IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 61

Tax Appeal No 16 of 2020

In the matter of Order 55 of the Rules of Court (Cap. 322, Rule 5)

And

In the matter of Section 54 of the Goods and Services Tax Act (Cap. 117A)

And

In the matter of Goods and Services Tax Board of Review Appeals No. 1 & 2 of 2018 and a Decision delivered on 8 October 2020 ensuing therefrom

And

In the matter of the assessment of Dynamac Enterprise under the Goods and Services Tax Act (Cap.117A)

Between

Comptroller of Goods and Services Tax

… *Appellant*

And

Dynamac Enterprise

… *Respondent*

JUDGMENT

[Revenue Law — Goods and Services Tax (GST) — zero rated supply]

Comptroller of Goods and Services Tax
v
Dynamac Enterprise

[2022] SGHC 61

General Division of the High Court — Tax Appeal No 16 of 2020
Choo Han Teck J
28 February 2022

18 March 2022 Judgment reserved.

Choo Han Teck J:

1 The respondent, a partnership, is an exporter of electronic products such as, mobile phones, tablets, and notebooks. It was registered under the Goods and Services Tax ("GST") regime since 1994. The facts in this appeal are based on the respondent's sales to its Malaysian customers. The customers collect the goods from the respondent's place of business, and hand-carry them to Malaysia by motor vehicles.

2 The goods are liable to Goods and Services Tax, and under s 8 of the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) ("GSTA"), the taxable rate applicable for goods and services in Singapore is subject to GST at the standard rate of 7%. However, for supplies of goods or services that are exported overseas, the Comptroller of Goods and Services ("the Comptroller") can exercise his discretion, under s 21 of the GSTA, to zero-rate the supply, that is to say, allow a waiver of payment of the GST.

3 In January 2016, the Comptroller conducted an audit on the respondent ("the 2016 audit") in the course of investigating Missing Trader Fraud, that is, a type of fraudulent trade practice with the intention to evade GST payment or claim GST refunds. In this audit, the Comptroller found that the respondent had not furnished certain documents that were required in the IRAS e-tax guide entitled "GST: Guide on Exports" ("ETG"), issued in 2009. Specifically, the respondent did not maintain the Declaration Form prescribed in the ETG and did not record the carrier's Vehicle Numbers in its export permits. It is not the Comptroller's case that the respondent was involved in a Missing Trader Fraud, and the respondent was not charged for any offence.

4 But, based on non-compliance with the above requirements, the Comptroller takes the view that the respondent should not be entitled to a zero-rating relief for electronic goods exported to Malaysia from April 2013 to October 2016 ("the Disputed Supplies"). Accordingly, the Comptroller issued Notices of Assessment ("NOA") to tax the Disputed Supplies at 7% GST, resulting in an aggregate GST of $26,957,061.05 ("the Disputed Assessments").

5 The respondent disputes the NOA. It avers that it had maintained all the export evidence that the Comptroller specifically directed it to maintain in his letter dated 6 September 2006 ("the Specific Directions") to it. It is undisputed that the respondent has been complying with the Specific Directions directed by the Comptroller for all its supplies since 2006, including the Disputed Supplies made between April 2013 and October 2016. This includes maintaining:

(a) tax invoice showing the models and quantity of the goods sold, the Malaysian customer's name and address, and the price of the goods;

(b) export permit indicating the quantity of goods to be exported;

(c) delivery order or collection note signed by the carrier (together with the carrier's passport number) indicating the date of collection and details of goods collected;

(d) photocopy of carrier's passport showing personal details and immigration endorsements for their entry into and exit from Singapore on the day of collection;

(e) evidence of receipt of payment from Malaysian customer; and

(f) signed and stamped confirmation of receipt from Malaysian customer certifying that the goods were received in order.

6 The respondent also says that after the Specific Directions were imposed, the Comptroller audited the respondent on two occasions in May 2007 ("2007 audit") and in April 2013 ("2013 audit"). After reviewing the export evidence maintained by the respondent in accordance with the Specific directions, the Comptroller affirmed the respondent's right to zero-rate its supplies to Malaysian customers on both occasions. Since the Comptroller did not dispute that the respondent had complied with the Specific Directions in both audits, the respondent says that the Comptroller must have accepted that the Specific Directions were the only applicable export evidence requirements for the respondent for the Disputed Supplies.

