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Judicial review as an appeal process under SST

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The Customs Appeal Tribunal was introduced in 2007 through an amendment to the Customs Act 1967 (CA 1967). Section 141B of CA 1967 established the Customs Appeal Tribunal to hear appeals from taxpayers who were aggrieved by the decision of the Director-General of Customs (DG). Prior to the establishment of the tribunal, such appeals were heard by the minister of finance. If taxpayers were dissatisfied with the minister's decision, they could appeal to the High Court by way of judicial review.

Under the soon-to-be-implemented Sales and Services Tax (SST), taxpayers who are aggrieved by a decision of the DG on SST matters may also appeal to the tribunal.

Judicial review

Notwithstanding the existence of the tribunal, established multinational corporations have opted to bypass this appeal process and commence their appeal by way of judicial review. Some of these cases, such as Levi Strauss (M) Sdn Bhd v Ketua Pengarah Kastam, Malaysia (Levi Strauss), were reported in the law journals. In Levi Strauss, the taxpayer challenged the imposition of additional customs duty and sales tax on it by way of adjustment of royalty pursuant to regulation 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999. It was a technical issue that involved the interpretation of various provisions of the law and working papers of the World Trade Organization. However, under the old consumption tax regime, the tribunal did not allow the taxpayer to be represented by an advocate and solicitor, which then resulted in the taxpayer seeking legal remedy by way of judicial review.

At present, there is a proposed amendment to the Customs Act 1967 before parliament to remove this restriction by allowing taxpayers to be represented by any person of their choice.

This article highlights that on certain matters, taxpayers may proceed directly to the High Court by way of judicial review if they are dissatisfied with the DG's decision under the soon-to-be-implemented SST regime. In other words, can taxpayers proceed directly to the High Court despite the existence of the tribunal or a similar tribunal under SST? It is anticipated that any appeal against the decision of the DG under the new regime will be forwarded to the tribunal.

The Levi Strauss case

In Levi Strauss, the taxpayer applied for leave from the High Court for an order of certiorari to quash the DG's decision to raise a bill of demand for additional taxes and pending the leave application, the taxpayer sought to stay the enforcement of the decision.

The attorney-general (AG), however, raised a preliminary objection to the taxpayer's application on the premise that the taxpayer's application was premature and misconceived. The AG took the position that the taxpayer should have filed its appeal before the tribunal and not the High Court. The taxpayer disagreed with that position and both parties were instructed by the High Court to file their written submissions. However, at the eleventh hour before the hearing, the AG withdrew his objection. Consequently, the High Court granted the taxpayer leave to apply for judicial review and stayed the enforcement of the decision pending the determination of the application.

The crux of the taxpayer's submission was that the availability of an alternative remedy (that is, the Customs Appeal Tribunal) does not exclude judicial review. The following grounds, which are discussed below, were raised by the taxpayer in support of its application for judicial review:

(a) The Sungai Gelugor case;
(b) The tribunal is not specialised;
(c) The tribunal is domestic;
(d) Section 141N of CA 1967; and
(e) The court's powers are not restricted by CA 1967.

The Federal Court's approach to Sungai Gelugor

In the case of Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan (Sungai Gelugor), the Federal Court examined in detail the alternative remedy argument after studying various local and English authorities on the point. The Federal Court concluded that where genuine grounds for judicial review were alleged, it was the refusal rather than the grant of relief that was the exceptional course. It further stated that "the reason for this is that whilst in theory the courts frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to judicial review, in practice the courts are often much kinder to the applicant with a good case and at the most probably entertain his application as an exception".

The above clearly establishes that if taxpayers choose not to exercise the statutory appeal remedy, namely the tribunal, the High Court's jurisdiction to hear such applications is not excluded. In fact, as a matter of practice, the courts are often inclined to grant judicial review to applications that have merit. This approach is also consistent with the position observed by the UK's Court of Appeal in R v Chief Immigration Officer Gatwick Airport, ex parte Kharrazi, where his lordship stated that "on countless occasions, the availability of appeal does not debar the court from quashing an order by certiorari and that everything depends upon the facts of the case". This observation was unanimously endorsed in Sungai Gelugor. In other words, when genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief that is the exceptional course.

The judicial pronouncements cited above illustrate that it is the refusal to grant judicial review that is an exception rather than the granting of judicial review in cases where there is an alternative remedy.

The tribunal is not specialised

Among the specialised tribunals mentioned by the Federal Court in Sungai Gelugor are the Special Commissioners of Income Tax, the Industrial Court and the Appeal Board under the Town & Country Planning Act 1976. These tribunals share the following characteristics: (a) The hearing is heard by at least one person who is legally qualified; and (b) the appellants can be represented by advocates and solicitors.

Given that these tribunals have the above characteristics, they are able to consider both issues of fact and law. However, with the Customs Appeal Tribunal, the scenario is slightly different. For example, Section 141C of the CA 1967 states that the members of the tribunal shall be a chairman and a deputy chairman appointed from the judicial and legal service, Section 141J of the CA 1967 allows the jurisdiction of the tribunal to be exercised by any of its members sitting alone. It must be noted that other members of the tribunal need not be legally qualified. Unlike the specialised tribunals mentioned above, a hearing before the Customs Appeal Tribunal can be presided by a person who has no legal training or background.

Further, the fact that the chairman or the deputy chairman may preside over an appeal by sitting alone clearly illustrates that the appeal before the tribunal may not necessarily be heard by a person with special knowledge and experience in Customs matters as well. This is because the chairman or the deputy chairman need not have any background in Customs matters.

Unlike the Customs Appeal Tribunal, which excludes legal representation, the structure of the Special Commissioners of Income Tax, the Industrial Court and the Appeal Board under the Town & Country Planning Act 1976 allows the appellant to be represented by an advocate and solicitor. In this regard, the tribunal is not specialised and is, at most, only domestic.

