Singapore High Court Allows Zero-Rating of Exports of Goods for GST Purposes Although Some IRAS e-Tax Guide Conditions Not Met

Authored by Partners Tan Kay Kheng and Tan Shao Tong, with contribution from Senior Associate Goh Ziluo

In *Comptroller of Goods and Services Tax v Dynamac Enterprise* [2022] SGHC 61, the General Division of the Singapore High Court ("**High Court**") affirmed the decision of the Goods and Services Tax ("**GST**") Board of Review ("**Board**") in *GDY v Comptroller of Goods and Services Tax* [2021] SGGST 1 to allow a taxpayer to claim zero-rating for goods allegedly exported even though the taxpayer had not furnished certain documents that were required by the Inland Revenue Authority of Singapore ("**IRAS**") e-Tax Guide entitled "GST: Guide on Exports" ("**ETG**") issued in 2009.

Our Comments

This is the first reported High Court decision on the issue of whether goods allegedly exported can be zero-rated even where the taxpayer has not furnished all documents required in the ETG.

According to the ETG, zero-rating for exports of goods would be granted only if all documents required under the applicable section of the ETG have been furnished.

This decision, which upheld the Board's earlier decision (collectively, "**Decisions**"), indicates that there may be situations where zero-rating should still apply to the export of goods even though not all documents required under the ETG have been furnished by a taxpayer.

In this case, the taxpayer was entitled to claim zero-rating for its exports of goods even though it had failed to furnish to IRAS the documents required under the ETG. Both the High Court and the Board found that the applicable export evidence in this case should not be the documents required under the ETG, but rather what the Comptroller of Goods and Services Tax ("**Comptroller**") had earlier, in a letter to the taxpayer, *specifically* directed the taxpayer to maintain as export evidence.

The Decisions also establish the following:

- The Board has the jurisdiction to determine the applicable export evidence requirement(s) for the zero-rating of exported goods. In this regard, the Board should be able to determine whether the ETG (and the conditions thereunder) have been validly issued.

- The Board also has the jurisdiction to examine whether the Comptroller has made a fair and reasonable determination of whether supplies are indeed exported.

We would caution that the Decisions do not signal that zero-rating of exports would be allowed in all cases where not all documents required under the ETG can be or have been furnished by a taxpayer. The Decisions are specific to the unique circumstances of this case.

It also remains to be seen whether there would be changes in legislation or the ETG as a result of the High Court and the Board's *obiter dicta* in the Decisions. For example, as it was suggested that the ETG did not impose legally binding conditions, it is uncertain as to whether the ETG might be amended (or regulations promulgated) to make the conditions in the ETG legally binding. As it stands, the legislative effect of the ETG (or rather, the lack of such effect) may be contrasted against that of the IRAS e-Tax Guide entitled "Income Tax: Tax Exemption under Section 13(12) for Specified Scenarios, Real Estate Investment Trusts and Qualifying Offshore Infrastructure Project/Asset" (eight editions beginning from 22 February 2012 to 17 May 2021), as the latter is specifically enabled by the Income Tax (Exemption of Foreign Income – REITs and Other Special Cases) Order 2006 (G.N. No. S435/2006). Another example would be the IRAS e-Tax Guide entitled "GST: Taxing imported services by way of reverse charge" (Third Edition published on 11 February 2022), which indicates that, in order to claim an adjustment for previously accounted reverse-charge GST, a taxpayer would need to complete a specified form. While the specified form sets out certain documents and records that must be maintained in order to claim such adjustments, these requirements are specifically provided for under regulations 90D and 90E of the GST (General) Regulations.

Finally, we make a few other observations. First, the doctrines of substantive legitimate expectation and estoppel were raised in this case (in the context of binding the Comptroller to a previously expressed position). While neither the High Court nor the Board made any substantive comments on the applicability of these two doctrines to tax law, it would be interesting to see whether either of these doctrines could apply in a future case. Second, the Board allowed the taxpayer to proceed with its appeal despite its non-payment of the disputed additional GST and penalties (which, being of significant amounts, would have caused hardship to the taxpayer). The Board also refused a stay of proceedings pending the Comptroller's appeal to the High Court, which meant that a full refund of input taxes had to be made to the taxpayer pending the outcome of the Comptroller's appeal.

