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SPECIAL ALERT!

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Court of Appeal: Subsidiary Legislation and Customs' Guidelines Cannot Supersede the Principal Act

Subsidiary legislation cannot be interpreted in a manner that conflicts with the principal Act. Specific words that appear in different provisions of a legislation, including any subsidiary legislation, must be interpreted and applied in the same manner and in the same sense. These trite rules of statutory interpretation were recently emphasised by the Court of Appeal in ***Dyson Manufacturing Sdn Bhd v Ketua Pengarah Kastam*** (Appeal No. B-01(A)-773-10/2022).

Brief Facts

The Malaysian Taxpayer, Dyson Manufacturing Sdn Bhd, provided research and development services ("**R&D Services**") to its related company Dyson Operations Pte Ltd ("**Dyson Singapore**"), based in Singapore. The Director General of the Royal Malaysian Customs Department ("**Customs**") contended that the Taxpayer should have levied 6% GST to Dyson Singapore for the R&D Services

rendered and issued a GST Bill of Demand ("**BOD**") on the Taxpayer for RM26,912,808.13.

The High Court dismissed the Taxpayer's application for judicial review to quash the BOD. On 8.3.2024, the Court of Appeal allowed the Taxpayer's appeal and quashed the BOD.

Customs' Contention

It was common ground that Dyson Singapore is GST registered under Section 65(6) of the Goods and Services Tax Act 2014 ("**GST Act**") through the appointment of the Taxpayer as its Malaysian agent. Section 65(6) is undoubtedly a provision that can only be invoked for the GST registration of a foreign company which does not belong in Malaysia. However, Customs' contention was that:

(a) Up on appointing the Taxpayer as its agent for GST registration under Section 65(6) of the GST Act, Dyson Singapore was deemed to have a "fixed establishment" in Malaysia with the Taxpayer being an agent through which Dyson Singapore carried on business in Malaysia.

(b) Consequently, Dyson Singapore should be deemed to be a person belonging in Malaysia for the purpose of paragraph 2(2) of the Goods and Services Tax (Zero-Rated Supply Order) 2014 ("**Zero-Rated Order**") and should not enjoy zero-rating under Item 12, Second Schedule of the Zero-Rated Order.

Court of Appeal's Decision

In allowing the Taxpayer's appeal, the Court of Appeal held the following:

(a) The legal test to determine the place of belonging for a company as set out under Section 65(8) of the GST Act and paragraph 2(2) of the Zero-Rated Order are materially indistinguishable, the only difference being that the former is expressed in a positive manner, whilst the latter in the negative[1]. Section 65(6) of the GST Act is a provision that only applies to a person who does not belong in Malaysia but makes taxable supplies in Malaysia and meets the necessary GST registration threshold.

(b) Subsidiary legislation, in this case, the Zero-Rated Order, cannot be interpreted to be in conflict with the parent Act, i.e., the GST Act. Given that Dyson Singapore is not a person belonging in Malaysia for the purposes of Section 65(6) of the GST Act, it necessarily follows that Dyson Singapore is also not a person belonging in Malaysia under paragraph 2(2) of the Zero-Rated Order[2].

(c) Given that the legal test to determine the place of belonging under the GST Act and the Zero-Rated Order is the same, Customs' contention that Dyson Singapore was a person not belonging in Malaysia for the purpose of the principal Act but simultaneously a person belonging in Malaysia for the purpose of the Zero-Rated Order was logically and legally flawed. Such irreconcilable contradiction represents a form of approbation and reprobation and should not be allowed[3].

(d) Customs further erred in applying their own definition of "fixed establishment" under the Customs' Guide on Supply, which has no force of law. It is trite that any construction of

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[1] See para [47] of COA's Grounds of Judgment ("**GOJ**") @p.22
[2] See para [48] of COA's GOJ @p.23
[3] See para [50] of COA's GOJ @p.23

statutes and, in fact, any written documents including Customs' Guide on Supply, is a question of law to be determined by the Court, where even witness evidence is irrelevant.

(e) Customs sought to argue that the Court should only be concerned with the decision-making process and not the correctness of the decision itself. The Court of Appeal rejected this argument, holding that it was not restricted to merely reviewing the decision-making process. Where Customs had taken into consideration factors that ought not to have been taken into account and had at the same time failed to take into account factors that ought to have been considered, the Court was entitled to review the substance of Customs' decision and quash it.

It is also worth noting that the Court of Appeal acknowledged in its ground of judgment that following the repeal of the GST Act and the GST Appeal Tribunal, the Customs Appeal Tribunal lacks jurisdiction to hear any appeal against a GST Bill of Demand issued under Section 43 of the GST Act[4]. Judicial review is the only remedy available to taxpayers who are aggrieved by the issuance of a bill of demand after the date of repeal of the GST Act.

The Court of Appeal's grounds of judgment is accessible here. The Taxpayer was successfully represented by Dato' Nitin Nadkarni, Ivy Ling Yieng Ping, and Jay Fong Jia Sheng from the Tax, Customs & Trade Practice Group of Lee Hishammuddin Allen & Gledhill.

[4] Para 12 of COA's GOJ @p.5

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