The tribunal is domestic

The Customs Appeal Tribunal is envisaged to handle domestic issues in an informal manner. This can be illustrated by the exclusion of strict rules of evidence and the fact that taxpayers may not necessarily be represented by an advocate and solicitor before the tribunal. It appears that the tribunal had been created to allow taxpayers to resolve general and factual issues in an informal fashion without the need for legal representation. Legislature must have intended for Section 141N of the CA 1967 to be utilised in circumstances where taxpayers with disputes that are technical in nature and involving questions of law can proceed directly to the High Court. If the taxpayer elects the latter, then he may have legal representation.

In Levi Strauss, the application involved the construction of regulation 5(1)(a)(iv) of Customs (Rules of Valuation) Regulations 1999, which pertains to the adjustment of customs value by including royalty and licence fees for the purposes of customs valuation. It is also difficult to envisage how the tribunal would apply the canons of construction to interpret the operation and application of regulation 5(1)(a)(iv) if the appeal is neither heard by a member who has no legal training and qualification nor assisted by legal counsel. The exclusion of legal representation as the law stands now would certainly create a problem when it comes to issues pertaining to evidential matters and interpretation of legislation and case law. It must be appreciated that the matter in Levi Strauss was essentially on the construction of regulation 5(1)(a)(iv), which traces its origin to the WTO Customs Valuation Code.

In such cases, the appeal procedure provided in Section 143 of the CA 1967, namely the appeal to the tribunal, is unsuitable and inadequate. Further, if the tribunal was to be the sole appeal forum for all appeals relating to indirect tax matters, then parliament would not have introduced Section 141N of the CA 1967.

Section 141N of the CA

The wording of Section 141N of CA 1967 clearly provides taxpayers with the option of addressing their grievances either before the Customs Appeal Tribunal or the High Court. This illustrates that an appeal before the High Court is not discounted at all by parliament. If taxpayers opt to file their appeals with the High Court, then they are excluded from appealing to the tribunal. Likewise, if taxpayers choose to file their appeals with the tribunal, then they are excluded from concurrently appealing to the High Court. Any other construction of this section would make it superfluous or redundant.

Hence, the wording of Section 141N clearly illustrates that parliament did not intend to grant exclusivity to the tribunal to hear all appeals pertaining to the decisions of the DG. The relevant part of Section 141N states that when an appeal is lodged with the tribunal, that appeal should not be the subject of another proceeding between the parties in court.

High Court's powers are not restricted

Unlike the Income Tax Act 1967 (ITA 1967), there is no provision in the CA 1967 that restricts the powers of the High Court to hear any matters, including judicial review application. For instance, Section 106(3) of the ITA states that "in any proceedings under this section, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A),(3),(4),(5),(6),(7) or (8)".

Section 106(3) states that if the government initiates civil action to recover taxes due and payable, the taxpayer's plea that the taxes sought to be recovered are excessive, incorrectly assessed, under appeal or incorrectly increased cannot be entertained by the High Court. If the taxpayer wants to dispute the taxes raised, then he must appeal to the Special Commissioners of Income Tax. Clearly, Section 106(3) restricts the powers of the High Court to hear such matters.

However, if the legislation, for example the CA 1967, does not expressly restrict the powers of the High Court, then the High Court may hear the matter. This point was succinctly explained by the High Court in Ketua Pengarah Hasil Dalam Negeri v Rheem (Far East) Pte Ltd, where his lordship commented: "As to the issue of the extent of the jurisdiction of the Special Commissioners under the said Act, it cannot be disputed that their powers are limited unlike the powers of the High Court. They are creatures of statute and as such, their jurisdiction has to be clearly spelt out by statute and in this case, the said Act. In the case of the High Court, which has unlimited jurisdiction, its powers may be taken away if it is specifically so stated in any statute. In other words, if the statute is silent, the High Court will have the jurisdiction. This principle cannot be applied in the case of the Special Commissioners."

Given that the CA 1967 neither has a provision equivalent to Section 106(3) of the ITA nor a provision to restrict the powers of the High Court, the authors are of the view that taxpayers' appeals can be heard directly by the High Court.

Conclusion

In Levi Strauss, despite the existence of the tribunal, the taxpayer succeeded in obtaining leave from the High Court to pursue its judicial review application. In addition to that, the taxpayer also successfully stayed the enforcement of the decision pending the determination of the application. This case illustrates that the mere existence of the tribunal does not preclude taxpayers from applying for judicial review.

If an appeal is necessitated on the premise that the DG had abused his authority by applying the law erroneously and had acted beyond the powers conferred on him, then judicial review appears to be a better legal remedy to the taxpayers. This is because unlike the tribunal, the High Court has the jurisdiction to stay the enforcement of the decision. Further, by pursuing the appeal to the High Court, taxpayers have the opportunity to be represented by legal counsel, a fundamental right that is denied before the tribunal. In Kim Thye Co v Ketua Pengarah Hasil Dalam Negeri, despite the existence of the Special Commissioners of Income Tax, the DG of Income Revenue accepted as "a matter of law that he is not immune from the process of judicial review and made no procedural objection" to the taxpayer's application in that case.

More recently, the Federal Court, in Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals, recognised that judicial review is an effective checks and balances mechanism in place to ensure that the executive and parliament act within their constitutional limits and uphold the rule of law. The judiciary acts as a bulwark of the constitution in ensuring that the powers of the executive, such as the DG, are kept within their intended limit, given that such powers had been abused in the past to arbitrarily demand for additional taxes. In conclusion, the DG's authority is not absolute and is open to judicial review even under the new SST regime. E

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