Background

Dynamac Enterprise ("**taxpayer**") is an exporter of electronic products such as mobile phones, tablets and notebooks. It purchases goods from local and overseas suppliers and resells them to customers locally and in Asia. It has been registered for GST since 1994. The issue in this case concerns the taxpayer's sales to its Malaysian customers. The Malaysian customers collect the goods from the taxpayer's place of business and hand-carry them to Malaysian by motor vehicles.

While goods supplied in Singapore are ordinarily subject to GST at the standard rate of 7%, for supplies of goods that are exported overseas, the Comptroller can exercise his discretion to zero-rate the supply (i.e., allow a waiver of payment of the GST).

In January 2016, in an audit conducted by the Comptroller, the Comptroller found that the taxpayer had not furnished certain documents that were required by the ETG (issued in 2009) for zero-rating. In particular, the taxpayer did not maintain the prescribed declaration form and did not record the carrier's vehicle numbers in its export permits. Based on the aforementioned non-compliance with these requirements under the ETG, the Comptroller took the view that the taxpayer should not be entitled to zero-rating of the disputed supplies exported to Malaysia between April 2013 and October 2016.

However, the taxpayer asserted that the Comptroller had, in its earlier audits, modified the conditions that were required of the taxpayer to warrant a zero-rated supply. The taxpayer asserted that it had maintained all the export evidence that the Comptroller had specifically directed it to maintain in the Comptroller's letter dated 6 September 2006 ("**Specific Directions**"), which differed from the prevailing version of the ETG. It was undisputed that the taxpayer had 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.

After the Comptroller issued the Specific Directions, there were two more audits conducted by the Comptroller in 2007 and 2013. On both occasions, the Comptroller accepted that the taxpayer had maintained the set of export documents in accordance with the Specific Directions and affirmed the taxpayer's right to zero-rate its supplies to Malaysian customers.

Following the 2016 audit, as the Comptroller had taken the view that the taxpayer should not be entitled to zero-rating of the disputed supplies exported to Malaysia between April 2013 and October 2016, the Comptroller raised assessments for the additional GST payable for this period. The taxpayer appealed against these assessments.

The central issue in this case was whether the goods purportedly exported to Malaysia by the taxpayer should be zero-rated.

The Board's Decision

The following key issues arose for decision before the Board:

- Whether there were grounds for the Comptroller to consider that no exports had in fact been made in respect of the disputed transactions.
- Whether the requirements in the ETG were considered promulgated restrictions or conditions, the non-compliance of which would render the transactions GST taxable, or whether they were merely administrative guides.
- Whether the ETG was in any case superseded by the Specific Directions made by the Comptroller in earlier audits, which the taxpayer claimed should prevail.

Unnecessary to consider whether the ETG was promulgated pursuant to section 21(6) or 21(7) (read with regulation 105 of the Goods and Services Tax (General) Regulations) of the GST Act

The relevant portions of section 21(6) of the GST Act are as follows:

> 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.

Section 21(7) of the GST Act provides as follows:

> The Minister may by regulations provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where the Comptroller is satisfied that the goods have been or are to be exported and such other conditions (if any) as may be specified in the regulations or as the Comptroller may impose are fulfilled.

The relevant portions of regulation 105 of the GST (General) Regulations, which was promulgated by the Minister for Finance under section 21(7) of the GST Act, read as follows:

> 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 –
>
> (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 condition or restriction as the Comptroller may impose for the protection of the revenue.

The Board concluded that the net result of sections 21(6) and 21(7) of the GST Act, read with regulation 105(1) of the GST (General) Regulations, is that the Comptroller is afforded the power to impose conditions for any kind of export, whether direct or indirect. It would therefore make no difference to the outcome of this appeal to address the question of which section was relied on by the Comptroller in exercise of its powers to impose conditions on the zero-rating of exported goods.

Requirements under the Specific Directions supersede those of the ETG

In the present case, the Board found that the Specific Directions issued by the Comptroller to the taxpayer in 2006 had not been revoked in subsequent audits or the passage of the revised ETG in 2009. Accordingly, the Board held that the taxpayer should not be denied zero-rating on the basis that it had failed to provide required documentation.