7 The respondent thus appealed against the Disputed Assessments to the GST Board of Review ("the Board"). The Board agreed that the respondent should not be denied zero-rating because it had complied with the Specific Directions issued by the Comptroller in 2006 which were not revoked by the subsequent audits or the revised ETG in 2009. The Board took the view that it

had the jurisdiction to ascertain whether the ETG was validly issued, but decided not to rule on the validity of the ETG, given that the issue was rendered academic by its finding that the Specific Directions, and not the ETG, applied to the respondent.

8 The Comptroller appealed to this court against the Board's decision pursuant to s 54(2) of the GSTA. The Comptroller raises three main points on appeal:

(a) The Board made a fundamental error of law in failing to decide whether s 21(6) of the GSTA or reg 105 of the Goods and Services Tax (General) Regulations ("GSTR") applied to the Disputed Supplies ("Applicable Provision Issue");

(b) 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 ("Jurisdiction Issue"); and

(c) 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 respondent had failed to comply with ("Applicable Export Evidence Issue").

9 First, on the Applicable Provision Issue, the matter was advanced before the Board, and the Board concluded that it was unnecessary to determine whether s 21(6) of the GSTA or reg 105 of the GSTR applied since both provisions prescribed common requirements for zero-rating.

The relevant portions of s 21(6) GSTA are as follows:

> 21.—(6) A supply of goods is zero-rated where the Comptroller is satisfied that the person supplying the goods —
>
> (a) has exported them; or
>
> (b) …
>
> and, in either case, if such other conditions or restrictions (if any) as may be prescribed by the Minister in regulations or as the Comptroller may impose are fulfilled.

The relevant portions of reg 105 GSTR are as follows:

> 105.—(1) Where the Comptroller is satisfied that goods supplied by a taxable person are to be exported, the supply shall be zero-rated if the taxable person —
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> (a) has obtained the prior approval of the Comptroller in relation to that supply;
>
> (b) produces such evidence of export as the Comptroller may require generally or in any particular case; and
>
> (c) complies with such other conditions or restrictions as the Comptroller may impose for the protection of the revenue.

10 The Board took the view that the two provisions prescribed two common requirements for zero-rating. First, the taxpayer must maintain export evidence to satisfy the Comptroller that the goods have been exported (s 21(6) GSTA) or were to be exported (reg 105 GSTR). Second, the taxpayer must maintain any export evidence imposed by the Comptroller as statutory conditions for zero-rating either under s 21(6) GSTA or reg 105(1)(b) GSTR. Therefore, the Board concluded that it was unnecessary to determine which provision applied since the case will turn on the factual finding of whether the Specific Directions or the ETG were the applicable export evidence requirements for the Disputed Supplies.

11 On appeal, the Comptroller says that the Board was wrong for failing to determine whether s 21(6) GSTA or reg 105 GSTR applied because the latter

has a "prior approval" requirement which is materially different from the former. The Comptroller further argues that since the Disputed Supplies are indirect exports, reg 105 GSTR should apply, and the respondent is not entitled to zero-rating because it failed to obtain "prior approval" for the Disputed Supplies

12 I disagree with the Comptroller's position. The Comptroller had by its own practice, deemed "prior approval" automatically, if the taxpayer had maintained the export evidence that the Comptroller required. Therefore, the determinative issue in this case is whether the Specific Directions or the ETG contained the export evidence that the Comptroller required. If the Specific Directions contained the applicable export evidence requirement, it would stand to reason that the respondent would be granted deemed "prior approval" since it complied with the Specific Directions.

13 Hence, I am of the view that the Board was not wrong in finding that it is unnecessary to determine whether s 21(6) GSTA or reg 105 GSTR applied. Regardless of which provision applies, the central issue is whether the applicable requirements that the respondent must comply with, had in fact been complied with.

14 Turning to the Jurisdiction Issue, the Comptroller says that the Board had no jurisdiction to substitute its views on the applicable export evidence requirements for the Comptroller. The Comptroller further says that the Board, in finding that the Specific Directions applied instead of the ETG conditions, has effectively usurped the administrative discretion that is vested solely in the Comptroller under reg 105 GSTR.

