judicial review.

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Among other things, the primary issues for determination were whether:

- the taxpayer had been denied procedural fairness
- the Commissioner and the Review Panel had erred in rejecting the application for assessment of final liability.

Court's Decision

In allowing the taxpayer's judicial review application, the court agreed with the taxpayer that there had been a breach of procedural fairness by the Commissioner in rejecting the taxpayer's application. Among other things, the court held that:

- Ordinarily, an administrative decision cannot be challenged on grounds of natural justice where there has been a comprehensive appeal or review which has cured any defects in the earlier decision. However, there was no such opportunity for the taxpayer to do so before the Review Panel.

In conducting its review, the Review Panel was limited to consideration of only the information that had been presented before the Commissioner. As the Commissioner's decision here was tainted with an incurable breach of procedural fairness, and as no new information could be obtained by the Review Panel, the Review Panel should have revoked the Commissioner's decision.

- The Commissioner had failed to provide the taxpayer with the opportunity to correct its application by contacting the taxpayer's agent for further information to be supplied. Importantly, the court rejected the Commissioner's argument that the relevant law did not expressly mandate the giving of such an opportunity to taxpayers. In the words of the court:

"... express words were not required to impose a duty on the Commissioner to give Downer an opportunity to render a compliant application for assessment. Nor does the presence elsewhere of express obligation to seek information, or to seek amendments to

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an application for review, necessarily deny the existence of an obligation to give Downer an opportunity to correct its application in the particular circumstances of this case.”

- The Dumping and Subsidy Manual issued by the Commission states that applicants would be advised by deficiencies in their application and indicated that the Commission will identify problems with information that was provided so that any shortcomings can be remedied. These representations demonstrate that the taxpayer could have been allowed to remedy its application. The taxpayer’s agent had also sought to engage with the Commission by contacting its office on the sufficiency of the information provided.
- The unfairness here was compounded by the fact that the Commission itself was the cause of the deficiencies in the taxpayer’s application through the software error in the spreadsheet provided on its website. Further, the deficiencies were minor and could have easily been corrected.
- Finally, the application had been duly filed before the expiry of the six-month period. Here, sufficient information had also been provided to the Commission for the calculation of the final duty payable, despite the issues with the taxpayer’s application.

Conclusion

The *Downer Utilities* decision demonstrates the Federal Court of Australia’s readiness to recognise and uphold the importance of procedural fairness to taxpayers in the context of anti-dumping matters, even in the absence of express statutory provision imposing a particular duty on the public authorities to provide opportunities to taxpayers to make representation. This decision is also in line with the recent jurisprudence of the Malaysian courts on public law. Among other things, our superior courts have held in:

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- *Majlis Bandaraya Pulau Pinang v Datin Noorzaina Mat Zain & Anor* [2019] 4 CLJ 36 (CA)

“Thus, the respondents have rightly, a legitimate expectation that there will be observance of procedural fairness accorded to them, that the appellant will act fairly by taking into consideration all relevant factors...”

- *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265 (FC)

“The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reason unless that very statute specifies that no reason needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.”

In the light of these cases, in undertaking trade investigations in Malaysia, the Ministry of International Trade and Industry needs to ensure that procedural fairness is accorded to all interested parties, failing which its decision would be equally susceptible to judicial review.

If you have any queries pertaining to trade investigations and importation or transshipment of goods into Malaysia, please contact our Tax, SST & Customs partners, **Datuk D P Naban** or **S Saravana Kumar**, at tax@lh-ag.com

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