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Indirect Tax Alert

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Goods and Services Tax (GST)

High Court's decision: zero-rating of exports and e-Tax Guides

This alert provides a summary of the outcome of the appeal by the Comptroller of GST with the Singapore High Court against the GST Board of Review's decision in the case of GDY v Comptroller of GST [2021] SGGST 1.

Background

On 29 June 2021, the GST Board of Review (Board) issued a decision in the case of GDY v Comptroller of Goods and Services Tax [2021] SGGST 1. This case relates to an appeal by the taxpayer against the decision of the Comptroller of GST (Comptroller) to disallow the zero-rating of certain taxable supplies of goods purportedly exported to Malaysia on the basis that the taxpayer did not maintain certain documents in accordance with the Inland Revenue Authority of Singapore's (IRAS) e-Tax Guide (ETG) *GST: Guide on Exports*, which were required for zero-rating. The taxpayer had been relying on a list of export documents issued by the Comptroller in an earlier audit (Specific Directions) to satisfy the documentary requirements for the zero-rating of its export supplies. The Board allowed the appeal in favour of the taxpayer, who was permitted to zero-rate its disputed supplies. Further details may be found in our earlier article here.

The Comptroller subsequently appealed against the Board's decision with the Singapore High Court in the case of Comptroller of Goods and Services Tax v Dynamac Enterprise [2022] SGHC 61.

The Comptroller's appeal

The Comptroller raised the following three main points on appeal:

- The Board made a fundamental error of law in failing to decide whether section 21(6) of the GST Act or regulation 105 of the GST Regulations applied to the disputed supplies.
- The Board has no jurisdiction to determine the applicable export evidence requirements because the discretion to impose conditions for export evidence is vested solely in the Comptroller.
- Even if the Board had jurisdiction to decide on the applicable export evidence requirements, the applicable requirements in this case should be the requirements under the ETG which the taxpayer had failed to comply with.

The High Court's decision

On 18 March 2022, the High Court dismissed the Comptroller's appeal and upheld the Board's decision.

Whether the Board made a fundamental error of law in failing to decide which provision applied

The High Court held that the Board was not wrong in finding that it is unnecessary to determine whether section 21(6) of the GST Act or regulation 105 of the GST Regulations applied. Regardless of which provision applies, the central issue is whether the applicable requirements that the taxpayer must comply with, had in fact been complied with.

Whether the Board had jurisdiction to determine the applicable export evidence requirements

The High Court is of the view that the Board has jurisdiction to determine the applicable export evidence requirement in this case. The Board was entitled to make a factual finding that the Specific Directions prescribed the export evidence required by the Comptroller in the case of the disputed supplies. Importantly, the Board is not deciding the export evidence that is required for zero-rating but rather, which set of export evidence requirements applied on the present facts.

Whether the applicable export evidence requirements should be those stated under the ETG

The High Court found that it is reasonable for the Board to conclude that the Specific Directions were the applicable export evidence requirements that the taxpayer had to comply with.

For completeness, the High Court noted that even if they were to consider the entire ream of evidence to determine the applicable export evidence requirements, the High Court would have arrived at the same conclusion as the Board due to the following reasons:

- The taxpayer had tendered documents complying with the Specific Directions in audits conducted in 2007 and 2013, and on both occasions, the taxpayer was permitted to zero-rate its exports. This was even when the 2013 audit was conducted after the publication of the ETG in 2009, which suggests that the ETG did not supersede the applicability of the Specific Directions.
- The publication of the ETG did not impose legally binding conditions that override the Specific Directions. Singapore courts have consistently held that ETGs are merely guidelines and are not law. They may illuminate the practice of tax authorities, but practice is not law.

  Further, in the present case, the aim of the ETG is expressly stated to "provide general guidance" and there is an express disclaimer stating that the "IRAS shall not be responsible or held accountable in any way for any decisions made… in reliance upon the contents in the ETG", which suggest that the ETG is more of a guide rather than conditions.

Key takeaways

The decision of the High Court shows that zero-rating may still apply to the export of goods in certain settings even though the taxpayer has not maintained all the documents listed in the ETG. It also reiterates the fact that ETGs are not law. Nonetheless, to avoid lengthy and costly audit disputes with the Comptroller, it is best to seek the Comptroller's approval early if a business arrangement or scenario deviates from the relevant guide and is not free from doubt. To do so, businesses should keep abreast of the developments in the tax rules and regulations.

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