KPMG

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GST Board of Review - Export of goods

There are not many Goods and Services Tax (GST) Board of Review (the Board) cases and even fewer ruled in favour of traders. In *GDY v Comptroller of Goods and Services Tax* [2021] SGGST 1, decided this September, the trader appealed against the Comptroller of GST's decision to deny zero-rating for export of goods hand-carried to Malaysia. In this Tax Alert issue, we examine the implications of the case and share insights gained from the decision.

Background

The trader, GDY, is in the wholesale trade of mobile phones, tablets and related accessories (Goods). It purchases Goods from local and overseas suppliers and resells them to customers in and outside of Singapore.

GDY sold the Goods to Malaysian customers who collected them from GDY's Singapore place of business and hand-carried the Goods to Malaysia by motor vehicles. The primary issue was whether the Goods purportedly exported to Malaysia by GDY could be zero-rated (hereby referred to as "Disputed Transactions").

The Comptroller of GST (the Comptroller) conducted several audits of the trader's sales, with the first audit in 2004 and the last in 2016. It was during the last audit when the Comptroller denied zero-rating on these sales on the basis that the declaration form and carrier's vehicle number on its export permits were not maintained. These are documents required in the Inland Revenue Authority of Singapore's (IRAS) e-Tax Guide (the ETG), entitled "GST: Guide on Exports", as of its sixth edition dated 16 March 2009.

The Comptroller took the position that the Disputed Transactions should not be zero-rated and imposed a GST assessment of close to S$27 million on GDY. It was worth noting that in the second audit in 2006, the Comptroller had written a letter referencing this export scenario and repeated a list of export documents that the trader had to maintain (Specific Directions) that was identical to that provided in the first audit in 2005. In the subsequent two audits in 2007 and 2013, the list of documents, with no declaration and an absence of the motor vehicle number, was reviewed by the IRAS and zero-rating treatment was accepted with no queries.

At that time in 2016, the Comptroller was investigating persons suspected of being involved in carousel fraud where goods of this nature were purportedly exported in a paper exercise and the claimant was claiming fraudulent GST refunds.

Primary issue

The issue at hand is whether GDY could rely on the Specific Directions given by the Comptroller, instead of the documents specified in the ETG, to support the zero-rating of the sale of goods for export out of Singapore, pursuant to sections 21(6) and 21(7) of the GST Act (GSTA).

The trader's position

GDY argued that the Disputed Transactions could be zero-rated based on the key reasons stated below.

a) **Export documents maintained by GDY objectively proved that the Goods were exported out of Singapore and requirements in the ETG had materially been complied with.**

GDY had provided export documents, including export permits, delivery orders, collection notes, photocopies of passports of the Carrier's agent and immigration endorsements for both their entry into and exit from Singapore on the day of collection, and confirmation of receipt from the Malaysian customer certifying that it had received the Goods.

GDY argued that the Comptroller had adhered rigidly and inflexibly to the ETG, without exercising his statutorily conferred discretion to determine whether the Goods were exported out of Singapore, by insisting on the maintenance of declaration form and the carrier's vehicle number on the export permits. This was too draconian.

b) **The ETG was superseded by the Comptroller's own Specific Directions, which GDY had complied with.**

The crucial point is in the fourth audit in 2013, when GDY submitted export documents based on the Specific Directions to the Comptroller and the audit was closed without issues, notwithstanding the revised ETG in 2009 which required the declaration form and carrier's vehicle number on its export permits to be maintained. These were notably not maintained, but zero-rating treatment was accepted. Accordingly, GDY took the position that it was entitled to rely on the 2013 audit outcome and the export documents maintained were sufficient to support zero-rating of the sale of Goods.

The Comptroller's position

The Comptroller argued that this was an indirect export scenario and section 21(7) in conjunction with regulation 105 should be relied upon. There are two limbs under Regulation 105(1) for zero-rating to apply, which are as follows:

i. **Satisfaction limb** – the Comptroller must be satisfied that the goods supplied are to be exported

   Under the satisfaction limb, the Comptroller took the view that if he considers a taxable person has failed to satisfy him that an export has occurred, such decision should be upheld as valid (and the Board has no power to overrule), unless it is so outrageous that no sensible person who applied his mind to the question to be decided could have arrived at it, or that no reasonable person could have come to such a view.

ii. **Conditions limb** – the taxable person must comply with the stipulated conditions by obtaining the prior approval of the Comptroller and comply with such other condition or restriction as the Comptroller may impose.