As the 2013 audit was the only one conducted after the passage of the new ETG requirements in 2009, the Board found the characterisation of what transpired in the 2013 audit to be critical to the appeal. The Board made the following points regarding the 2013 audit:

- It was incumbent on the Comptroller to explain why the Board should not draw the conclusion that a conscious decision was made to waive the requirements in the ETG that were missing from the tendered documents during the 2013 audit. The Board was thus prepared to draw an adverse inference as the Comptroller did not explain why the officer who conducted the 2013 audit was not called to rebut the evidence given by the taxpayer's account of the 2013 audit, especially since the officer attended the hearing before the Board.
- Therefore, having passed the 2013 audit without qualification, the taxpayer was entitled to believe that it had to satisfy only the requirements in the Specific Directions for future zero-rating purposes.

- Had there been no further audit between the passage of the revised ETG in 2009 and the final audit in 2016, it would have been incumbent upon the taxpayer to check with the Comptroller how it should proceed in the event of any discrepancy between the Specific Directions and the ETG. In this case, however, since the taxpayer had been audited for those very transactions and received the Comptroller's approval in the form of an unqualified audit, the onus lay on the Comptroller to alert the taxpayer that its acceptance of the documents required by the Specific Directions pertained only to the 2013 audit and nothing further.

The Board's finding on this issue was determinative to its holding in favour of the taxpayer in this appeal.

Conditions for zero-rating under the prevailing ETG suggested to be not legally binding

At the outset, we would mention that as the Board's holding in this appeal turned on the issue discussed above (on whether the requirements under the Specific Directions superseded the ETG), the Board's observations on the non-legally binding nature of the zero-rating conditions under the ETG were *obiter dicta*.

First, the Board observed that, while it does not have supervisory jurisdiction over whether the Comptroller has exceeded the legal ambit of his powers (which would be a matter involving judicial review), the issue of whether the Comptroller had validly issued a set of conditions relates to the finding of a precedent fact, i.e., that such conditions do indeed exist and were validly issued by the Comptroller. In other words, in questioning whether the ETG had been validly issued, the Board was not examining the manner in which the Comptroller exercised his power to impose conditions, but rather whether he had in fact exercised such power.

Relying on section 49(1)(b) of the GST Act, which states that any person may apply to the Comptroller for review and revision of any decision made by the Comptroller with respect to the tax chargeable on the supply of any goods or services or on the importation of any goods, the Board observed that it was able to examine the precedent facts which gave rise to the right to zero-rate a supply, and that it should be capable of making a finding on the existence of conditions for or restrictions to zero-rating. Thus, the Board took the view that it had jurisdiction to determine whether a given set of requirements was indeed intended to be passed by the Comptroller as conditions for zero-rating.

As to whether the conditions for zero-rating under the ETG had been validly imposed, the Board, while stressing that it was not making a finding, made the following observations:

- The Comptroller's intention to exercise a statutory power has to be objectively ascertained. There should therefore be some evidence confirming that a set of requirements was intended by the Comptroller to be issued as conditions pursuant to a particular statutory power (for example, an explicit reference in the document to the fact that it contains conditions issued pursuant to that statutory power) and was in fact issued by the Comptroller for that purpose.

- There should be nothing on the face of the document that detracts from its import as a set of mandatory conditions. The often draconian consequences of disallowing zero-rating should require the Comptroller to state, at the minimum, that the requirements in the ETG are statutorily imposed conditions. The authority of the state delegated to the Comptroller should be exercised in an open, transparent and unambiguous matter. For example, the name of the document itself should not afford opportunity for confusion (e.g., reference to the document as being a "guide"). The contents of the instrument should

also not contain any ambiguity as to the peremptory nature of its contents; nor should their compliance be capable of alternative interpretation by the taxable person.

- There should be steps taken to ensure that such conditions reach the attention of taxable persons to whom they apply. This may require publication in the Government Gazette, if the contents of the instrument in question are intended to have legislative effect. If such conditions are not brought to the constructive notice of a taxpayer by way of publication in the Gazette, reasonable efforts should be made to bring any new conditions to the actual notice of taxable parties. The Comptroller should consider whether publication of a revised ETG on the IRAS website coupled with electronic alerts to subscribers would be sufficient.

