

GST e-Alert

JULY 2016

Bad Debt Relief - Legality Of The DG's Decision

The Customs' requirement that bad debt relief is only available if the supply is made to another GST registered person has substantially restricted this relief to businesses.

The DG's Decision

Item 3 of the Director General's (DG) Decision 1/2014 provides that:

“(ii) The bad debt relief may be claimed if – (w.e.f. 28/10/2015)

(a) Requirements under s.58 GSTA and Part X of the GST Regulations 2014 are fulfilled; and

(b) The supply is made by a GST registered person to another GST registered person; and

(iii) The bad debt relief shall be claimed immediately in the taxable period after the expiry of the sixth month from the date of supply (w.e.f. 28/10/2015)”

The effects of the DG's Decision are that:

- (a) A GST registered supplier must ascertain the GST registration status of its recipient either before conducting business with him or claiming for bad debt relief.
- (b) One cannot claim bad debt relief if the recipient is not a GST registered person.

This DG's Decision imposes unnecessary burden and administrative inconvenience to businesses.

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Legality Of The DG's Decision

Section 58(1) of the GST Act 2014 (GSTA) states that a taxable person may claim bad debt relief on the whole or any part of the GST paid by him in respect of a taxable supply if:

- (a) he has not received any payment or part of the payment from the debtor within 6 months from the date of supply; or
- (b) the debtor has become insolvent before the period of 6 months has elapsed; and
- (c) sufficient efforts have been made to recover the debt.

If the above conditions are satisfied, the taxable person can recover from the DG, the GST which he had accounted for in respect of the taxable supply he has made. The recovery can be made by stating the equivalent amount in the GST-03 Form (see Regulation 71(1) of the GST Regulations 2014 (GSTR)). If the debtor subsequently pays the debt, the GST claimed as bad debt must be repaid to the DG (see Section 58(3) of the GSTA).

It is trite law that taxing statute has to be interpreted strictly according to what is clearly said and provided for in the legislation. Accordingly, no other conditions except those which had been provided under the GSTA and GSTR are applicable for the purposes of claiming bad debt relief. Section 58 of the GSTA and Regulations 70 to 74 of the GSTR spell out the conditions which must be fulfilled for a taxable person to claim bad debt relief.

The condition that bad debt relief can only be claimed if the supply is made by one GST registered person to another is nowhere to be found in the legislation. The condition imposed under the DG's Decision does not conform to the law and has no legal force.

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Customs' Internal Policy

It appears that the DG's Decision is a publication of the Customs' policy based on their interpretation of the GSTA and their internal policy on administrative matters. Such policy has no legal effect and this is supported by the following:

- (a) In the *Multi-Purpose Holdings Berhad* case, the Court of Appeal held that the policy of Government departments such as the administrative requirement of the Foreign Investment Committee has no force of law as it is of an advisory character only. The court relied on the decision of the Supreme Court in the *Ho Kok Cheong Sdn Bhd* case where it was held that the Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs have no force of law.
- (b) In the *Metacorp Development* case, the High Court held that the Decision Impact Statement (DIS) issued by the Inland Revenue Board of Malaysia (IRB) had no force of law. The DIS issued by the IRB was inconsistent with the decision of the Court of Appeal in the *Penang Realty* case. The court held that the DIS was defective and that the IRB had acted in excess of its authority.
- (c) The High Court in the *NV Alliance* case observed that the IRB's public rulings have no force of law and is not binding on the court.
- (d) In the *Success Electronics* case, the High Court held that the IRB is not entitled to reduce or disallow the reinvestment allowance claimed by a taxpayer based on its own internal ruling and guidelines.

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Conclusion

The condition contained in the DG's Decision has no force in law. A taxpayer aggrieved by a Customs decision refusing bad debt relief based on the DG's Decision has the option of applying for review under Section 124(1) of the GSTA, filing an appeal with the GST Appeals Tribunal or commencing judicial review proceedings in exceptional circumstances.

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