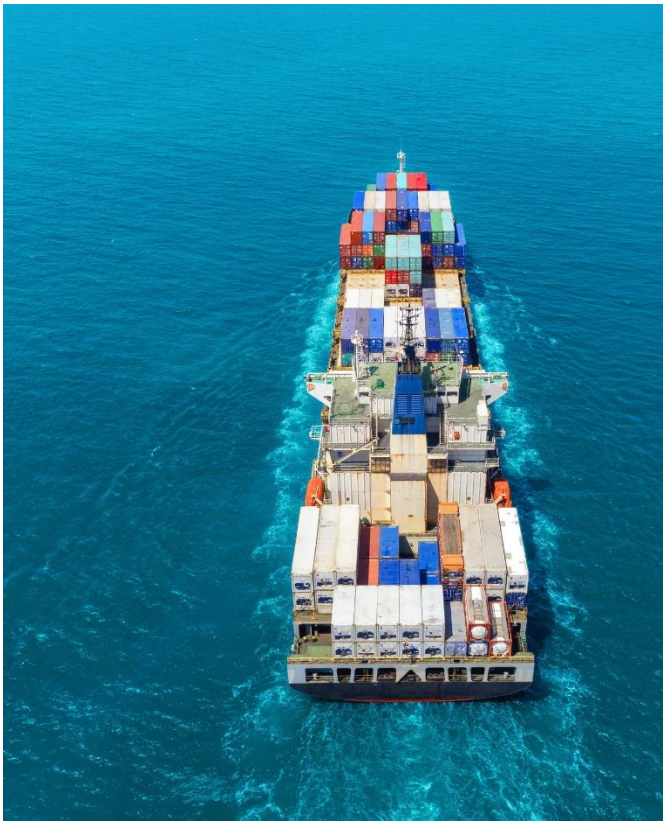
   The Comptroller viewed that both limbs must be met before zero-rating could apply.

Decision of the Board of Review

The Board allowed GDY's appeal and provided its main reasons as stated below.

The requirements under the Specific Directions supersede the ETG

The Specific Directions issued by the Comptroller to GDY in the 2006 audit were not revoked in the 2013 audit or after the revised ETG in 2009 was issued. GDY should not be denied zero-rating on the basis that it had failed to provide the declaration form and carrier's vehicle number on its export permits since the Specific Directions should be relied upon instead of the requirements in the ETG.



Whether the Comptroller had made a fair and reasonable determination that GDY had not exported the Goods

The Board was of the view that as GDY had provided evidence supporting export of the Goods, it was incumbent upon the Comptroller to take the necessary steps to examine whether such export had occurred and not merely insist on the two documents which were absent (which could be explained as the Specific Directions were relied upon). In short, the Board did not agree that the Comptroller had taken such steps, for instance by not investigating the Malaysian Customers and not affording GDY the opportunity to explain the difference in the weight of the goods on a small sample selected for audit. Hence, it was not fair and reasonable for the Comptroller to arrive at the conclusion that there had been no export of the Goods.

The Board ruled that the GST assessment of S$27 million raised by Comptroller was erroneous and allowed GDY's appeal. The Comptroller has now appealed against the Board's decision.

Our comments

The Comptroller's powers in issuing conditions for zero-rating

It is clear from the Board's decision that the Comptroller has the power to issue conditions under section 21(6) or 21(7) of the GSTA for taxable supplies to be zero-rated. Nonetheless, these conditions should be promulgated to the businesses in an "open, transparent and unambiguous manner". The disclaimer in page 2 of the ETG that "taxable persons rely on it at their own risk" did not help. On this basis, it would be interesting to see if the IRAS would remove its disclaimer in some of its guides where conditions must be adhered to in support of the GST position.

While the ETG does not have the force of law, these are IRAS guidelines and should still be complied with — especially in export scenarios where the Comptroller has the power to set conditions before zero-rating can apply.

Reliance on the Comptroller's Specific Directions

Following this decision, it would appear that businesses should be able to rely on Specific Directions issued by the Comptroller, if they differ from those in the ETG, and to the extent that these directions were provided after the issuance of the ETG.

Consequently, if you receive specific IRAS instructions or rulings where the position in the subsequent ETG contradicts that position, it begs the question if you should continue to rely on the earlier IRAS instructions or clarify with the IRAS.

Similarly, where the IRAS has audited your GST returns and issued a clean bill of health, but you have noticed inconsistency in the GST treatment with that in the ETG, it does not appear to be prudent to rely on the IRAS' earlier audit without verification with the IRAS. If you find yourself in any of these situations, you should seek professional advice to avoid any possible GST exposure.

How we can help

As your committed tax advisor, we welcome any opportunity to discuss the relevance of the above case to your business and any potential exposure you may face.

To uncover more insights on the global tax implications of COVID-19, read our COVID-19 Global Tax Developments Summary
Read more of our insights and perspectives at the KPMG in Singapore Webpage

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