15 I disagree with the Comptroller. I am of the view that the Board has jurisdiction to determine the applicable export evidence requirement in this case. Regulation 105 GSTR requires taxable persons to maintain export evidence "as the Comptroller may require generally or in any particular 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. Just because the Board's factual finding was not in favour of the Comptroller does not mean that the Board usurped the Comptroller's statutory discretion to impose conditions on export evidence. The Board is not deciding what export evidence should be needed for zero-rating but rather, which set of export evidence requirements applied on the present facts.

16 The Comptroller seeks to re-characterise the respondent's argument as one engaging the doctrines of substantive legitimate expectation ("SLE") and estoppel which the Board lacks supervisory jurisdiction to hear. I disagree with this characterisation of the respondent's argument. The respondent's only argument before the Board was that the Specific Directions were the only statutory conditions imposed for the Disputed Supplies and that the respondent's compliance with these conditions entitled it to rely on the statutory right of zero-rating. It is not the respondent's case that even though the Specific Directions were not the applicable conditions, the respondent is nevertheless entitled to zero-rate the Disputed Supplies due to the Comptroller's representations during the audits. Therefore, the respondent's argument does not engage the doctrine of SLE and estoppel, and the Board has jurisdiction to make a determination of the applicable export evidence requirements imposed for the Disputed Supplies.

17 I now turn to address the Applicable Export Evidence Issue. The Comptroller says that even if the Board has jurisdiction, the Board erred in finding that the Specific Directions applied instead of the ETG. As a preliminary point, I note that s 54(2) GSTA only allows for appeals on questions of law or mixed law and facts. The Comptroller cited *Comptroller of Income Tax v AQQ* [2014] SGCA 15 ("*AQQ*") in which the Singapore Court of Appeal held that "when the court considers an appeal from the Board on a finding of fact, the question that the court asks itself is whether 'no reasonable body of members constituting an Income Tax Review Board could have reached the findings reached by the Board'" (at [123]). *AQQ* therefore highlights the high threshold that must be crossed before this court can review a finding of fact by the Board.

18 In the present case, it cannot be said that "no reasonable body of members constituting the Goods and Services Tax Board of Review" would have concluded that the Specific Guidelines were the applicable export evidence requirements that the respondent had to comply with. On the contrary, it seems to me that the Board was correct. Therefore, I will not disturb the Board's finding of fact.

19 For completeness, even if I were to "consider the entire ream of evidence" to determine the applicable export evidence requirements, as the Comptroller suggests, I would have arrived at the same conclusion as the Board for two reasons. First, it is undisputed that the respondent had tendered documents complying with the Specific Directions in both the 2007 audit and 2013 audit, and on both occasions, the respondent 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.

20 The Comptroller seeks to avoid this conclusion by characterising the 2013 audit as a "partial audit" that did not scrutinize the export documents tendered by the respondent. However, before the Board, the Comptroller did not call the officer who conducted the 2013 audit to give evidence as to the scope and details of the 2013 audit. The only officer called was the officer who conducted the 2016 audit who admitted that she had no personal knowledge of what transpired in the 2013 audit. This is especially when the officer who conducted the 2013 audit attended the hearing before the Board itself and there was no impediment in calling him as a witness. Under these circumstances, the Board was right to draw the adverse inference that the 2013 audit was not a "partial audit" and that the ETG did not supersede the applicability of the Specific Directions. I should point out that "adverse inference" in this context merely meant that the absence of needed evidence had led the Board to the logical conclusion that the matter had not been proven.

21 Second, the publication of the ETG did not impose legally binding conditions that override the Specific Directions. Our courts have consistently held that e-tax Guides are merely guidelines and are not law (*Zhao Hui Fang v Comptroller of Stamp Duties* [2017] 4 SLR 925 at [113]). They may illuminate the practice of tax authorities, but practice is not law (*Comptroller of Income Tax v GE Pacific Pte Ltd* [1994] 2 SLR(R) 948 at [35]).