Not fair and reasonable for the Comptroller to conclude that there had been no export

The Board took the view that it had the jurisdiction to examine whether the Comptroller had made a fair and reasonable determination of whether the supplies had been exported, and that, where the taxpayer had provided evidence supporting such export, it was incumbent upon the Comptroller to take the necessary steps to examine whether such export had occurred. In this case, the Board indicated that, for zero-rating to be denied, the Comptroller must have been satisfied that there was sufficient evidence of the lack of export, and such a conclusion should be reached with proper consideration of the contrary evidence, coupled with a fair opportunity afforded to the taxpayer to rebut any evidence adverse to its cause.

The Board did not agree that the Comptroller had taken such steps here, and accordingly found that it was not fair and reasonable for the Comptroller to have arrived at the conclusion that there had been no export.

The High Court's Decision

The Comptroller appealed to the High Court against the Board's decision, raising 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 (General) Regulations applied to the disputed supplies.
- The Board had no jurisdiction to determine the applicable export evidence requirements because the discretion to impose conditions for export evidence was 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 found against the Comptroller on all three points.

The Board was not wrong in finding that it was unnecessary to determine whether section 21(6) of the GST Act or regulation 105 of the GST (General) Regulations) applied

Before the High Court, the Comptroller argued that the Board had erred in failing to determine whether section 21(6) of the GST Act or regulation 105 of the GST (General) Regulations applied because the latter had a "prior approval" requirement which was materially different from the former. The Comptroller further argued that, since the disputed supplies were indirect exports, regulation 105 of the GST (General)

Regulations should apply and the taxpayer was not entitled to zero-rating because it failed to obtain "prior approval" for the disputed supplies.

The High Court affirmed the Board's finding and held that, regardless of which provision applied, the central issue was whether the applicable requirements that the respondent had to comply with had in fact been complied with. The High Court also found that, in any event, 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 was whether the Specific Directions or the ETG contained the export evidence that the Comptroller required. If the Specific Directions contained the applicable export evidence requirements, the taxpayer was granted deemed "prior approval" since it complied with the Specific Directions.

The Board had jurisdiction to determine the applicable export evidence requirement

The High Court held that the Board had jurisdiction to determine the applicable export evidence requirement. Regulation 105 of the GST (General) Regulations requires taxable persons to maintain export evidence "as the Comptroller may require generally or in any particular case". The High Court therefore took the view that 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.

The Board's finding of fact that the Specific Directions contained the applicable export evidence requirements should not be disturbed

Citing the Court of Appeal's holding in *Comptroller of Income Tax v AQQ* [2014] SGCA 15, the High Court indicated that, for it to review a finding of fact by the Board, the question that the court had to ask itself was whether "no reasonable body of members constituting [the Board] could have reached the findings reached by [the Board]", which is a high threshold to be crossed.

Here, the High Court found that it could not be said that "no reasonable body of members constituting the Board" would have concluded that the Specific Directions were the applicable export evidence requirements that the taxpayer had to comply with, and refused to disturb that finding of fact.

With regard to the applicable export evidence requirements, the High Court, in *obiter dicta*, agreed with the Board that the applicable export evidence in this case should be the Specific Directions for the following reasons:

- It was undisputed that the taxpayer had tendered documents complying with the Specific Directions in both the 2007 audit and the 2013 audit, and on both occasions, the respondent was permitted to zero-rate its exports. This was so even for the 2013 audit which had been conducted after the publication of the ETG in 2009, which suggested that the ETG did not supersede the Specific Directions. 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.

- The publication of the ETG did not impose legally binding conditions that overrode the Specific Directions. Our courts have consistently held that e-Tax Guides are merely guidelines and are not law. They may illuminate the practice of tax authorities, but practice is not law.

- 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". The ETG also contains 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".
- The authority of the state, so delegated to the Comptroller, should be exercised in an open, transparent, and unambiguous matter. If the Comptroller intends to impose legally binding statutory conditions, there should, at the minimum, 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. These elements were all absent in the ETG.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

TAN Kay Kheng
Head – Tax
d: +65 6416 8102
e: kaykheng.tan
@wongpartnership.com
Click here to view Kay Kheng's CV.

TAN Shao Tong
Partner – Tax
d: +65 6416 8186
e: shaotong.tan
@wongpartnership.com
Click here to view Shao Tong's CV.

Connect with WongPartnership.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-
WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com
-
Al Aidarous Advocates and Legal Consultants
Oberoi Centre, 13th Floor, Marasi Drive, Business Bay
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw

wongpartnership.com