22 In the present case, the aim of the ETG is expressly stated to "provide general guidance to assist GST-registered businesses to comply with the zero-rating provisions on exports of goods". Furthermore, there is also an express disclaimer stating that "IRAS shall not be responsible or held accountable in any way for any decisions made … in reliance upon the Contents in this e-tax Guide". These suggest that the nature of the ETG is more of a "guide" than

"conditions". I agree with the Board's opinion that "the authority of the state, so delegated to the Comptroller, should be exercised in an open, transparent, and unambiguous manner". If the Comptroller intends to impose legally binding statutory conditions, there should minimally be some explicit reference in the document which states that it contains conditions issued pursuant to a specified statutory provision, by a specified statutory authority (*Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 at [16]). These elements were all absent in the ETG. Therefore, I am of the view that the ETG did not impose legally binding conditions and did not override the Specific Directions issued by the Comptroller to the respondent in 2006.

23 Given my findings above, I am of the view that the Specific Directions were the only export evidence requirements imposed for the Disputed Supplies and it was not superseded by the ETG issued in 2009. Therefore, the respondent should be entitled to zero-rate the Disputed Supplies and the Comptroller's appeal should be dismissed.

24 Finally, I will deal with the consequential issue of the interest order. The Board below has ordered for the Comptroller to refund the amount of $4,623,962.88 to the respondent with interest. Section 19(11) of the GSTA provides that the Comptroller must pay interest if input tax refunds are not paid on time, at 5.5% per annum (reg 64 GSTR). The Comptroller appeals against the interest order on the ground that s 19(11) did not apply because the $4,623,962.88 was "additional tax payable" assessed by the Comptroller. This amount was set-off against the input credits of $5,206,980.08 claimed by the respondent and $583,017.20 was duly refunded to the respondent in 2017.

25 I am of the view that s 19(11) of the GSTA applies. The Comptroller, by setting off the $4,623,962.88 from the input tax claimed by the respondent, wrongfully withheld $4,623,962.88 from the respondent. Even if the Comptroller seeks to characterize the $4,623,962.88 as "additional tax payable", the effect of the set-off is that $4,623,962.88 worth of input tax credit was not refunded to the respondent in a timely fashion. The annulment of the Disputed Assessments means that the respondent should be restored to the position as if the Disputed Assessments had never been issued (*TYC Investment Pte Ltd v Chan Siew Lee Jannie* [2018] 4 SLR 293 at [32]). Therefore, interest should be payable to the respondent from the date the input tax refunds were due to the respondent up until the date the Comptroller eventually paid the refunds.

26 Under s 19(10) GSTA, read with reg 63 GSTR, the Comptroller is required to pay input tax refunds within a period equivalent to the applicable prescribed accounting period ("PAP"), commencing on the date one day after the GST return for that PAP has been filed. In the respondent's case, the PAP is one month. Therefore, the interest should be payable from one month after the GST was filed by the respondent for each corresponding PAP, until 9 February 2021, when the Comptroller finally repaid the input tax refunds.

27 The Comptroller then seeks to rely on reg 63(2) GSTR which provides that where the Comptroller makes reasonable requests for information, the Comptroller is only required to make payment within three months of receipt of all information requested. Although it is undisputed that the Comptroller had requested for additional documents from the respondent, the respondent has consistently indicated that it did not have, and was not required to produce the requested documents since they are not part of the requisite export evidence.

Under these circumstances, I am of the view that reg 63(2) GSTR is not applicable in this instance. Otherwise, it will mean that the Comptroller can, theoretically, postpone the statutory timeline to pay input tax credits indefinitely since it will never receive "all information requested" when the taxpayer disputes the relevance of the documents in the first place.

28 Therefore, I am of the view that the appeal should be dismissed. Interest should be payable, at 5.5% per annum, from one month after the GST return was filed by the respondent for each corresponding PAP, up until 9 February 2021 when the Comptroller finally paid the refunds. I will hear questions of costs at a later date if parties are unable to agree costs themselves.

- Sgd -
Choo Han Teck
Judge of the High Court

Pang Mei Yu, Rajiv Rai and Adam Liew Wei Loong (Inland Revenue Authority of Singapore) for the appellant;
Stephen Phua Lye Huat, Kuan Cheng Tuck and Tneu Jia Jin (RHTLaw Asia LLP) for the respondent.